ORIGINAL JURISDICTION
CIVIL.SIDE
DATED: ALLAHABAD 28:05:2010

BEFORE
THE HON'BLE YOGENDRA KUMAR SANGAL, J.

Civil Misc. Writ Petition No.-388 of 2010

Shiv Balak ...Petitioner
Versus
Deputy Director Consolidation Unnao Camp, Lucknow. ...Respondent

Counsel for the Petitioner
Surya Mani Pandey
D.C. Dubey

Counsel for the Respondent
C.S.C.

U.P. Consolidation of Holdings Act- 1952- Section 48-Power of Revisional court-Concurrent finding of facts recorded by the consolidation authorities-set-a-side-and order of remand without disclosing any illegality-held-D.D.C. being the court of fact and law having unfettered jurisdiction-complete control should test the correctness of order before remand-considerable time consumed No useful purpose will be solved to remand the matter before consolidation officer-direction issued to Deputy Director of Consolidation itself to decide the revision within 3 months positively awaiting adjournment if necessary subject to deposit of cost of Rs.1000 with undertaking to participate in next date.

Held: Para 8 & 9

I have also gone through the law of apex Court cited on behalf of the petitioners referred above, which provides that as entire matter was before the D.D.C. and his jurisdiction was unfettered and he was in complete control and position to test the correctness of the order made by the courts below so he should have himself gone through the record and decide the dispute at his level. No where It was pointed out specifically which point of evidence was not considered by the courts below. On what point and evidence appreciation of courts below was not found correct by him. Which party was intending to adduce further evidence in the matter and was stopped by the courts below to adduce that evidence, it is also not clear from the impugned order. On what points wrong conclusion has been drawn by the courts below, it is also not clear from the impugned order.

Case law discussed:
1999 Rajshwa Law Times 184 Ramveer Vs. D.D.C., 1996 (87) RD 1992 Pritam Singh Vs. Assistant D.D.C, 2009 (27) LCD 712 Ram Awadh Vs. Ramdas.

(Delivered by Hon'ble Y.K. Sangal, J.)

1. This writ petition has been filed by the petitioners with the prayer to issue a writ, order or direction in the nature of certiorari quashing the orders dated 24.04.2010 passed by the Deputy Director of Consolidation (D.D.C) contained in Annexure No. 1. He further prayed to issue a writ of mandamus commanding the opposite parties to maintain status-quo in regard to the possession over the disputed land as per order dated 11.03.2005 passed by the S.O.C. (Settlement Officer Consolidation) and 07.08.1987 passed by the C.O. (Consolidation Officer).

2. Heard learned counsel for the petitioners, learned Standing Counsel for the respondent nos. 1 to 3 and perused the record.

3. As per petition's case land of Khata No. 103 situated in village Sikandarpur Amaulia, Paragana Lalganj, district Lucknow was recorded in the

name of one Gurudin. After his death name of his two heirs Ishwari and Baiju were recorded. Both were having equal share in the land of this Kahata. Ishwari died leaving behind heir Ghasite his son. As he was minor, Baiju get recorded his name as sole tenure holder taking benefit of minority of Ghasite. Baiju was having three sons, Matroo, Dulare and Lalita. After the death of Baiju, all the three sons were recorded as tenure holder. Further details are given, how many sons all these three have and their names were recorded on the land of Khata No. 103 after the death of their father. In 1981, consolidation proceedings started in the village. Heirs of Ghasite filed objections before the C.O. claiming their half share in the property in dispute. After providing opportunity of hearing to the parties vide order dated 07.08.1987 Consolidation Officer held that objector / heir of Ghasite has share in the land of Khata No. 103. Aggrieved by this order, respondent nos. 4 to 7 preferred an Appeal before the S.O.C. who after hearing the parties counsel affirmed the order of C.O. and rejected the appeal. Aggrieved by this order, a Revision was filed before the D.D.C. After giving opportunity of hearing to the parties counsel and perusing the record, learned D.D.C. has allowed the Revision by the impugned order and remitted the matter to C.O. for afresh finding in the matter in the light of the directions given by him in the judgement. Aggrieved by this judgement, this writ petition has been filed.

4. Learned counsel for the petitioners challenged the findings of D.D.C. on the grounds that the D.D.C. was not empowered in Revision proceedings to set aside the concurrent findings of both the courts below. However, if he was of the opinion that both the courts below have not considered the arguments raised by the parties' counsel properly and some important evidence was ignored by the courts below in giving the findings, he himself was empowered to go through the entire record and give his own finding in the matter. No useful purpose is going to be served to remand the matter to the Consolidation Officer again to start second round of litigation between the parties.

5. In the facts and circumstances of the case, issuing notices to the respondent nos. 4 to 11 are hereby dispensed with subject to this condition that if any application for alteration or modification etc. of this order is moved, that shall be considered.

6. Learned counsel for the respondent argued that giving reasons, learned D.D.C. found that important evidence was ignored by the courts below. Some more evidence is required in the matter. Facts and evidence were not properly appreciated by the courts below so he passed the remand order for fresh decision by the C.O. Learned counsel for the petitioners cited case Law **1999 Rajshwa Law Times 184 Ramveer Vs. D.D.C**. and argued that under Section 48 of Consolidation of Holdings Act, D.D.C. is empowered to go through the record himself and in place of remitting the matter to the Consolidation Officer, he should have decided the same at his level. Another case law **1996 (87) RD 1992 Pritam Singh Vs. Assistant D.D.C**. was also cited. In this case, apex Court held as follows:

"When the matter was in Revision before the Assistant D.D.C., 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 position to test the correctness of the order made by the S.O.C. effecting remand. In another words, in exercise of revisional jurisdiction, D.D.C. can examine the finding recorded by the S.O.C. as to 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 is superior court the Assistant D.C. had even if the remand order of S.O.C. had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the court of Assistant D.C. is the court of revisional jurisdiction otherwise having suo motu power to correct any order of the subordinate officer. In this situation, the Assistant Director (Cons.) should not have follow fettered in it complete justice between the parties when the entire matter was before him....."

7. From the impugned order it reveals that in first paragraph detail of the case and in second paragraph detail of the facts that written arguments of the parties' counsel are taken on record, are given and in paragraphs 3 & 4 of the judgement, learned D.D.C. has mentioned what is detailed in the written arguments of both the parties. In the concluding paragraph of the judgement, he had not appreciated the arguments of both parties counsel. No decision has taken what evidence was ignored by both the courts below. It is also not detailed what more evidence is required in the matter and which party was intending to adduce hat evidence and refused by the courts below. Simply, he has mentioned that arguments of the parties were not duly appreciated by the courts below. What was the wrong in appreciation of the arguments of the parties counsel, it is also not explained. Giving such observation which are general in nature, he set aside the findings of both the courts below and remanded the matter to C.O. Apex Court in **2009 (27) LCD 712 Ram Awadh Vs. Ramdas** held that D.D.C. under Section 48 of the Act does not have jurisdiction to interfere with the concurrent findings of fact without any basis and on assumptions.

8. I have also gone through the law of apex Court cited on behalf of the petitioners referred above, which provides that as entire matter was before the D.D.C. and his jurisdiction was unfettered and he was in complete control and position to test the correctness of the order made by the courts below so he should have himself gone through the record and decide the dispute at his level. No where It was pointed out specifically which point of evidence was not considered by the courts below. On what point and evidence appreciation of courts below was not found correct by him. Which party was intending to adduce further evidence in the matter and was stopped by the courts below to adduce that evidence, it is also not clear from the impugned order. On what points wrong conclusion has been drawn by the courts below, it is also not clear from the impugned order.

9. In the facts and circumstances of the case, considering the arguments raised, I am of the view that no useful purpose would be served to remit the matter to the C.O. to start second round of

litigation between the parties. Already sufficient time has expired in the litigation between the parties. Under the provisions of law, learned D.D.C. is also empowered to permit the parties to file documentary evidence in support of their respective cases and opposite party may rebut by filing the documents.

10. In the facts and circumstances of the case, Interference by this Court in writ jurisdiction in the matter is required. Accordingly, the writ petition is allowed and the judgment and order passed by the learned D.D.C. is hereby set aside and matter is remitted back to the learned D.D.C. to decide the dispute between the parties on his own level in the light of the observations made above. However, it is made clear that no party to the case will be permitted to get adjourned the hearing in the Revision. If any party seeks adjournment of case, not less than Rs. 1,000/- shall be imposed as cost on that party and it will be pre-condition to permit that party to join the hearing on next date subject to he deposits earlier cost ordered. Learned D.D.C. will expedite the disposal of the Revision, if possible within three months from the date when the certified copy of this order is placed before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.04.2010

BEFORE
THE HON'BLE RAJES KUMAR,J.
THE HON'BLE PANKAJ MITHAL,J.

Civil Misc. Writ Petition No. 473 of 2004

Mange Ram and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Mukesh Prasad

Counsel for the Respondents:
C.S.C.

Revenue Recovery Act, 1890,Section 3(a)-read with U.P. Z.A. and L.R. Act, 1950-Section 279-Recovery of excise dues-petitioner already deposited much excess amount than demand of excise duty-demand of collection charges of 10%-unless service rendered by collection/revenue department-levy of Collection Charges-illegal, unjustified.

Held: Para 24

In view of the legal position enumerated above, we are of the opinion that in the instance case as no recovery of the excise dues has been made by the Collector, Ghaziabad and the amount sought to be recovered through his office has been paid directly by the petitioners to the Excise Commissioner, Sikar Rajasthan partly of their own and partly through remittances made by the Income Tax Department due to them, the demand of collection charges to the tune of Rs.47,47,972/-is wholly illegal and unjustified. We accordingly, issue a writ of certiorari quashing the impugned sale proclamation (Annexure XXI to the writ petition) and a writ in the nature of mandamus to respondent No.2 for the refund of any amount which may have been realised as collection charges in connection with the recovery in question.

Case law discussed:
1999 (2)awc, 1999(3) AWC 1885, AIR 1983 Alld. 234,

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

1. The petitioners along with certain other persons were granted licenses for vending country made liquor, foreign liquor and bear for the years 1999-2001 in District

Sikar, Rajasthan. In the year 1999-2000, petitioners defaulted in the payment of excise dues of Rs.8,36,49,712/-. Accordingly, Collector, Sikar on 1.11.2000 sent a recovery certificate to the Collector, Ghaziabad, where the petitioners were said to be residing and having immovable property, to recover the aforesaid amount as arrears of land revenue. A citation for the said amount was issued by the Tehsildar, Ghaziabad on 6.12.2000. The properties of the petitioners at Ghaziabad were put to auction vide sale proclamation dated 15.5.2001 fixing 14.6.2001 but the auction could not be held. The District Excise Officer, Sikar vide letter dated 9.7.2001 addressed to the Collector, Ghaziabad instructed not to auction the properties of the petitioners for the time being. In the meantime, income tax department released sums of (i) Rs.1,61,43,984.00, (ii) Rs.1,80,26,031.00, (iii) Rs.1,40,38,395.00, (iv) Rs.1,77,54,741.00 and (v) Rs.1,10,61,845.00 total Rs.7,70,24,996.00 in favour of District Excise Officer, Sikar, Rajasthan which it had realised from the petitioners as Tax Deducted at Source (TDS). The petitioners deposited a further sum of Rs.1,64,63,768/-, Rs.75,23,500/- and Rs.89,49,600/- on 7.9.2003 before the District Excise Officer, Sikar. In this way, petitioners deposited a total of Rs.9,34,89,036/- as against the original recovery of Rs.8,36,49,712/-. In spite of the above, a sale proclamation for the recovery of Rs.77,10,000/- as excise dues and Rs.47,47,972 as collection charges by the sale of house No.KK-116, Kavi Nagar, Ghaziabad of the petitioners was issued by the S.D.M. Ghaziabad fixing 10.4.2004 for the auction.

2. The above sale proclamation is under challenge by the petitioners in this writ petition with a further prayer to direct the respondents not to realise any collection charges from the petitioners and to refund the collection charges already paid by them on the ground that the excise dues were paid by the petitioners voluntarily and there was no realisation by the Collector, Ghaziabad so as to entitle the respondent Nos. 2 and 3 to recover any collection charges.

3. The writ petition was entertained and an interim order was passed on 31.3.2004 staying the sale proclamation and the sale of the properties of the petitioners in pursuance thereof. A counter affidavit was also invited. In the counter affidavit filed on behalf of the respondent Nos. 1, 2 and 3 the issuance of the recovery citation of the aforesaid amount of Rs.77,10,000/- as excise dues and Rs.47,47,972 as collection charges is admitted. It is however, stated that in view of Section (3-a) of the Revenue Recovery Act, 1890, as amended to its application in U.P., Collector is fully authorised to recover the amount indicated in the recovery certificate and to realise 10% of the amount as collection charges.

4. It is abundantly clear from the above facts that the petitioners were facing recovery of excise dues to the tune of Rs.8,36,49,712/- only and a sum of Rs.9,34,89,096/- was paid and as such there was, in fact, excess payment. This fact has not been denied by respondent Nos. 1, 2 and 3 in the counter affidavit. No counter affidavit on behalf of respondent No.4 has been filed. Thus, the above fact remains uncontroverted which has to be accepted. Even then the petitioners have been chased with a recovery of Rs.77,10,000/- as excise dues plus Rs.47,47,972/- as collection charges.

In the absence of any material on record to indicate how in the above circumstances a recovery of Rs.77,10,000/- as excise dues has been issued against the petitioners, the said recovery of excise dues can not be sustained in law and deserves to set aside.

5. In respect of the collection charges, the submission of Shri Mukesh Prasad, learned counsel for the petitioners is that the excise dues which were recoverable as arrears of land revenue have been paid voluntarily and directly to the Excise Officer, Sikar, Rajasthan and, therefore, the Collector, Ghaziabad is not authorised under law to recover the same.

6. On the other hand, Sri A.C. Tripathi, learned Standing Counsel contended that respondent Nos. 2 and 3 are legally entitled to recover collection charges to the extent of 10% of the amount mentioned in the recovery certificate, as the citation to recover as well as a sale proclamation was issued for recovering the excise dues.

7. It would be profitable to address to the procedure prescribed for recovering land revenue or as a matter of fact any other dues which can be recovered as arrears of land revenue before dwelling upon the respective submissions of the parties.

8. The procedure for settlement and recovery of land revenue was previously contained in Chapter V to Chapter VIII of the U.P. Land Revenue Act, 1901 but the provisions of the aforesaid chapter were repealed vide Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (in short U.P.Z.A. & L.R. Act) in its application to the areas where the said Act was made applicable. However, by virtue of the chapter X of the said Act and the Rules framed under the said Act, a similar mechanism for recovery of land revenue has been provided.

9. Any land revenue which remains unpaid after the date on which it becomes payable it termed as an "arrears of land revenue".

10. The excise dues are not part of land revenue though it may be termed as revenue. "Revenue" is a broader and a general term which is applicable to the income of the Government including public monies which the State collects and receives, from whatever source and in whatever manner. "Land revenue" is a narrower term and signifies tax on land and its produce which is paid annually to the Government. It is a charge upon the land payable to the Government. In other words, revenue derived by the State by taxation of lands and of profits on land is land revenue.

11. The excise dues though revenue in broader sense cannot be technically termed as land revenue recoverable under the provisions of the U.P.Z.A. & L.R. Act but for Section 11 of the Central Excise Act, 1944 read with provisions of Revenue Recovery Act, 1890 (hereinafter referred to as an 'R.R. Act') which permits recovery of such excise dues as arrears of land revenue. Section 3 of the said Act empowers the Collector of the District, where an arrear of land revenue or a sum recoverable as an arrear of land revenue is payable, to send a certificate under his signature in the prescribed form to the Collector of the other district wherein the property of the defaulter is situate to recover the said amount whereupon it is

obligatory upon the Collector to whom such a certificate has been sent to proceed to recover the amount stated therein with the costs of recovery in accordance with the provisions of Chapter X of U.P.Z.A. & L.R. Act and the Rules. Similarly, Section 5 and 5-A of the R.R. Act provides that where any sum is recoverable as an arrear of land revenue by any public officer other than a Collector or by any local authority, such officer or authority may make a request to the Collector concerned of the district where their office is situate for sending a certificate for the recovery of the said amount to the Collector of the district where the property of the defaulter is situate.

12. Section 279 of the U.P.Z.A. & L.R. Act, 1950 elaborates the various methods by which the land revenue may be recovered, namely - by issuance of writ of demand or a citation to appear, arrest and detention, attachment and sale of movable and immovable property etc. It also provides that the costs incurred in adopting the procedure mentioned therein shall be added in amount due and recoverable and shall be recoverable in the same manner as arrears of land revenue. For the sake of convenience Section 279 of the U.P.Z.A. & L.R. Act is reproduced hereinbelow:

***"279. Procedure for recovery of an arrear of land revenue**.- (1) An arrear of land revenue may be recovered by any one or more of the following processes-*

(a) by serving a writ of demand or a citation to appear on any defaulter,

(b) by arrest and detention of his person,

(c) by attachment and sale of his movable property including produce,

(d) by attachment of the holding in respect of which the arrear is due,

(e) [by lease or sale] of the holding in respect of which the arrear is due,

(f) by attachment and sale of other immovable property of the defaulter, [and],

[(g) by appointment a receiver of any property movable or immovable of the defaulter.]

[(2) The costs of any of the processes mentioned in sub-section (1) shall be added to and be recoverable in the same manner as the arrear of land revenue.]

13. Further Section 294 (2)(ee) authorises the State Government to make Rules with regard to the costs to be recovered in respect of the process mentioned in sub section (1) of Section 279 in exercise of its rule making power. Accordingly, Rule 243 of the U.P.Z.A. & L.R. Rules provides for a fee of 2/- for the issuance of a writ of demand or citation to appear which shall be added to the arrears sought to be recovered and shall be included in the amount specified therein. Similarly, Rule 248 of the Rules provides for a fee of Rs.5/- for a warrant of arrest. The fee for attachment of moveable property is Rs.0.75 and cost for every such sale is 6 paise in a rupee calculated on the amount of arrear etc. as per Rule 255 and 258 of the Rules respectively. A lesser rate is provided where the officer goes to conduct sale of movable property but no sale takes place. The rate of charge for the costs of every sale of immovable property is provided in Rule 284 of the Rules.

14. The aforesaid rates of collection charges were probably not found to be

sufficient with the passage of time therefore, the State Government vide G.O. dated 30.8.1974 provided for a flat rate of collection charges @ 10% of the dues. The aforesaid G.O. was the subject matter of controversy before a Division Bench of this Court in the case of Mahalakshmi Sugar Mills Co. Ltd. Vs. State of U.P. and others. On difference of opinion between the two judges, the matter was referred to the third judge and on the basis of the opinion of the third judge, the Division Bench ultimately vide judgment reported in **1999 (2) AWC 120 Mahalakshmi Sugar Mills Co. Ltd. Vs. State of U.P. and others** held the aforesaid G.O. to be bad and the demand of collection charges @ 10% was struck down.

15. In Mahalakshmi Sugar Mills Co. Ltd. (supra) the Court was of the opinion that collection charges of 10% of the amount mentioned and recovery certificate cannot be recovered from the defaulter as there is no provision to this effect in the U.P.Z.A. & L.R. Act and the Rules, and the costs of recovery has to be realised in accordance with the rates prescribed under the aforesaid Act and the Rules. The aforesaid decision was followed by the learned single Judge in the case of **Smt. Viddya Devi Vs. Collector, Mohaba and others reported in 1999(3) AWC 1885.**

16. However, the law so laid down in the case of Mahalakshmi Sugar Mills Co. Ltd. (supra) was short-lived. The State Legislature in order to nullify the effect of the aforesaid decision enacted Revenue Recovery (U.P. Amendment Act) 2001 i.e. U.P. Act No. 37 of 2001 amending the provisions of the Revenue Recovery Act, 1890 by inserting sub section (3-a) in Section 3 and 5-A of the said Act thereby providing for imposition of maximum of 10% of the amount referred in the recovery certificate/citation as collection charges. This amendment was made with retrospective effect from 30.8.1974, the date on which earlier the Government Order was brought about to the same effect which was struck down. A conjoint reading of the decision in Mahalakshmi Sugar Mills Co. Ltd. (supra) and the amendment made in the Act demonstrates that the restrictions of levying cost/collection charges over and above the rates prescribed under the U.P.Z.A. & L.R. Act and the Rules has been done away with and the Collector has been authorised to demand 10% of the amount mentioned in the recovery certificate/citation as collection charges.

17. A Division Bench of this Court in **Mirza Javed Murtaza Vs. U.P. Financial Corporation and another AIR 1983 Alld. 234**, which has been relied upon from the side of the petitioners, lays down that the Collector while recovering any amount as arrears of land revenue cannot include the collection charges in the certificate as the costs of collection are not known at the time when the certificate is sent to the Collector and the actual costs of the proceedings could be determined only when the costs are actually incurred i.e. after the sale. Accordingly, the inclusion of collection charges in the recovery certificate/citation even before the sale takes place were held to be illegal. The aforesaid decision is not an authority on the point as to whether collection charges can be levied and recovered from the defaulter even where no recovery has been made through the process of the Collector or by sale of any property of the defaulter.

18. In view of the aforesaid facts and circumstances, a very important question of law of a fundamental nature arises for determination i.e whether the costs of collection of recovering land revenue or a sum as an arrear of land revenue can at all be recovered or realised from the defaulter when the recovery has not been made through the process/machinery of the Collector under the provisions of U.P.Z.A. & L.R. Act/Rules despite provisions under the Act to realise 10% of the amount as collection charges.

19. The answer to the above question though intricate is very simple.

20. It is an admitted position that costs of collection or collection charges are not in the nature of tax. The same are levied in lieu of the services rendered by the revenue department of the State in recovering the amount due as an arrear of land revenue. Therefore, undisputedly an element of 'quid pro quo' comes into play, meaning thereby that the collection charges has to be for the services rendered by the Collector in recovering the amount and not otherwise. Therefore, where no such amount is recovered by the Collector or the machinery of the Collector/revenue department, it cannot be said that they have rendered any service so as to authorise them to levy collection charges.

21. The provisions of R.R. Act as amended to its application in U.P. or the U.P.Z.A. & L.R. Act and its Rules does not mandate that the collection charges can be realised even when the amount has not been recovered by adopting coercive method as envisaged under Section 279 of the U.P.Z.A. & L.R. Act or precisely by sale of any property, rather the Rules stipulate a lower rate of charges than prescribed for the cost of sale of movable or immovable property when the officer goes for conducting the sale but fails to conduct it which element is missing in the R.R. Act. The R.R. Act is completely silent as to what will happen when no amount is recovered by any of the coercive means and actually the amount is directly paid by the defaulter to the authority concerned. In the absence of any specific mandate providing for levying and realising of collection charges even if no sale takes place, the authorities are not empowered in law to recover such collection charge as costs of recovery without rendering any service.

22. In this respect it would be relevant to pay attention to Section 10 of the R.R. Act which in clear term provides that the Collector shall remit to the authority concerned the sum recovered after deducting the costs of recovery. Section 11 of the R.R. Act provides for making rules for carrying out the objects of the Act. In exercise of the said rule making power U.P. Revenue Recovery Rules, 1966 have been framed. Rule 8 of the aforesaid Rules also provides that on recovery of any amount under the Act it shall be deposited in government treasury or remitted to the authority concerned after deducting the collection charges, if any, unless wholly or partly exempted. A plain reading of Section 10 along with Rule 8 of the Rules clearly brings out that the Collector i.e. the Recovering Authority has to remit the amount to the authority concerned after deducting the collection charges, if any. This envisages deducting of collection charges only after recovering the amount and before remitting the same to the authority concerned. The necessary corollary of the above is that in the absence

of any recovery of the amount due as an arrear of land revenue, no collection charge can be levied and realised. That being the position, there is no question of levying and recovering collection charges in respect of the amount which has not been recovered by the Collector by adopting any of the modes prescribed under Section 279 of the U.P.Z.A. & L.R. Act.

23. There is no provision under any of the Acts for levying any collection charge for mere issuance of citation or sale proclamation. The cost of these items have been taken adequate care in the U.P.Z.A. & L.R. Rules and as such there is no scope for any additional charge in this respect.

24. In view of the legal position enumerated above, we are of the opinion that in the instance case as no recovery of the excise dues has been made by the Collector, Ghaziabad and the amount sought to be recovered through his office has been paid directly by the petitioners to the Excise Commissioner, Sikar Rajasthan partly of their own and partly through remittances made by the Income Tax Department due to them, the demand of collection charges to the tune of Rs. 47,47,972/- is wholly illegal and unjustified. We accordingly, issue a writ of certiorari quashing the impugned sale proclamation (Annexure XXI to the writ petition) and a writ in the nature of mandamus to respondent No.2 for the refund of any amount which may have been realised as collection charges in connection with the recovery in question.

25. The writ petition is accordingly, allowed.

Parties to bear their own costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2010

BERORE
THE HON'BLE ASHOK SRIVASTAVA, J.

Criminal Revision No. 571 of 2008

Sant Pratap Singh ...Revisionist
Versus
State of U.P. and others ...Opposite Parties

Counsel for the Revisionist:
Mr. Prashant Saxena
Mr. S.D. Kautilya.

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

Code of Criminal Procedure: Section 125- maintenance claimed by a wife-marriage itself in contravention of section 11 of Hindu marriage Act-void from its very inception-not entitled but the illegitimate children even after void marriage-entitled for maintenance-accordingly the application by the children party allowed-but rejection order relating to the claim of wife voidable marriage held proper.

Held: Para 22

Now the position of law is clear. Law recognizes the claim of maintenance by an illegitimate child, but it does not recognize a claim by an illegitimate wife. Section 16 of the Hindu Marriage Act, 1955 clearly says that a child born out of a void or voidable marriage shall be a legitimate child in the eye of law. Therefore, he is always entitled to a claim of maintenance under section 125 of Cr. P.C.

Case law discussed:
1988(25) ACC 119
AIR 1988 SC 664
2005 (51) ACC 923
1969 (6) ACC 200 (SC)

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

1. A brief reference to the factual position would suffice because essentially the dispute has to be adjudicated with reference to scope and ambit of section 125 of the Code of Criminal Procedure, 1973 (in short the 'Code').

2. A petition under section 125 Cr.P.C. was moved before the learned Judicial Magistrate, Court No.14, Farrukhabad by opposite party no.2 Smt. Sanju and opposite party no.3 Vipin Kumar against the revisionist Sant Pratap Singh which was registered in that Court as Crl. Case No.20/12/07. The said petition was decided by the learned Judicial Magistrate on 7.5.2007. The learned Magistrate dismissed the claim of opposite party no.2 whereas he awarded maintenance of Rs.2000/-p.m. to opposite party no.3. Feeling aggrieved by the said judgment the revisionist filed a criminal revision before the learned Sessions Judge, Farrukhabad who after hearing the case allowed the revision, set aside the judgment and order passed by the learned Judicial Magistrate and remanded back the case for fresh hearing to the learned trial court. Thereafter the matter was heard by the learned Judicial Magistrate, City, who vide his judgment and order dated 13.11.2007 allowed the petition under section 125 Cr.P.C. and directed the revisionist to pay a sum of Rs.2200/- p.m. to opposite party no.2 and a sum of Rs.2100/-p.m. to opposite party no.3. Feeling aggrieved by all the three orders the revisionist has filed the present revision.

3. The petition under section 125 Cr.P.C. was moved before the Court of learned Magistrate with the allegations that opposite party no.2 was married to the revisionist on 10.2.1994 and out of this wedlock opposite party no.3 was born. The revisionist is posted in the police department. After having a married life of some 6-7 years the revisionist due to certain reasons turned out opposite party nos. 2 & 3 from his house after abusing and assaulting them. On enquiry the opposite party no.2 came to know that the revisionist was having illicit relationship with one Smt. Kamlesha. Opposite party nos. 2 & 3 have further alleged in the petition that both of them are not in a position to maintain themselves. It has further been contended therein that opposite party no.2 is the legally wedded wife of the revisionist whereas opposite party no.3 is his legitimate son. The revisionist contested the claim. He denied the allegations and averments leveled against him in the claim petition. He further stated that he was married to Smt. Kamlesha in the year 1977 and both of them are living together since then as husband and wife and they have two children out of this wedlock. The revisionist has further stated in his objection moved before the learned Magistrate that Dhan Singh is his real brother and a property dispute is there between the two. It has also been stated that opposite party no.2 is a kept of Dhan Singh and opposite party no.3 is his illegitimate child. The revisionist has further stated that on the instigation of Dhan Singh opposite party no.2 has filed the petition under section 125 Cr.P.C. with false allegations in order to extract money from the revisionist.

4. After hearing both the parties the picture which emerged before the learned Magistrate was that the revisionist had married Smt. Kamlesha in the year 1977

but unfortunately the couple could not beget a child. Thereafter in the year 1994 the revisionist married opposite party no.2. This was his second marriage. Out of this second wedlock a son was born who is opposite party no.3. After the birth of opposite party no.3 Smt. Kamlesha the first wife of the revisionist became pregnant and she also gave birth to a male child. Thereafter another child was also born to Smt. Kamlesha. After a few years the revisionist started avoiding his second wife, opposite party no.2 and after sometime started maltreating her and one day he turned her out of his house alongwith opposite party no.3. Thereafter opposite party no.2 alongwith her son went to her father's home and since then she is living there having no means to maintain herself and her minor son.

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

6. The first point which has been submitted before me by the learned counsel for the revisionist is that the learned lower court has failed to appreciate the evidence adduced from his side whereby he had contended before the learned lower court that opposite party no.2 Smt. Sanju was a concubine of one Dhan Singh, younger brother of the revisionist. It has been further submitted in this regard that the revisionist had certain property dispute with Dhan Singh and this dispute was of such a nature that once Dhan Singh had fired upon the revisionist by his gun, but the fire missed its target. In this reference it has also been submitted from the side of the revisionist that due to intervention of his mother, the revisionist did not lodge an F.I.R. in the matter or take any action.

7. I have examined the judgment dated 13.11.2007 of the learned lower court who has given a categorical finding regarding this contention. The learned Magistrate has found that but for the bald statement of the revisionist and his first wife Smt. Kamlesha there is nothing on the record which may indicate that opposite party no.2 was a concubine of Dhan Singh. The learned lower court has referred the statement of the mother of Dhan Singh in this regard and also various documents which indicated that marriage had taken place in between the revisionist and opposite party no.2. There is also a categorical finding of the learned lower court in which it has held that proof of property dispute or firing by Dhan Singh upon the revisionist have not been proved by the revisionist. In this regard I have examined the judgment of the lower court and other materials available on record. I find that this finding of the lower court is based on evidence and it can not be said that this finding of fact is perverse. Therefore, in revision this court is not inclined to interfere with this factual aspect of the matter. It is sufficient to say that on both the occasions both the Magistrates have given a clear-cut finding that a marriage had taken place in between the revisionist and opposite party no.2. They have also given categorical findings that opposite party no.3 Vipin Kumar is the minor son of the revisionist and opposite party no.2.

8. The revisionist had filed his objection on the petition filed by opposite party no.2 under Section 125 Cr.P.C. in the Court of the learned Magistrate. In his objection the revisionist has said that he even does not know opposite party no.2 but at the same time he has also stated that opposite party no.2 is a concubine of

his younger brother. In his cross-examination before the learned Magistrate a photograph was shown to him regarding which he has admitted that he was sitting in the photograph alongwith opposite party no.2, his mother and his nephew. These facts go to show that on material points the revisionist had tried to mislead the court by speaking lies.

9. From the perusal of judgments impugned it is evident that both the learned Magistrates have given a distinct finding that opposite party no.2 Smt. Sanju had married the revisionist in the year 1994. The Magistrates have also given categorical findings that the revisionist was married to one Kamlesha Devi in the year 1977 i.e. much before the marriage of the revisionist with opposite party no.2.

10. Mr. Lokesh Varun, learned Judicial Magistrate, Court No.14, Farrukhabad vide his judgment and order dated 7.5.2007 passed in complaint case No.20/12/07 has said that since opposite party no.2 was the second wife of the revisionist, she is not entitled to get a maintenance from the revisionist because the second marriage was a void marriage. He had relied upon the judgment of Supreme Court reported as Bakulabai and another Vs. Ganga Ram and another. This judgment of Mr. Lokesh Varun was challenged before the learned Sessions Judge, Farrukhabad, who did not agree with the finding given by the learned Magistrate and with certain unreasonable findings and without considering the ratio of Bakulabai's case, the learned Sessions Judge allowed the revision and remanded the case back for fresh consideration by the learned Magistrate. It is very astonishing that before passing his revisional judgment the learned Sessions Judge did not try even to read the ratio given by the Apex Court in Bakulabai's case and by adopting a queer logic he remanded the matter for fresh trial.

11. In my opinion the learned Sessions Judge should have behaved in a more matured manner while giving certain directions to the lower court. It appears that he forgot that the court of a magistrate is judicially subordinate to a Sessions Judge and it is bound to follow the directions given by him in revision. I find that because of illogical directions given by him in his revisional judgment to the lower court the learned judicial magistrate, City, was forced to give certain findings which probably he would not have given while he was deciding the remanded petition Under Section 125 Cr.P.C. had he been properly directed by the learned Sessions Judge.

12. Mr. Chandra Pal the learned Judicial Magistrate City, Farukhabad has on 13.11.2007 passed the relevant judgment in case No.127/12/2007 which is actually and substantially impugned herein. The learned Magistrate has given a clear-cut finding that respondent no.2 is the second wife of the revisionist. From his judgment it also appears that when opposite party no.2 married the revisionist she had knowledge that the revisionist was already married to one Smt. Kamlesha Devi. The learned Judicial Magistrate City, has also given a categorical finding that opposite party no.3, is the son of opposite party no.2 and the revisionist. He has allowed maintenance to opposite party no.3 but at the same time he also allowed maintenance to opposite party no.2

holding that she is a legally married wife of the revisionist.

13. The only legal issue involved in the instant case is that whether opposite party no.2 Smt. Sanju is entitled to get any maintenance from the revisionist or not.

14. Factually, it has been established that the revisionist was married to one Smt. Kamlesha Devi in the year 1977. He did not have a surviving child from Smt. Kamlesha and it appears that in these circumstances he had decided to marry opposite party no.2 and did marry her in the year 1994. It also appears that opposite party no.3 was born out of the second marriage of the revisionist. Facts also show that after the birth of opposite party no.3 Smt. Kamlesha Devi gave birth to a male child, who is alive. After the birth of this child, it appears, that the revisionist had started misbehaving with opposite party no.2 and opposite party no.3 and he turned them out of his house forcing opposite party no.2 to go back to her father's house where she is living with her son, opposite party no.3. In the instant case factually it has been established that opposite party no.2 is the second wife of the revisionist and opposite party no.3 is his illegitimate son.

15. Now let us examine the status of opposite party no.2. Section 11 of The Hindu Marriage Act, 1955 states as follows:-

"**11.Void marriages**.-Any marriage solemnised after the commencement of this Act shall be null and void any may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5."

16. The above Section clearly states that any marriage solemnised after the commencement of the Hindu Marriage Act, 1955 shall be null and void if it contravenes any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Hindu Marriage Act, 1955 which is as follows:-

"**5.Conditions for a Hindu Marriage**.- A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage
(ii) at the time of the marriage, neither party-
(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(c) has been subject to recurrent attacks of insanity.
(iii) The bridegroom has completed the age of twenty one years and the bride, the age of eighteen years at the time of the marriage;
(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
(v) the parties are not sapindas to each other, unless the custom or usage governing each of them permits of a marriage between the two;

17. From the perusal of the sections it is evident that a marriage can not be solemnised between any two Hindus if either party has a spouse living at the time of the marriage. If section 5 and section 11 of the Hindu Marriage Act, 1955 are read together it is evident that any marriage solemnised between any two Hindus shall be null and void if any of the parties has a spouse living at the time of the marriage. **In 1988(25) ACC 119, Bakulabai and another vs. Ganga Ram and another** the Apex Court has said that the marriage of a Hindu woman with a Hindu male with a living spouse, performed after the commencement of the Hindu Marriage Act, 1955 is null and void and the woman is not entitled to maintenance under section 125 of the Cr.P.C. The judgment was passed by the Supreme Court on 27.1.1988. On the same date the same Bench of the Supreme Court passed another judgment reported in **AIR 1988 SC 664, Smt. Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav and another**. This judgment is a detailed judgment in which the Supreme Court has stated that Section 5 of the Hindu Marriage Act, 1955 lays down the necessary conditions for a lawful marriage.

18. It is a necessary condition for a lawful marriage that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. Section 11 of the Hindu Marriage Act, 1955 deals with void marriages. A marriage covered by Section 11 of the Act is void ipso jure i.e. void from the very inception, and has to be ignored as not existing in law at all if and when such a question arises. Such a question also arises when a petition under Section 125 Cr.P.C. is dealt with by the court of a Magistrate. From the perusal of the provisions of Section 125 Cr.P.C. it is evident that the Magistrate, before granting maintenance to a woman claiming herself to be married to the person from whom she is claiming maintenance has to hold that such woman is wife. Wife means a legally wedded wife. If the woman claiming maintenance is not legally wedded wife of the person form whom the maintenance is being claimed her petition for maintenance can not be allowed. Therefore in such circumstances personal law of the parties has to be considered. In Hindus marriage with person having living spouse is null and void and not voidable. Therefore, an attempt to exclude altogether the personal law applicable to the parties from consideration is improper. **In 2005 (51) ACC 923 Savitaben Somabhai Bhatiya vs. State of Gujrat and others** the Apex Court while referring **1969 (6) ACC 200 (SC)Nanak Chand vs. Chandra Kishore Agarwala & Others** has said that the provisions of personal law are applicable and enforceable where parties are governed by such Act. Referring the Yamunabai's case (supra) the Supreme Court has further held that the personal law is relevant for deciding the validity of the marriage and therefore, it can not be altogether excluded from the consideration.

19. The Apex Court in Smt.Yamunabai's case (supra) has finally held that the marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is, therefore, not entitled to the benefit of Section 125 of the Code. Further in Savitaben's case (supra) the Supreme

Court has said that the expression 'wife' used in Section 125 of the Code should be interpreted to mean only a legally wedded wife. The word 'wife' is not defined in the Code except indicating, in the explanation to Section 125, its inclusive character so as to cover a divorcee. A woman can not be a divorcee unless there was a marriage in the eye of law preceding that status. The expression must therefore be given the meaning in which it is understood in law applicable to the parties. The marriage of a woman in accordance with the Hindu rites with a man having a living spouse is a complete nullity in the eye of law and she is therefore not entitled to the benefit of Section 125 of the Cr.P.C. or the Hindu Marriage Act.

20. Section 125 of Cr.P.C. has been enacted in the interest of a wife and one who intends to take benefit of this provision has to establish the necessary conditions. One of the necessary conditions is that the claimant should be the wife of the person concerned. This issue can be decided only by a reference to the law applicable to the parties. It is only where an applicant establishes such status or relationship with reference to the personal law that an application for maintenance can be maintained. In **(2008) 4 SCC 774, Chand Patel vs. Bismillah Begum and another** the Supreme Court has considered this aspect of relationship of Hindus also despite the fact that the case is in reference of Muslim parties. Paragraph 24 should be quoted here:-

"24.Although the law applicable in this case is under the personal law of Muslims, it has many similarities with the provisions of Sections 11 and 12 of the Hindu Marriage Act, 1955. Section 11 of the 1955 Act, defines ' void marriages' and provides that any marriage solemnised after the commencement of the Act shall be null and void and on a petition presented by either party thereto, be so declared by a decree of nullity if it contravened any one of the conditions specified in Clauses (i), (iv) and (v) of Section 5 of the Act. In *Yamunabai Anantrao Adhav vs. Anantrao Shivram Adhav this* Court had held that marriages covered by Section 11 are void ipso jure, that is, void from the very inception and have to be ignored as not existing in law at all. A marriage in contravention of Section 11 must be treated as null and void from its very inception."

21. In the above case the Apex Court has categorically said that the marriages covered by Section 11 of the Hindu Marriage Act, 1955 are void ipso jure i.e. void from very inception and have to be ignored as not existing in law at all. A marriage in contravention of Section 11 of the Hindu Marriage Act must be treated as null and void from its very inception.

22. Now the position of law is clear. Law recognizes the claim of maintenance by an illegitimate child, but it does not recognize a claim by an illegitimate wife. Section 16 of the Hindu Marriage Act, 1955 clearly says that a child born out of a void or voidable marriage shall be a legitimate child in the eye of law. Therefore, he is always entitled to a claim of maintenance under section 125 of Cr. P.C.

23. From the perusal of the relief clause of this revision it is evident that the revisionist has filed this revision with the prayers that the orders passed by the learned lower courts on 7.5.2007, 24.2.2007 and 13.11.2007 be quashed and set aside. I have

perused all the three judgments reference whereof has been given in this revision. It will complicate the matter if it is decided by this Court as to which order is to be set aside or which is not to be set aside or which is to be set aside partially. Therefore, while disposing of this criminal revision the following directions are given:-

(i) The petition filed by opposite party no. 2 Smt.Sanju and opposite party no.3 Master Vipin Kumar Singh (minor) under Section 125 Cr. P.C. before the Court of learned Magistrate concerned is partly allowed.

(ii) The claim of opposite party no.2 Smt. Sanju is rejected as she is not legally wedded wife of the revisionist.

(iii) The claim for maintenance of Master Vipin Kumar Singh, minor is partly allowed. t is further held that he is entitled to get a sum of Rs.2,100/-p.m. from the revisionist from the date of the petition till the date the child attains the age of majority. **the Apex Court while referring**

(iv) The revisionist is directed to pay to opposite party no.3, Master Vipin Kumar Singh, minor, the entire arrears of maintenance within a period of three months from today and this amount shall be paid to the opposite party no.2, the mother of Master Vipin Kumar Singh, opposite party no.3, as she is his natural guardian and she will receive this amount on behalf of opposite party no.3.

(v) The revisionist is also directed to pay the above mentioned future monthly amount of maintenance to opposite party no.3 by 10th of each succeeding month through his mother, opposite party no.2.

With the above directions the revision is finally disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLHABAD 11.5.2010

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Second Appeal No. 647 Of 2006

Siya Ram ...Plaintiff/Appellant
Versus
Nagar Palika Parishad Tilhar and another ...Defendant/Respondents

Counsel for the Appellant:
Sri Manish kumsr Nigam

Counsel for the Opposite Parties:
Sri Prem Chand

Code of Civil Procedure-Section 100-suit for injuction-appellant paying tehbajari to the Nagar Palika-to run the sweet shop-in Principle-even a tresspasses cannot be evicted without taking recourse of law-dismissed by court below-the status of appellant as tenant came to an end everyday-moreover no one has right to encroach upon public road; footpath-meant for public use by pedestrians-there can be no against statute-No substantial Question of law found-appeal dismissed

Held: Para 14

The licence of the plaintiff appellant has expired long back. Considering all facts and circumstances of the case in totality and following the ratio laid down in Shivala Footpath Sangathan Sansthan (Dukandar)'s case (supra), judgment of the lower appellate court is upheld as footpath cannot be allotted to any

person or given on licence on payment of Tehbazari. Hence the plaintiff appellant has no legal right to occupy footpath meant for public use by pedestrians. No substantial question of law is involved in this appeal as there can be no estoppal against the statute

Case law discussed:

A.I.R. 1989 S.C.-2097, A.I.R. 1989 S.C.-997.

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

1. Rejoinder affidavit filed is taken on record.

Heard counsel for the parties.

2. It appears from the order dated 28.7.2006 that this second appeal was admitted but question of law has not been formulated.

3. Counsel for the appellant submits that the appeal was admitted on the substantial question of law, " Whether the lower appellate court erred in law in dismissing the suit as even a trespasser or an unauthorised occupant cannot be dispossessed except in accordance with law".

4. In support of his contention, he has relied upon paragraph no. 9 of the judgment rendered in **Krishna Ram Mahale Vs. Mrs. Shobha Venkat Rao** reported in A.I.R. 1989 S.C.-2097, which reads thus:

"*This proposition was also accepted by a Division Bench of this Court in Ram Rattan Vs. State of U.P.(1977) 2 SCR 232: AIR 1977 SC 619).The Division Bench comprising of three learned Judges held that a true owner has every right to dispossess or throw out a trespasser while he is in the act or process of trespassing but this right is not available to the true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner. In such circumstances, the law requires that the true owner should dispossess the trespasser by taking recourse to the remedies under the law. In the present case, we may point out that there was no question of the plaintiff entering upon the premises as a trespasser at all as she had entered into the possession of the restaurant business and the premises where it was conducted as a licensee and in due course of law. Thus, defendant no. 3 was not entitled to dispossess the plaintiff unlawfully and behind her back as has been done by him in the present case. It was pointed out by Mr. Tarkunde that some of the observations referred to above were in connection with a suit filed under S. 6 of the Specific Relief Act, 1963 or analogous provisions in the earlier Specific Relief Act, 1877. To our mind, this makes no difference in this case as the suit has been filed only a few weeks of the plaintiff being unlawfully deprived of possession of the said business and the premises and much before the period of six months expired. In view of the aforesaid conclusions arrived by us, we do not propose to consider the question whether the agreement between the plaintiff and defendant no. 3 amounted to a licence or a sub-lease."*

5. Second decision relied upon by the learned counsel for the appellant is **State of U.P. and others Vs. Maharaja Dharmander Prasad Singh etc.** reported in A.I.R. 1989 S.C.-997. On the basis of aforesaid authorities, counsel for the appellant submits that it is well settled law that where a person is in settled possession of the property, he cannot be

dispossessed except in accordance with law.

6. Per contra, Sri Prem Chandra, learned counsel for the respondents submits that father of the plaintiff appellant was aHalwai and was selling sweet meet on a Chabutara on roadside about ten feet away from the centre of the road. It is stated that the court below has held that the plaintiff appellant was a licensee and not a tenant, who was allowed to sell his goods on the roadside on payment of Tehbazari.

7. After hearing counsel for the parties and on perusal of the record, it appears that trial court had found that the plaintiff appellant was only a licensee and not a tenant. This finding has been given by the trial court on issue no. 1 and 2 framed by it as under:

"1- क्या वादी विवादित भूमि पर बतौर किरायेदार काबिज है यदि हॉ तो प्रभाव?

2- क्या वादी विवादित सम्पत्ति का नगर पालिका तिलहर का रूपया 60/- प्रतिमाह की दर से सन 1955 से किरायेदार है? यदि हॉ तो प्रभाव?"

8. The trial court noting the fact that though the appellant claimed that he was a tenant and was paying rent under Kiraidari but he could not produce the same and from the documents filed by the plaintiff, it appears that he was only a licensee. The relevant extract of findings recorded on the aforesaid issues are as follows:

"ऐसी स्थिति में पत्रावली पर वादी की ओर से जो प्रलेखीय व मौखिक साक्ष्य प्रस्तुत किया गया है उनसे निःसन्देह विवादित जगह का वादा किरायेदार तो साबित नहीं होता है बल्कि लाईसेन्सी साबित होता है जिसकी पुष्टि पी०डब्लू-1 के प्रति परीक्षण के बयानों से भी होती है। ऐसी स्थिति में में उक्त विवेचना से न्यायालय इस निष्कर्ष पर पहुँचती है कि वादी विवादित जगह की विपक्षीगण की ओर से किरायेदार होना साबित नही है बल्कि यह साबित है कि वादी विवादित जगह का विपक्षीगण की ओर से बतौर लाईसेन्सी उपयोग कर रहा है, जैसा कि विपक्षीगण के विद्वान अधिवक्ता ने भी अपने तर्क में स्वीकार किया है कि वादी उनकी ओर से विवादित जगह का लाइसेन्सी के रूप में प्रयोग करता है। . . . . . तदनुसार वाद बिन्दु सं०-1 व 2 **निर्णीत करते हुए निस्तारित किया जाता है कि वादी विवादित जगह का रूपया 60/- प्रतिमाह की दर से किरायेदार के रूप में काबिज व दाखिल नहीं है बल्कि बतौर लाईसेन्सी विवादित जगह पर काबिज व दाखिल है और उस पर हलवाईगीरी का काम करता है।** अस्तु उक्त प्रकार से वाद बिन्दु सं०-1 व 2 निस्तारित किये जाते हैं।"

9. As regards the judgment in **Krishna Ram Mahale's case** (supra) is concerned, in that case the plaintiff had filed a suit for recovery of possession of premises upon which she had entered as a licensee to conduct the business of restaurant. She was subsequently dispossessed by the licensor unlawfully and behind her back. Immediately thereafter she filed suit for recovery of possession. In these circumstances, it was held therein that she was entitled to decree for recovery of possession. Since she was unlawfully dispossessed, it could not be said that the licence having expired long back and the plaintiff not being entitled to renewal of licence could only ask for damages for unlawful possession.

10. From the above, it is clear that petitioner in the aforesaid case had been unlawfully dispossessed by the licensor before expiry of the licence period whereas in the instant case the plaintiff appellant is a licensee on day to day basis on payment of Tehbazaari. His licence expires every day in the evening. It may also be noticed that in the case of Krishna Ram Mahale (supra), a restaurant was being run by the plaintiff in a private property whereas in the instant case

admittedly the plaintiff appellant was selling sweets on roadside and claims to have inherited from his father who was selling sweets since 1955.

11. In the case of **State of U.P. and others Vs. Maharaja Dharmander Prasad Singh** (supra), the question before the Court was whether the purported forfeiture and cancellation of the lease of the Nazool land by the State Govt., were valid or not and be allowed to be agitated in proceedings under Art. 226. It was held in that case that a lessor with the best of title, has no right to resume possession extra judicially by use of force from a lessee even after the expiry or earlier termination of the lease by forfeiture or otherwise. The use of the expression re entry in the lease deed does not authorise extrajudcial methods to resume possession. Under law, the possession of a lessee, even after the expiry or its earlier termination is juridical possession and forcible possession is prohibited, a lessee cannot be dispossessed otherwise than in due course of law.

12. At this stage, reference may also be made to a Division Bench decision of this Court rendered in **Shivala Footpath Sangathan Sansthan (Dukandar) and others Vs. District Magistrate, Kanpur Nagar and others** (2004(1) C.R.C.-703, where the petitioners had their shops on footpath and allotment in their favour were made by Nagar Nigam for use of footpath and they were paying Tehbazari. The Court in the aforesaid circumstances held that petitioners therein have no right to occupy the footpath and Nagar Nigam has no right to allot footpath which is for public use by pedestrians.

13. In the present case, the plaintiff appellant has lost from the lower appellate court. He has not been evicted during trial or appeal before the lower appellate court as injunction was in force. He has also not been evicted during pendency of the present second appeal as an interim order was in his favour. The defendant respondents have applied for vacation of the interim order and have prayed the Court to pass appropriate orders. This action or proceeding cannot tantamount to eviction of plaintiff appellant by extra judicial methods or not in accordance with law.

14. The licence of the plaintiff appellant has expired long back. Considering all facts and circumstances of the case in totality and following the ratio laid down in Shivala Footpath Sangathan Sansthan (Dukandar)'s case (supra), judgment of the lower appellate court is upheld as footpath cannot be allotted to any person or given on licence on payment of Tehbazari. Hence the plaintiff appellant has no legal right to occupy footpath meant for public use by pedestrians. No substantial question of law is involved in this appeal as there can be no estoppal against the statute.

15. The appeal is accordingly dismissed. Interim order, if any, stands vacated. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2010

BEFORE
THE HON'BLE AMITAVA LALA, ACJ
THE HON'BLE SHABIHUL HASNAIN, J.

Special Appeal No. 662 of 2010

S.M.A. Abdi and another
...Respondents-Appellants
Versus
Private Secretaries Brotherhood and another ...Petitioners-Respondents

Counsel for the Petitioner:
Sri Mr. Zafar Nayyer, Addl. Advocate General,
Mr. M.C. Chaturvedi, CSC
Mr. Ravi Shankar Prasad, Addl. CSC
Mr. M.C. Tripathi, Addl. CSC.

Counsel for Respondents:
Mr. M.D. Singh Shekhar
Mr. R.D. Tewari

High Court Rules-1992 Chapter VIII-Rule-5 Special Appeal-against the order framing Charges-for willful disobedience of judgement affirmed by apex court-Three affidavits filed on different times-found misleading-whether special appeal maintainable? Held-'yes'.

Held: Para 6

Upon a conjoint reading of the Supreme Court judgments, we do not find anything that there is any dearth of right to prefer an appeal in such circumstances, and therefore, according to us, the appeal is maintainable.

Case law discussed:
AIR 2006 SC 2190; (1998)3 UPLBEC 2333; (1997) 4 SCC 430; (2004) 8 SCC 683; JT 2001(4) SC 405;(1996) 1 SCC 589;JT 2007 (12) SC 27; AIR 2003 SC 2723; (1972) 3 SCC 839; (1995) 4 SCC 1.

(Delivered by Hon'ble Amitava Lala, J.)

1. **Amitava Lala, A.C.J.** This special appeal is arising out of an order passed by the learned Single Judge dated 23rd April, 2010 in a contempt proceedings, being Civil Misc. Contempt Petition No. 1774 of 2008. However, the officers, against whom the charges have been framed, have preferred this appeal and the same is supported by the State.

2. Originally, an order was passed on 29th July, 1998 by a Division Bench of this Court to give appropriate pay scale to the Private Secretaries working in the office of the U.P. State Law Officers, Allahabad/Lucknow. The said order was challenged by the State before the Supreme Court, which was also dismissed by order dated 28th of November, 2007. After about a period of six months, the contempt application was filed on 11th May, 2008, which has given rise to the order impugned in the present appeal. The State also preferred a review petition before the Supreme Court against the order dated 28th November, 2007, which was dismissed on 23rd July, 2008. Thereafter, a compliance affidavit dated 17th November, 2008 was filed annexing the Office Order dated 14th November, 2008, but the learned Single Judge, hearing contempt matters, found that it was misleading and in the teeth of the judgment of this Court and passed an order, in detail, giving further opportunity to the appellants herein to comply the directions given the Court. Such order, according to us, is in the form of interpretation of the earlier order passed by the Division Bench of this Court. A second compliance affidavit was filed on

25th May, 2009, which was also found to be misleading in nature by the learned Single Judge taking the contempt matters. Another compliance affidavit was filed providing pay protection and bifurcating the cadre in different pay scales to the Private Secretaries of the office of the U.P. State Law Officers, Allahabad/Lucknow. However, on closure scrutiny of the order, we find that the learned Single Judge wanted to find out the import by interpretation of the order and give effect of the same in his own way. However, sitting in the contempt jurisdiction, interpretation of the original order cannot be held to be justiciable nor advisable. In any event, ultimately the Court arrived at the following conclusions:-

"Thus, there being a prima facie case for trial, the following charges are framed:

"You Shri S.M.A. Abdi, The Principal Secretary (Law) Government of Uttar Pradesh, U.P. Secretariat, Lucknow show cause why he should not be tried and punished for willful and deliberate violation of the order and judgment of this Court dated 29.7.1998 passed in Writ Petition No. 17885 of 1996.

You are further charged for filing false and misleading affidavits of compliance in this Court applying subterfuge to overcome the orders of this Court."

"You Shri Manjeet Singh, The Principal Secretary (Finance) Government of Uttar Pradesh, U.P. Secretariat, Lucknow show cause why he should not be tried and punished for willful and deliberate violation of the order and judgment of this Court dated 29.7.1998 passed in Writ Petition No. 17885 of 1996.

You are further charged for filing false and misleading affidavits of compliance in this Court applying subterfuge to overcome the orders of this Court."

Your reply should be filed on or before 11.5.2010 after serving a copy on the counsel for the applicant who may file a reply thereto before the next date fixed.

It is clarified that any observations or findings made or recorded herein above are only prima facie in nature and are subject to the replies which may be filed in response to the charges framed.

List on 14.5.2010 when both the officers shall be present in person."

3. Here, a question arose before this Court whether the special appeal from such order, which is on the basis of the prima facie view of the Court of Contempt, can be held to be maintainable under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952. To that, the learned Additional Advocate General has submitted before this Court that in **AIR 2006 SC 2190 (Midnapore Peoples' Co.op. Bank Ltd. & Ors. Vs. Chunilal Nanda & Ors.),** similar question was considered and it was held by the Apex Court that against an order of the High Court deciding an issue or making any direction relating to the merits of the dispute between the parties, in a contempt proceedings, the intra-Court appeal can be held to be maintainable. Relevant finding of the Supreme Court is

available in sub-paragraph V of paragraph 11 of such judgment, which is as follows:-

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

The first point is answered accordingly."

4. That apart, we have come across another Supreme Court judgment reported in **[(1998) 3 UPLBEC 2333, A.P. Verma, Principal Secretary, Medical Health and Family Welfare, U.P. Lucknow & Ors. Vs. U.P. Laboratory Technicians Association, Lucknow & Ors.],** wherein it has been held that an appeal will also be maintainable under Chapter VIII Rule 5 of the High Court Rules against the directions issued in the impugned order, which are regarding the merit of the claim made by the respondents in the writ petition.

5. Requirement of understanding the legal position is to examine as to whether the contempt appeal can be held to be maintainable only after passing of the final order under Section 19 of the Contempt of Courts Act or not. It is right to say that when final order is passed, then the same will be appealable, but what will happen if any judgment and order is passed by the Court, which are in the trappings of the finality during the interlocutory stage of the proceedings - whether the aggrieved persons will be debarred from preferring an appeal?

6. Upon a conjoint reading of the Supreme Court judgments, we do not find anything that there is any dearth of right to prefer an appeal in such circumstances, and therefore, according to us, the appeal is maintainable.

7. So far as the merit is concerned, the learned Senior Counsel appearing for the complainants (respondents herein), has urged before us that repeated Government Orders were issued to frustrate the grievance of the Private Secretaries of the office of the U.P. State Law Officers, Allahabad/Lucknow, to which the learned Additional Advocate General has contended before us that the appellants have already complied with the order and since the Private Secretaries are the staff of his own office, it is his duty to protect their interest. The learned Additional Advocate General has also relied upon an Office Memorandum/Government Order, being dated 29th July, 2009 and said that this Order has been issued by the appellant no.1, being the Principal Secretary and, therefore, the same is the latest Government Order superseding the earlier Office Memorandums/Government Orders to protect the interest of the Private Secretaries as per the orders of the Court in the writ petition as well as in the contempt application. However, the learned Senior Counsel appearing for the complainants has stated that there is no indication with regard to any consequential benefit, to which both the learned Additional Advocate General and the learned Chief Standing Counsel have given an undertaking before this Court that the same will be done in compliance with the direction of this Court and

further said that consequential benefit is automatic upon enhancement of the pay scale pursuant to the orders of this Court and as per the Government Order dated 29th July, 2009. The learned Additional Advocate General further said that on 30th July, 2009, an order was passed by the Contempt Court upon considering the Government Order dated 29th July, 2009, which has not been taken into account by the learned Judge taking contempt matters at the time of passing the impugned order and charges were framed against the appellants. However, the learned Senior Counsel appearing on behalf of the complainants has accepted the statement and undertakings given by the learned Additional Advocate General as also the learned Chief Standing Counsel, but contended that the officers, who failed to discharge their responsibilities and are responsible for committing gross contempt of the order of the Court by their willful disobedience, should not be exonerated. Though after making the complaint, the matter is between the Court and the contemnor, but the learned Senior Counsel was a little enthusiastic to cite certain judgments to come to an appropriate conclusion in this respect. He has handed a set of following judgments before this Court, on which reliance has been placed:-

8. In **(1997) 4 SCC 430 (State of Bihar & Ors. Vs. Subhash Singh),** wherein the Supreme Court affirmed the judgment of the High Court in a contempt matter, by which a cost of Rs.5000/- against the erring official was imposed for wilful disobedience of the order of the High Court.

9. **In (2004) 8 SCC 683 (E.T. SUNUP Vs. C.A.N.S.S. Employees Association & Anr.)**, wherein it was held that "It has become a tendency of the government officers to somehow or the other circumvent the orders of court and try to take recourse to one justification or other. This shows complete lack of grace in accepting the orders of the Court. This tendency of undermining the Court's order cannot be countenanced. This Court time and again has emphasized that in a democracy the role of the Court cannot be subservient to administrative fiat. The executive and legislature have to work within the constitutional framework and the judiciary has been given the role of watchdog to keep the legislature and executive within check." However, in the said case, considering the tenure of service of the officer concerned etc., a fine of Rs. 5000/- was imposed.

10. In **JT 2001 (4) SC 405 (Vidhya Dhar Sharma Vs. G.B. Patnaik & Ors.),** wherein the Supreme Court has held that it is only the pain and fear of being punished for contempt that seems to have persuaded the erring persons to take action and comply with the direction of the Supreme Court. In that case, a cost of Rs. 5,000/- was imposed.

11. I**n (1996) 1 SCC 589 (Abhijit Tea Company Pvt. Ltd. Vs. Terai Tea Co. (P) Ltd. & Ors.)**, it was held that no one should be left in lurking doubt that by manoeuvre or otherwise one would get over non-implementation of the order of the Court and was successful in its avoidance or seem to be defeated. The arm of the Court is long enough to reach injustice wherever it is found, which should be dealt with appropriately.

12. In **JT 2007 (12) SC 27 (M/s. Maruti Udyog Limited Vs. Mahinder**

C. Mehta & Ors.), it has been held that the facts and circumstances of the case are such that the contemnors should be held guilty and be punished with appropriate punishments.

13. In **AIR 2003 SC 2723 (U.P. Resi. Emp. Co-op. House B. Society & Ors. Vs. New Okhla Indus. Deve. Authority & Anr.)**, wherein a false affidavit was filed to mislead the Court and with a view to see that the Court does not pass any order, adverse to what Noida Authority is contending, therefore, a show cause notice was issued by the Supreme Court.

14. In **(1972) 3 SCC 839 (Mulk Raj Vs. State of Punjab)**, wherein it was held that the apology is an act of contrition. Unless apology is offered at the earliest opportunity and in good grace apology is of penitence. If apology is offered at a time when the contemnor finds that the Court is going to impose punishment, it ceases to be an apology and it becomes an act of a cringing coward.

15. In **(1995) 4 SCC 1 (T.M.A. Pai Foundation & Ors. Vs. State of Karnataka & Ors.)**, the Supreme Court rejected the unconditional apology as tendered by the five officers and held such persons guilty of contempt of Court and a copy of order was made part of the Annual Confidential Reports/Record of service of each of the officers.

16. Possibly, the learned Senior Counsel has referred the aforesaid cases to establish that there is no mistake on the part of the learned Single Judge in passing the impugned order to come to an appropriate conclusion.

17. We are of the view that power to pass an order by the Court of Contempt is discretionary power which can be passed considering facts and circumstances of each case. In this case admittedly compliance is there but the complainant has insisted for consequential benefit, to which an undertaking has been given. In case violation of such undertaking is there, Court can consider the cause of passing stringent order.

18. Against the aforesaid background, the learned Additional Advocate General and the learned Chief Standing Counsel both have contended before us that there is no willful disobedience on the part of the either of the officers (appellants). They are innocent victim of the circumstances. Whenever any order was passed, they tried to comply, but when new Rules were framed, they have no other alternative but to proceed in accordance with the same. They are the victims of the interpretation of the order of the Court, which cannot be treated to be willful disobedience on their part. However, taking into account the fact that the first appellant is going to retire soon, possibly in this month, and the second appellant has a long career and he has only followed the direction of the first appellant, we are of the view that for the fitness of things, they can be exonerated but they are cautioned under this order to be more careful in future as against the orders of the Court. However, this order, which is passed directing them to be more careful in future, is advisory in nature and shall not be treated to be part and parcel of their confidential remarks, but they are warned that no leniency will be shown in future.

19. The undertaking given before this Court will be complied with within two months from the date of communication of this order.

20. The appeal is disposed of with the above directions and observations, however, without passing any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2010

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition No. 673 of 2010

Vishwakant Gupta ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
H.N. Singh
B.N. Singh

Counsel for the Respondents:
C.S.C.

U.P. Excise(Settlement of Licence for Retail/Sale of Bear) Rules 2001-Rules-6-Renewal of licence-petition was running bear shop with his name exclusively for the year 2009-10-new policy introduced for the year 2010-11-also provides renewal-co-licencee has already separated himself much prior to grant of licence held-action of Distt. Magistrate settlement of licence through lottery illegal-existing licensee had right of renewal.

Held: Para 8 & 9

We find substance in the argument of learned counsel for the petitioner. Rule 6 of the Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 contemplates the renewal of licence for such period, and on such terms and conditions as decided by the State Government. The State Government has introduced the Excise policy for the year 2010-11 which provides for the renewal of existing license. Therefore, there is no dispute that the existing licensees had a right of renewal of their licences for the year 2010-11. The question for consideration is that on the date when the Excise policy for the year 2010-11 has been introduced giving right to the existing licensees to get their licence renewed, who was the licensee. Admittedly, the licence dated 29.9.2009 for the year 2009-10 was issued in the name of the petitioner only. Sri Sanjay Kumar Gupta was not shown as co-licensee in the licence and, therefore, we are of the view that the petitioner, being the existing licensee, had a right of renewal and his licence should be renewed for the year 2010-11.

We are further of the view that the pleas of Sri Sanjay Kumar Gupta had no substance. By the letter dated 15.5.2009, Sri Sanjay Kumar Gupta, stated that he wants to withdraw from the shop. Therefore, while issuing the licence it appears that the application of Sri Sanjay Kumar Gupta for withdrawing himself as a co-allottee had been accepted. It is not the case of respondent nos. 2 and 3 that the alleged letter dated 4.8.2009 filed along with an affidavit and the alleged letter dated 17.8.2009 had been confronted to the petitioner at any stage during the subsistence of the licence. It is not their case that they acted upon such letters and affidavits and taken any action. It is also surprising that after filing the aforesaid letters and affidavits, Sri Sanjay Kumar Gupta kept mum for more than seven months and woke up on 10.3.2010 when the time for renewal of the licence had come. Admittedly, the licence dated 29.9.2009 issued only in the name of the petitioner has not been suspended or cancelled till date. We

have gone through the letter dated the letter dated 10.3.2010. The averments made in the letters are contradictory. In the letter dated 10.3.2010 Sri Sanjay Kumar Gupta stated that for the year 2009-10 the shop was running properly and for the future years there might not be a proper understanding and the principal allottee had given threat several times that he would misuse the licence in the coming year and would involve him. In this letter there is no reference about the earlier letters dated 4.8.2009, affidavits and the letter dated 17.8.2009. In the order dated 12.3.2010 passed by the District Magistrate, Firozabad also there is no reference of the earlier letters. Photostat copies of the original application dated 15.5.2009 of Sri Sanjay Kumar Gupta, affidavit dated 28.4.2009, affidavit dated 4.8.2009 and the application dated 10.3.2010 are as Annexures-C.A.-4, C.A.5 and C.A.7 to the counter affidavit. The signature available on the applications and the affidavits appear to be the same. Therefore, on the facts and circumstances, it appears that the plea of Sri Sanjay Kumar Gupta that signature on the application dated 15.5.2009 and the affidavit dated 28.4.2009 are not his signature and are forged, cannot be accepted. It further appears that the subsequent letter dated 4.8.2009 and the affidavits are the subsequent creation to defeat the right of renewal of the petitioner. The above position also stand justified, as the date of letters is dated 4.8.2009 and date of licence is 29.9.2009. If the said letter would be available perhaps the licence in the name of the petitioner would not be granted.

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

1. By means of the present writ petition, the petitioner is seeking a writ of certiorari quashing the orders dated 7/8.4.2010 and 12.4.2010 passed by the District Magistrate, Firozabad, and a writ **4.8.2009 filed along with an affidavit and** of mandamus to the respondent to renew the licence of the petitioner for the year 2010-11.

2. The brief facts of the case are that for the settlement of the beer shop for the area Sarabi Market to Gali Bohran Sadar Bazar for the excise year 2009-10 applications were invited by the office of the District Excise Officer, Firozabad. Number of persons moved the applications. The petitioner also moved application showing Sri Sanjay Kumar Gupta, son of Sri Sampat Ram Gupta, as a co-applicant. In a lottery, held on 23.3.2009, the beer shop for the aforesaid area had been settled in favour of the petitioner along with Sri Sanjay Kumar Gupta as a co-applicant. It is the case of the petitioner that on 15.5.2009, Sri Sanjay Kumar Gupta wrote a letter to the District Magistrate, Firozabad to separate himself from the shop as a co-allottee at his own sweet will and without any fear and pressure. He stated that he has nothing to do with the said shop and Sri Vishwakant Gupta would be only responsible. He requested that he would be excluded from the aforesaid shop. The application was filed along with an affidavit. A copy of the application and the affidavit are annexed as Annexure-5 to the writ petition. The licence had been issued by the Licensing Officer on 29.9.2009 only in the name of the petitioner. The name of Sri Sanjay Kumar Gupta had not been mentioned in the licence. A Copy of the licence is annexed as Annexure-6 to the writ petition. The petitioner had run the said shop upto 31st March, 2010. There is no dispute in this regard. The petitioner being the sole licensee for the year 2009-10, moved an application before the District Excise

Officer, Firozabad for renewal of the licence on 11.3.2010. It appears that Sri Sanjay Kumar Gupta wrote a letter dated 10.3.2010 to the District Excise Officer, Firozabad, stating therein that the shop had been settled by lottery system and he was running the shop as a co-allottee and now there was no proper understanding between him and petitioner. Therefore, the licence would not be renewed and the shop be cancelled. On the application of Sri Sanjay Kumar Gupta dated 10.3.2010, the District Magistrate, Firozabad has passed the order that the said beer licence may not be renewed and be settled through lottery system.

3. Being aggrieved by the said order, the petitioner filed Writ Petition No. 420 of 2010. This Court vide order dated 22.3.2010 allowed the writ petition and set aside the order dated 12.3.2010 and directed the District Magistrate, Firozabad to pass a fresh order relating to the renewal of the licence after giving opportunity of hearing to the petitioner and Sri Sanjay Kumar Gupta or any other concerned parties in accordance to law. In pursuance thereof, the District Magistrate, Firozabad has passed the impugned order dated 7/8.4.2010. The District Magistrate, Firozabad has held that there is serious dispute between the two partners and both the partners do not want to continue the partnership and, therefore, in accordance to paragraph-8 of the Rule, the application of renewal, filed by the petitioner, has no force and accordingly rejected. It has been further directed to settle the shop by public lottery. In the impugned order, it is stated that Sri Sanjay Kumar Gupta filed an application dated 4.8.2009 along with an affidavit stating therein that the earlier application dated 28.4.2009 (appears to be incorrect and the date should be 15.5.2009) is false and forged and further an application was filed on 17.8.2009 before the District Magistrate with the request to take legal action against Vishwakant Gupta, and he has fraudulently obtained a licence dated 29.9.2009 in his name, which is not in accordance to law. It appears that after passing the aforesaid impugned order, a fresh lottery was held on 12.4.2010 and the said shop has been settled in favour of Sri Manish Kumar Sharma, son of Banwari Lal, respondent no. 5.

4. The writ petition was reported on 28.4.2010. It has, however, been filed on 29.4.2010 which came up for consideration on 3.5.2010. On 3.5.2010, this Court has directed the learned Standing Counsel to seek instruction and, if so advised, may file a counter affidavit. The matter was listed on 11.5.2010 as fresh. On 10.5.2010, notices were issued to respondent nos. 4 & 5 and the petitioner was directed to serve the respondents by Dasti summon and to file an affidavit of service. Further, the service on respondent nos. 4 & 5 was also directed to be affected through District Excise Officer, Firozabad. Writ petition was fixed on 18.5.2010. On 18.5.2010, the date was again fixed on 19.5.2010. On 19.5.2010, Sri S.P. Kesarwani, learned Additional Chief Standing, filed a counter affidavit annexing therewith a copy of the notices, served upon respondent nos. 4 and 5, and Sri H.N. Singh, learned counsel for the petitioner filed a rejoinder affidavit. He also filed an affidavit of service in respect of service of notices on respondent nos. 4 and 5. The matter has been heard on 19.5.2010. Sri H.N. Singh, Advocate, argued on behalf of the petitioner and Sri S.P. Kesarwani, learned Additional Chief Standing Counsel,

argued on behalf of respondent nos, 1,2 and 3. Despite the service of notices, respondent nos. 4 and 5 did not appear.

5. Sri H.N. Singh, learned counsel for the petitioner submitted that Rule 6 of the Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 provides for renewal of the licence. It says that the licence granted under these rules may be renewed for such period, and on such terms and conditions as decided by the State Government from time to time. He submitted that under the excise policy, for the year 2010-11, the licensee of the year 2009-10 are entitled for renewal of their licence. There is no dispute in this regard. He submitted that undisputedly, the petitioner was the sole licensee under the licence dated 29.9.2009 for the year 2009-10, upto 31st March, 2010. The said licence has neither been suspended nor cancelled till date. Therefore, on the date of introduction of the new policy, for the year 2010-11, introduced in the month of March, 2010 the petitioner being the existing licensee was entitled to get his licence renewed. Therefore, the petitioner had a right to get his licence renewed being the licensee for the year 2009-10 and accordingly the petitioner applied for renewal of the licence on 11.3.2010. He submitted that the licence was issued on 29.9.2009 only in the name of the petitioner when Sri Sanjay Kumar Gupta, a co-allottee, withdrew himself. If such letter from Sri Sanjay Kumar Gupta would not have been there, the licence for the year 2009-10 would not have been issued in the sole name of the petitioner on 29.9.2009. It means that the application of Sri Sanjay Kumar Gupta dated 15.5.2009 withdrawing himself from the shop as a co-allottee had been accepted by the excise authorities. He submitted that the alleged letter dated 4.8.2009 and further letter dated 17.8.2009 had never been confronted to the petitioner during the subsistence of the licence and no action on the said letters had been taken. He submitted that these evidences had been created subsequently against the petitioner to deny the right of the petitioner for renewal of licence. He further submitted that the averments made in the letter dated 4.8.2009 and the affidavit are contradictory to the letter dated 10.3.2010 filed by Sri Sanjay Kumar Gupta. He submitted that in the alleged letter dated 4.8.2009 and the affidavit filed along with the said letter, which are part of the counter affidavit, it has been averred that the earlier letter dated 15.5.2009 was forged. While in the letter dated 10.3.2010, it is stated that he was running the shop as a co-owner properly. If Sri Sanjay Kumar Gupta raised the dispute and made various allegations against the petitioner, in the letter dated 4.8.2009 and the affidavit and requested the District Magistrate, Firozabad vide letter dated 17.8.2009 to take legal action against the petitioner, then there was no occasion to state that he was running the shop as a co-owner properly on 10.3.2010. He submitted that for the purposes of renewal of the licence the only relevant consideration is that who was the licensee under the licence on the day when a new policy for the renewal was introduced which provides right of renewal. He submitted that only the petitioner has a right of renewal being the sole licensee under the licence dated 29.9.2009.

6. Sri S.P. Kesarwani, learned Additional Chief Standing Counsel submitted that the shop was allotted to the petitioner and Sri Sanjay Kumar Gupta

was a co-allottee. He submitted that, in fact, the licence should also be issued in the name of the petitioner showing Sri Sanjay Kumar Gupta as a co-licensee but inadvertently the licence was issued only in the name of the petitioner. He submitted that Sri Sanjay Kumar Gupta filed a letter dated 4.8.2009 along with an affidavit before the District Excise Officer and the further letter dated 17.8.2009 reveals that there was a serious dispute between the petitioner and Sri Sanjay Kumar Gupta. Therefore, in the interest of justice, the District Magistrate has rightly rejected the application for renewal and directed for the settlement of the shop by fresh lottery system. He submitted that the shop has been settled in favour of respondent no. 5 in a fresh lottery held on 14.4.2010.

7. Having heard learned counsel for the parties, we have given our anxious consideration to the rival submissions and perused the record.

8. We find substance in the argument of learned counsel for the petitioner. Rule 6 of the Uttar Pradesh Excise (Settlement of Licences for Retail Sale of Beer) Rules, 2001 contemplates the renewal of licence for such period, and on such terms and conditions as decided by the State Government. The State Government has introduced the Excise policy for the year 2010-11 which provides for the renewal of existing license. Therefore, there is no dispute that the existing licensees had a right of renewal of their licences for the year 2010-11. The question for consideration is that on the date when the Excise policy for the year 2010-11 has been introduced giving right to the existing licensees to get their licence renewed, who was the licensee. Admittedly, the licence dated 29.9.2009 for the year 2009-10 was issued in the name of the petitioner only. Sri Sanjay Kumar Gupta was not shown as co-licensee in the licence and, therefore, we are of the view that the petitioner, being the existing licensee, had a right of renewal and his licence should be renewed for the year 2010-11.

9. We are further of the view that the pleas of Sri Sanjay Kumar Gupta had no substance. By the letter dated 15.5.2009, Sri Sanjay Kumar Gupta, stated that he wants to withdraw from the shop. Therefore, while issuing the licence it appears that the application of Sri Sanjay Kumar Gupta for withdrawing himself as a co-allottee had been accepted. It is not the case of respondent nos. 2 and 3 that the alleged letter dated 4.8.2009 filed along with an affidavit and the alleged letter dated 17.8.2009 had been confronted to the petitioner at any stage during the subsistence of the licence. It is not their case that they acted upon such letters and affidavits and taken any action. It is also surprising that after filing the aforesaid letters and affidavits, Sri Sanjay Kumar Gupta kept mum for more than seven months and woke up on 10.3.2010 when the time for renewal of the licence had come. Admittedly, the licence dated 29.9.2009 issued only in the name of the petitioner has not been suspended or cancelled till date. We have gone through the letter dated 4.8.2009 filed along with an affidavit and the letter dated 10.3.2010. The averments made in the letters are contradictory. In the letter dated 10.3.2010 Sri Sanjay Kumar Gupta stated that for the year 2009-10 the shop was running properly and for the future years there might not be a proper understanding and the principal allottee had given threat several times that he would misuse the licence in the coming

year and would involve him. In this letter dated 4.8.2009, affidavits and the letter dated 17.8.2009. In the order dated 12.3.2010 passed by the District Magistrate, Firozabad also there is no reference of the earlier letters. Photostat copies of the original application dated 15.5.2009 of Sri Sanjay Kumar Gupta, affidavit dated 28.4.2009, affidavit dated 4.8.2009 and the application dated 10.3.2010 are as Annexures-C.A.-4, C.A.5 and C.A.7 to the counter affidavit. The signature available on the applications and the affidavits appear to be the same. Therefore, on the facts and circumstances, it appears that the plea of Sri Sanjay Kumar Gupta that signature on the application dated 15.5.2009 and the affidavit dated 28.4.2009 are not his signature and are forged, cannot be accepted. It further appears that the subsequent letter dated 4.8.2009 and the affidavits are the subsequent creation to defeat the right of renewal of the petitioner. The above position also stand justified, as the date of letters is dated 4.8.2009 and date of licence is 29.9.2009. If the said letter would be available perhaps the licence in the name of the petitioner would not be granted.

10. For the reasons stated above, we are of the view that the petitioner's application for the renewal has been illegally rejected by the District Magistrate, Firozabad. On the facts and circumstances, the petitioner is entitled for the renewal of the licence of the shop for the year 2010-11 in respect of the shop for which the petitioner had a licence for the year 2009-10. The subsequent settlement of the shop by lottery system in favour of respondent no. 5 is also liable to be set aside. The respondent is directed to return the amount, if any, taken from respondent no. 5 along there is no reference about the earlier letters with interest @ 10% within a period of one week.

11. In the result, the writ petition is allowed with cost. The order dated 7/8.4.2010, Annexure-14 to the writ petition, is hereby set aside and the District Magistrate, Firozabad is directed to pass an appropriate order on the renewal application of the petitioner in the light of the direction given above within a period of one week from the date of presentation of a certified copy of this order. Cost is awarded at Rs.2,500/-.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.05.2010

BEFORE
THE HON'BLE ABDUL MATEEN, J.
THE HON'BLE V.K. DIXIT, J.

Criminal Appeal No. 752 of 2009

Lala @ Abdul Gaffar ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri S.H. Ibrahim
Sri Neeraj Sahu
Sri S.A. Abbas Zaidi

Counsel for the Respondent:
G.A.
Sri Amitabh Tripathi

Code of Criminal Procedure-Bail Pending Appeal-conviction of life imprisonment with fine-offense under Section 302/34 IPC read with 25 Arms Act-deceased being history-sheeter encountered by Police-informant not an eyewitness the person who narrated the story denied-body of deceased dragged from court to a considerable length but no dragging marks found-appellants were already on

bail before court below-no allegation of misusing the same-held entitled for bail-on deposit of half amount of fine-remaining half stayed.
Held: Para 4 & 5

It has further been submitted that appellants were on bail during trial and they did not misuse the liberty of bail granted to them. It has also been submitted that the appeal will take considerable long time for reaching on its logical conclusion.

Learned counsel for the appellants relies upon the judgment reported in 2009 (3) SCC 767 and paras 23 & 24 of which is the base of his argument.

Taking into consideration overall aspect of the matter and without commenting any further on merits of the case, we find it a fit case for bail.

Let appellants-Lala @ Abdul Gaffar, Sabir and Bakridi convicts in Session Trial No. 437 of 1996, 213 of 2000 and 518 of 1999 be released on bail on their furnishing personal bond and two sureties each in the like amount to the satisfaction of the court concerned.
Case law discussed:
2009 (3) SCC 767

(Delivered by Hon'ble Abdul Mateen, J.)

1. Heard learned counsel for the appellants and learned Additional Government Advocate with respect to prayer for bail in pending appeal.
Appellants-Lala @ Abdul Gaffar, Sabir and Bakridi by means of judgement and order dated 21.03.2009 passed by Additional Sessions Judge, Court No. 4 Rae Bareli in Sessions Trial Nos. 437 of 1996, 213 of 2000 and 518 of 1999 have been convicted under Section 302/34 IPC and under Section 25 Arms Act and sentenced for the maximum term of life imprisonment with fine stipulation thereof.

2. We have gone through the contents of the judgment of the learned court below, the prosecution evidence and lower court record.

It has been submitted by learned counsel for the appellants that no doubt incident had taken place at about 09.00 a.m. of which FIR has been lodged at 11.15 a.m. on the same day. The role assigned to the present appellants is of firing upon the deceased, who after receiving firearm injuries succumbed to the same. Two other co-accused, namely, Zafar and Naim were assigned the role of inflicting lathi blows upon the person of the deceased. As per post mortem report Wajid (deceased) had received three firearm injuries which correspond two entry wounds and one exit wound. It has further been argued that after considering the prosecution evidence, the court below came to the conclusion, at page 46 of the judgment, that inclusion of the names of Zafar and Naim in the array of the accused is false and they have been falsely implicated as they had not participated in the commission of crime, as such, it has been argued by learned counsel for the appellants that then what remains in the evidence to prove that the appellants had participated in the commission of crime. Apart from it, it has been submitted that the deceased Wajid was history-sheeter as stated by DW-4 Taj Mohammad and actually he was encountered by the police and not as put up by the prosecution. It has also been argued that PW-1 Mohd. Ishaq, who is complainant but not an eye-witness, had stated that whatever has been stated by PW-2 Nanhai alias Mustafa he has

incorporated in the FIR although PW-2 stated not to have told anything to PW-1 about the occurrence.

3. It is also the case of prosecution that after killing the deceased on a cot his body was dragged to considerable length and was left in open place but surprisingly there is no dragging mark on the body of the deceased. Although the incident is of July 1996 there is no other eye-witnesses count except PW-2 who is said to have seen the occurrence even his testimony is shaky. Thus while evaluating the prosecution evidence, we find that the court below has committed a manifest error in convicting the appellants and on the same set of evidence acquitting co-accused Zafar and Naim. In other words, learned counsel for the appellant submitted that if inclusion of names of two persons were found to be false, how for conviction of the appellants on the basis of same evidence can be said to be justified.

4. It has further been submitted that appellants were on bail during trial and they did not misuse the liberty of bail granted to them. It has also been submitted that the appeal will take considerable long time for reaching on its logical conclusion.

5. Learned counsel for the appellants relies upon the judgment reported in 2009 (3) SCC 767 and paras 23 & 24 of which is the base of his argument.

Taking into consideration overall aspect of the matter and without commenting any further on merits of the case, we find it a fit case for bail.

Nanhai alias Mustafa when confronted he Let appellants-Lala @ Abdul Gaffar, Sabir and Bakridi convicts in Session Trial No. 437 of 1996, 213 of 2000 and 518 of 1999 be released on bail on their furnishing personal bond and two sureties each in the like amount to the satisfaction of the court concerned.

6. Realization of half of the fine is stayed and remaining half of the fine shall be deposited by the appellants within one month from the date of their release on bail.

7. The court below is directed to transmit to this Court forthwith photocopies of bond and sureties filed by appellants to be preserved in the record maintained here.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.4.2010

BEFORE
THE HON'BLE VIJAY MANOHAR SAHAI, J.
THE HON'BLE RAJ MANI CHAUHAN, J.

Special Appeal No. 1223 of 2006

Dwarika Singh ...Petitioner/Appellant
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Nawal Kishore Mishra
Sri K. Shahi

Counsel for the Respondents:
Sri K.R. Sirohi
C.S.C.

Financial Hand Book: Vol-II Para 2 to 4-
Rule 56(C) compulsory retirement-constitution of Screening committee-found not proper-impugned Order of

retirement based upon recommendation of such committee can not be held proper-order set-a-side.
Held: Para 7

The Administrative Judge had found that the committee had committed glaring mistake while taking decisio of compulsory retirement of Syed Imam Raza. If the constitution of committee was not proper as against Syed Imam Raza then how it could be treated to be proper as against the appellant-petitioner. Since the appeal of Raza has been allowed by the Administrative Judge interalia on the ground that the formation of the committee by the District Judge, Ballia was not proper, therefore, the recommendation of the committee for compulsory retirement of the employees can not be said to be proper. The Special Appeal, therefore, deserves to be allowed on this score alone and the impugned order dated 11.7.2006 passed by the District Judge, Ballia regarding compulsory retirement of the appellant-petitioner on the recommendation of the screening committee and the order of the learned Single Judge dated 29.8.2006 deserve to be set aside.

(Delivered by Hon'ble V. M. Sahai, J.)

1. We have heard Sri K. Shahi, learned counsel for the appellant and Sri S.P. Singh appearing for the respondents.

2. This intra court appeal has been filed challenging the order of learned Single Judge dated 29.8.2006 passed in Civil Misc. Writ Petition No.41874 of 2006.

3. The relevant facts giving rise to the present special appeal in brief are that the appellant-petitioner was appointed as peon in Judgeship Ballia on 1.2.1985 and thereafter he continued so in service. Sri sarvesh Kumar Pandey on 04.06.2006 became District Judge, Ballia and he in view of the provision under Fundamental Rules of the Financial Hand Book Volume-2 constituted a committee consisting of one Additional District Judge as Chairman and Civil Judge (Junior Division) as member for screening of class-IV and class-III employees, who had lost their utility to the judgeship. The committee after screening the list found as many as eight employees, out of which three were class-III employees and five were class-IV employees, who could be retired compulsorily. Consequently the committee recommended for compulsory retirement of those eight employees. The appellant-petitioner was one of them. The District Judge agreeing with the recommendation of the committee and exercising the powers under Fundamental Rules 56(C) of the Financial Hand Book Volume-2 para-2 to 4 ordered for compulsory retirement of all the eight employees vide its order dated 11.07.2006.

4. The appellant-petitioner challenged his compulsory retirement by filing Civil Misc. Writ Petition No. 41784 of 2006, Dwarika Singh Versus State of U.P. through legal Remembrances Secretary Law U.P. Lucknow and another. The learned Single Judge dismissed his writ petition vide judgment and order dated 29.8.2006. The appellant-petitioner being aggrieved by the judgment and order passed by the learned Single Judge has preferred the present Special Appeal.

5. The only point urged by the learned counsel for the petitioner is that one Syed Imam Raza, the then Senior Administrative Officer (SAO) was also ordered to be compulsory retired by the

District Judge. He had preferred departmental appeal before the High Court challenging his compulsory retirement. His appeal was allowed by Hon'ble Mr. Justice D.V. Sharma, the then Administrative Judge, Ballia inter-alia on the ground that the District Judge Ballia had constituted the screening committee consisting of an Additional District Judge as Chairman and a Civil Judge (Junior Division) as member. The Civil Judge (Junior Division) was an unexperienced officer, who could not travel against the direction of the District Judge. He had got no administrative experienced too. The District Judge was expected to constitute a committee of senior most Additional District Judges, who were having long experience of judicial and administrative work so that they could exercise their well considered and independent views while recommending compulsory retirement of the employees. In this way the Administrative Judge for screening of the employees was not proper and up to the mark. Accordingly the Administrative Judge allowed the appeal of Syed Imam Raza. Since the administrative judge has already held that the committee constituted by the District Judge for screening the class-III and class-IV employees not well experienced and proper, therefore, the compulsory retirement of the appellant-petitioner on the basis of the recommendation of the committee was also illegal and the special appeal deserves to be allowed on this ground alone.

6. We have summoned the record of the High Court which contains the decision of the Administrative Judge in the matter of Syed Imam Raza, the then Senior Administrative Officer (SAO), who had been ordered to be compulsory retired and whose departmental appeal had been allowed by the then Administrative Judge. The Administrative Judge in para-7 of the order has made the following observation about the constitution of screening committee, which is being extracted below:

"In the matter of compulsory retirement the screening committee should have been constituted comprising some senior most judicial officers, but the District Judge constituted the screening committee consisting of an Additional District Judge and a Civil Judge (Junior Division). It also does not appeal to reason as to why senior most officers were not inducted in the screening committee. A Civil Judge (Junior Division) who has no administrative experience , not well versed with Government Orders etc. may fall in the line of the District Judge and might have not gone against wishes of the District Judge, otherwise such a glaring error would not have been committed."

7. The Administrative Judge had found that the committee had committed glaring mistake while taking etailed of compulsory retirement of Syed Imam Raza. If the constitution of committee was not proper as against Syed Imam Raza then how it could be treated to be proper as against the appellant-petitioner. Since the appeal of Raza has been allowed by the Administrative Judge interalia on the ground that the formation of the committee by the District Judge, Ballia was not proper, therefore, the recommendation of the committee for compulsory retirement of the employees can not be said to be proper. The Special Appeal, therefore, deserves to be allowed on this score alone and the impugned order dated 11.7.2006 passed by

the District Judge, Ballia regarding compulsory retirement of the appellant-petitioner on the recommendation of the screening committee and the order of the learned Single Judge dated 29.8.2006 deserve to be set aside.

8. The Special Appeal is allowed and the impugned judgement and order of the learned Single Judge dated 29.08.2006 passed in Civil Misc. Writ Petition No. 41874 of 2006(Dwarika Singh Versus State of U.P. and others) is set aside and the civil misc. writ petition detailed above is allowed and the order of the learned District Judge, Ballia dated 11.7.2006 retiring the appellant-petitioner compulsorily from his service is set aside and the appellant-petitioner will be reinstated in service with all consequential service benefits forthwith.

APPELLATE JUISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2010

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Second Appeal No.1574 of 1984

Shrimati Anjuman ...Plaintiff-Appellant
Versus
Sri Shabbir ...Opposite Party

Counsel for the Petitioner:
Sri M.A.Qadeer
Sri Ravi Kiran Jain
Sri M.Islam
Sri R.K. Awasthi
Sri Shamim Ahmad

Counsel for the Respondent:
Sri H.S.Nigam
Sri Ashfaq Ahmad Ansari
Sri Mohd. Arif
Sri Virendar Kumar

Code of Civil Procedure-Section 100- Suit for specific Performence-agreement to sale-executed on 31.7.75-defendent/ Respondent encouraged the appellant to invest more money in raising constructions-one of the condition of agreement was to obtain permission before execution of sale deed-no permission obtained as yet-Trail Court decreed the suit-first appellate court dismissed the suit as barred by limitation-only in October, 1980 refused to execute the sale-suit filed in 1981-well within time-Substantial question of law regarding erroneous approach of Appellate court decided affirmatively.

Held: Para 11

It appears from the record that after taking advance of Rs.1,000/-the defendant respondent executed agreement to sell dated 31.7.1975. He had not objected to raise construction by the plaintiff appellant, rather he had encouraged her to raise construction. This does not amount to refusal for giving rise to cause for filing the suit in October, 1980, the defendant respondent inadvertently refused to execute the sale-deed in pursuance of agreement dated 31.7.1975 giving rise to cause of action to the plaintiff appellant for filing the suit as such the suit was well within time.

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

1. The case is taken up in the revised list. None has appeared on behalf of defendant respondent. Heard Sri M.A. Qadeer, learned counsel for the plaintiff appellant and perused the record.

2. This second appeal arises out against the judgment and decree dated 9.5.1984 passed by the Civil Judge, Saharanpur in Regular Civil Appeal No. 118 of 1982 arising out of Original Suit

No. 5 of 1981, Sabbir Ahmad versus Mohd. Anwar and another.

3. The second appeal was admitted on the substantial question of law as to whether the findings of the lower appellate Court that the suit was barred by time was erroneous?

4. The facts as culled out from the record are that the defendant respondent executed an agreement dated 31.7.1975 for sale of property which was described in schedule 'A' of the plaint for a consideration of Rs.6,000/- for which he had also received an advance of Rs.1,000/-.The agreement provided that Sri Sabbir, defendant respondent will seek permission for sale of the said property from the District Magistrate, Saharanpur/ Ceiling Authority and will accordingly, inform the plaintiff appellant within 15 days about having received the permission. Thereafter within 15 days from the aforesaid information having been received Smt. Anjuman wife of Anwar, the plaintiff appellant will get the sale-deed executed from the Registration department. It further provided that if defendant appellant fails to comply with the conditions of the agreement to sell, Smt. Anjuman will have right to get the sale-deed executed through the Court. The defendant respondent instead of getting permission to sell from the District Magistrate, prolonged the execution of sale-deed on one pretext or the other.

5. It appears that the property in suit fell down in the year 1978 and was reconstructed by the plaintiff appellant with the consent of the defendant respondent after getting the map sanctioned from the Nagar Palika.

6. When defendant respondent was still dilly dallying in executing the sale-deed, the plaintiff appellant Smt. Anjuman filed original suit no. 5 of 1981, Smt. Anjuman versus Sri Sabbir which was decreed by the trial Court vide its order and judgment dated 8.3.1982.

7. Aggrieved by the aforesaid judgment and decree dated 8.3.1982, the defendant respondent filed Civil Appeal No. 118 of 1981. The first Appellate Court vide its order and judgment dated 9.5.1984 allowed the appeal with costs by setting aside the order and judgment of the trial Court on a finding that the suit was filed beyond limitation. It is in the aforesaid backdrop substantial question of law on question of limitation has been framed in the second appeal.

8. The only ground of challenge in this appeal pressed by the counsel for the appellant is that the finding recorded by the first appellate Court that the suit filed by the plaintiff appellant was barred by limitation is erroneous and that the findings in this regard recorded by the trial Court have been ignored by the lower Appellate Court.

9. The contention of learned counsel for the plaintiff appellant is that it was proved from the evidence on record in support of the pleadings in the plaint that defendant respondent had been giving assurances for executing the sale-deed and simultaneously he was also encouraging the appellant to spend money by raising constructions and make improvement on the property in dispute. In this manner, he kept the appellant in dark and thereafter he finally refused to execute the sale-deed sometime in October, 1980. Further contention of learned counsel for the appellant is that

the suit was within time from the date of its institution as earlier the defendant respondent had not refused to execute the sale-deed, rather he had been encouraging the plaintiff appellant to invest money for raising construction for which he had also received an advance of Rs.1,000/-.

10. It is lastly submitted by the learned counsel for the appellant that it was one of the terms and conditions of the agreement to sell that the defendant respondent will seek permission from the District Magistrate and will inform the plaintiff appellant regarding grant of permission for the purpose of transfer of the property by way of sale. It is stated that in the facts and circumstances of this case the trial Court has committed an error apparent in law in holding that as no notice was given by the plaintiff appellant to defendant respondent as to why he was not executing the sale-deed, hence the suit was time barred from the date of agreement to sell had been entered into between the parties.

11. It appears from the record that after taking advance of Rs.1,000/- the defendant respondent executed agreement to sell dated 31.7.1975. He had not objected to raise construction by the plaintiff appellant, rather he had encouraged her to raise construction. This does not amount to refusal for giving rise to cause for filing the suit in October, 1980, the defendant respondent inadvertently refused to execute the sale-deed in pursuance of agreement dated 31.7.1975 giving rise to cause of action to the plaintiff appellant for filing the suit as such the suit was well within time.

12. For all these reasons, the substantial question of law involved in this appeal as to whether the finding of the lower appellate Court that the suit was barred by time is erroneous, is answered in affirmative.

13. The appeal is accordingly allowed and the order and judgment of the lower appellate Court are set aside and that of the trial Court is affirmed. No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 10.05.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Application No. 1797 of 2010
Case: U/S 482/378/407

Sudhakar Singh @ Bhannu Singh Pradhan ...Petitioner
Versus
State Of U.P. Thru. Prin. Secy. Home And Another ...Respondent

Counsel for the Petitioner:
Sri Arjun Singh Somvanshi

Counsel for the Respondent:
Govt. Advocate

<u>Code of Criminal Procedure- Section 482</u>- Direction of Same day-offense under section 452,323,504,506 I.P.C.- application disposed of in terms of Lal Kamlendra Pratap Singh-if surrendered within period of one month-bail application be considered on same day-till then there shall be no arrest.

Held: Para 4

It is, however, provided that if the applicants Sudhakar Singh alias Bhannu Singh Pradhan, Laxman, Shri Chand alias Lala Chauhan, Bhannu Singh alias Satyapal Singh, Ramendra alias Vinda Singh in Complaint Case No. 2081 of

2009 under sections 452,323, 504 and Castes & Scheduled Tribes (Prevention of Atrocities) Act, P.S. Lonar, District Hardoi pending before the Additional Chief Judicial Magistrate, Court No. 5, Hardoi appear before the courts below and apply for bail within one month, their bail prayer shall be considered and disposed of by the courts below on the same day in the light of the principles laid down in the case of Lal Kamlendra Pratap Singh versus State of U.P. & others (2009) 4 SCC 437.

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

1. Heard the learned counsel for the applicants and the learned AGA and perused the record.

2. The learned Magistrate, keeping in view the materials on record, arrived at the conclusion that there were sufficient material on record to summon the accused. The finding of the learned Magistrate is based on proper appraisal of the relevant material. The petition has no merit and is liable to be dismissed.

3. The learned counsel for the applicants further submitted that the applicants, being law abiding citizen, want to appear before the courts below to seek bail, therefore, he may be provided some interim protection.

4. It is, however, provided that if the applicants Sudhakar Singh alias Bhannu Singh Pradhan, Laxman, Shri Chand alias Lala Chauhan, Bhannu Singh alias Satyapal Singh, Ramendra alias Vinda Singh in Complaint Case No. 2081 of 2009 under sections 452,323, 504 and 506 IPC and 3(1)(X) of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, P.S. Lonar, District Hardoi pending before the Additional Chief Judicial Magistrate, Court No. 5, Hardoi appear before the courts below and apply for bail within one month, their bail prayer shall be considered and disposed of by the courts below on the same day in the light of the principles laid down in the case of **Lal Kamlendra Pratap Singh versus State of U.P. & others (2009) 4 SCC 437.**

5. Till the surrender of the applicants before the Court or expiry of the aforesaid period of one month, whichever is earlier, the applicants shall not be arrested.

6. With the aforesaid observations the petition under section 482 CrPC is disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED LUCKNOW 11.05.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Application No. 1882 of 2010
Case: U/S 482/378/407

Kamal-Ud-Din @ Babu ...Petitioner
Versus
State of U.P. And Another ...Respondent

Counsel for the Petitioner:
Abhishek Ranjan

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section-397-Criminal Revision-against summoning order-offense v/s 406, 409, 411 I.P.C.-dismissed on ground of interlocutory order-revision not maintainable-held-Learned Revisional Court committed manifest error of law- order Quashed-

Test for consideration of final and interlocutory order given.

Held: Para 5

Whenever it is contended that any particular order is an interlocutory order and the revision is not maintainable under section 397 CrPC, the proper test to appreciate the submission is whether the proceeding would culminate in the event of acceptance of the objection raised against the order. If the proceeding would continue even after acceptance of the objection, the order would be interlocutory but in the event of acceptance of the objection if the proceedings of the case culminate, the order will not be an interlocutory order. If this test is applied in the present case, the summoning order can not be said to be an interlocutory order because if the revision filed by the petitioner had been allowed and the summoning order had been quashed, the proceedings initiated on complaint filed by the respondent no.2 would have culminated. Therefore, the learned Special Judge has committed manifest error of law in treating the summoning order as interlocutory order and dismissing the revision as not maintainable.

Case law discussed:

2005 (1) LP 58 (S.C.), 2004 (6) SCC page 662, SCC page 338.

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

1. Heard the learned counsel for the applicant Kamal-ud-din @ Babu and the learned AGA and perused the impugned judgment.

2. With the consent of the learned counsels for the parties, this petition is being disposed of finally at the stage of admission.

3. It appears that the police submitted a final report in the case crime no. 9 of 2004 under sections 406, 409, 411 IPC, police station Risiya, district Bahraich. The Ist Additional Civil Judge (Junior Division)/ J.M., Bahraich treated the final report as complaint and proceeded with the same and ultimately passed the summoning order dated 11.7.2006, against which the applicant preferred criminal revision no. 541 of 2006, which was dismissed on 20.2.2009 by the Special Judge (SC/ST Act), Bahraich on the ground that the revision was not maintainable in view of the principles of law laid down by the Apex Court in the cases of (1***) Poonam Chand Jain vs. Fazaroo 2005 (1) LP 58(S.C.), (2) Subrahmaniyam Sethuraman vs. State of Maharashtra & others 2004 (6) SCC page 662, and (3) Adalat Prasad vs. Roop Lal Jindal & others 2004 (7) SCC page 338 (Three Judge Bench)***, and held that the only remedy, which could be available to the applicant, was to file a petition under section 482 CrPC. The aforesaid cases relied on by the learned Additional Sessions Judge have not dealt with the jurisdiction of the Sessions Judge to hear a revision against the summoning order.

4. The question whether or not the summoning order is an interlocutory order within the meaning of section 397 (2) CrPC was neither raised nor decided in the aforesaid cases. Therefore, the learned Special Judge can not be said to be justified in dismissing the revision as not maintainable.

5. Whenever it is contended that any particular order is an interlocutory order and the revision is not maintainable under section 397 CrPC, the proper test to

appreciate the submission is whether the proceeding would culminate in the event continue even after acceptance of the objection, the order would be interlocutory but in the event of acceptance of the objection if the proceedings of the case culminate, the order will not be an interlocutory order. If this test is applied in the present case, the summoning order can not be said to be an interlocutory order because if the revision filed by the petitioner had been allowed and the summoning order had been quashed, the proceedings initiated on complaint filed by the respondent no.2 would have culminated. Therefore, the learned Special Judge has committed manifest error of law in treating the summoning order as interlocutory order and dismissing the revision as not maintainable.

6. The petition under section 482 CrPC is allowed. The impugned order dated 20.2.2009 passed by the revisional court is set aside and the matter is remanded to the learned Special Judge for a fresh decision in accordance with law.

7. The revisional court is directed to dispose of the revision expeditiously. The learned counsel for the petitioner, however, submitted that the trial court may be directed not to proceed with the criminal case till the disposal of the revision by the learned Special Judge. It is not necessary to pass any order in this regard. The petitioner may move an application for stay before the revisional court and if any such application is moved, the same may be considered and disposed of in accordance with law.

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of acceptance of the objection raised against the order. If the proceeding would

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 24.05.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Application No. 1895 of 2010
Case: U/S 482/378/407

Ram Rang Bharti ...Petitioner
Versus
State of U.P. And Another ...Respondent

Counsel for the Petitioner:
Surya Narayan Mishra

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure, Section 319 Summoning order-offence under Section 307 I.P.C.-on basis of statement made by three prosecution witnesses-Trials Judge not recorded basis of satisfaction regarding conviction of applicant-and the evidence adduced remains uncontroverted-absence of such findings-Summoning order-can not Sustainble.

Held: Para 23

In the instant case the court below while passing the order under section 319 CrPC, has not recorded any specific finding as to whether or not the evidence adduced under section 319 CrPC if unrebutted, would be sufficient to record a conviction against the petitioner. In absence of such finding, the impugned order can not be sustained

Case law discussed:
(1983 (1) SCC 1), 2001 SCC (Crl) 1090, (2007) 4 SCR 1023, 2008 (16) SCALE 276, (2007) 4 SCC 773, 2009 (66) ACC 32,

2009 (66) ACC 273, (2000) 3 SCC 262, 2004 (7) SCC 792, 2009 (13) SCC 608, (1979) 1 SCC 345).

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

1. Heard the learned counsel for the petitioner and the learned AGA for the respondent no.1 and perused the impugned judgment and order.

2. With the consent of the learned counsel for the parties, this petition is being disposed of finally at the stage of admission.

3. It appears that the petitioner Ram Rang Bharti has been summoned under section 319 CrPC to face trial in regard to the offence under section 307 IPC in S.T.No. 358/2009 State vs. Vishnu Prasad, vide the order dated 27.4.2010 passed by the Additional Sessions Judge, Court No.5, Gonda.

4. During the trial, three witnesses PW-1, PW-2 and PW-3 were examined, who have deposed in regard to complicity of the petitioners along with the charge-sheeted accused. The learned lower court placing reliance on the statements of the witnesses, has passed the impugned order summoning the petitioner.

5. The learned counsel for the petitioner submitted that the learned Additional Sessions Judge has not recorded any satisfaction that on the basis of the evidence adduced, there was a possibility of conviction of the petitioner, therefore, the summoning order is bad. It was also submitted that petitioner was named in the FIR but he was left in the charge sheet.

6. The learned Additional Sessions Judge has passed the summoning order only on the basis of the statements of the aforesaid witnesses without examining other witnesses and getting them cross-examined.

7. ***In Joginder Singh v. State of Punjab (1979) 1 SCC 345)***, the Apex Court while dealing with the ambit and scope of section 319 CrPC, held that the court has power to add any person as accused if there is sufficient evidence indicating his involvement in the offence.

8. In ***Municipal Corporation of Delhi v. Ram Kishan Rohtagi*** (1983 (1) SCC 1) the Apex Court after referring to the decision of Joginder Singh's case (supra) observed that the power under section 319 CrPC is an extra ordinary power, which should be used very sparingly only if compelling reasons exists for taking cognizance against the other person against whom some action has not been taken.

9. In the case of ***Rakesh & another vs. State of Hariyana, 2001 SCC (Crl) 1090***, the Apex Court extended the meaning of the term 'evidence' used in section 319 CrPC to include not only the evidence given during the inquiry or trial but also the evidence collected during the investigation and forming part of the case diary. The Apex Court overruled the submission that the term 'evidence' used in section 319 CrPC would mean "evidence which is tested by cross-examination' by holding that the question of testing the evidence by cross-examination would arise only after addition of the accused.

10. But in the case of ***Mohd. Shafi v. Mohd. Rafiq & Anr., (2007) 4 SCR 1023,*** the Apex Court expressed a contrary opinion and propounded that the trial judge in terms of Section 319 CrPC was required to arrive at his satisfaction only after the cross-examination of the witnesses is over with no exception.

11. Another Division Bench of the Apex Court in the case ***of Hardeep Singh vs. State of and Punjab and another 2008 (16) SCALE 276,*** doubted the correctness of the judgment rendered in the case of Mohd. Shafi v. Mohd. Rafiq & another (supra) and referred the following two questions to a Larger Bench:

(i) When the power under sub-Section (1) of section 319 of the Code of addition of accused can be exercised by a Court? Whether application under section 319 is not maintainable unless the cross-examination of the witness is complete?

(ii) What is the test and what are the guidelines of exercising power under sub-section (1) of section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted?

12. However, in Hardeep Singh's case (supra) the Apex Court held that at the stage of issuing summons or process, a court has to see whether there is a prima facie case against the person sought to be summoned or against whom process is sought to be issued.

13. In regard to necessity of cross examination of the prosecution witnesses before invoking section 319 CrPC the Apex Court observed in Hardeep Singh's case that it is, thus, difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' used in sub-section (1) of section 319 of CrPC would mean evidence which is tested by cross examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person should or should not be added as accused.

14. A Three Judge Bench of the Apex Court in the case of ***Y. Saraba Reddy vs. Puthur Rami Reddy (2007) 4 SCC 773***, propounded that the term evidence under section 319 CrPC contemplates the evidence of witnesses given in the court and not the materials contained in the charge sheet or the case diary. In this way, the Three Judge Bench of the Apex Court has taken a view which is different from the view expressed in the case of Rakesh (supra) by a Two Judge Bench of the Apex Court. Therefore, the view expressed in Y. Saraba Reddy's case would prevail.

15. In the case of ***Sarabjit Singh and another vs. State of Punjab and another 2009 (66) ACC 32,*** which was decided much after the decision rendered in the cases of Rakesh (supra), Mohd. Shafi (supra) and Hardeep Singh (supra), another Division Bench of the Apex Court held that indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out

grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly. The Apex Court further observed that an order under section 319 CrPC, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person. Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. After making these observations, the Apex Court further held that the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

16. In Sarabjeet Singh's case, the Apex Court further observed that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the Court must be satisfied that there exists a strong suspicion. While framing charge in terms of section 227 CrPC, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under section 319 CrPC is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (I) an extraordinary case and (ii) a case for sparingly exercise of jurisdiction, would not be satisfied.

17. Another Division Bench of the Apex Court in the case of ***Brindaban Das and others vs. State of West Bengal, 2009 (66) ACC 273,*** propounded the same principle and held that in matters relating to invocation of powers under section 319 CrPC, the Court is not merely required to take note of the fact that the name of a person who has not been named as an accused in the FIR has surfaced during the trial, but the Court is also required to consider whether such evidence would be sufficient to convict the person being summoned. The Apex Court further observed that the fulcrum on which the invocation of section 319, CrPC rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

18. In the case of ***Michael Machado & Anr. V. Central Bureau of Investigation & Anr., (2000) 3 SCC 262***, the Apex Court propounded that power under section 319 CrPC vested in the Court should be used sparingly and the evidence on which the same was to be invoked should indicate a reasonable prospect of conviction of the person sought to be summoned.

19. The prospects of conviction as one of the requirement for summoning a person as accused under section 319 CrPC has been propounded even in the case of

Krishnappa vs. State of Karnataka, 2004 (7) SCC 792. It has been held in that case that invocation of the power under section 319 CrPC should not have been resorted to, since the chances of conviction on the basis of the evidence on record was remote. Applying the principles laid down in the cases of **Ram Kishan Rohtagi** and **Michael Machado**, the Apex Court further ruled that the power to summon an accused is an extraordinary power conferred on the Court and it should be used very sparingly and only if compelling reasons exist for taking cognizance against the person other than the accused.

20. In the case of **Harbhajan Singh & Another Versus State of Punjab & Another, 2009 (13) SCC 608,** a division bench of the Apex Court has held that only because the correctness of a portion of the judgment in the case of Mohd. Shafi (supra) has been doubted by another bench, the same would not mean that we should wait for the decision of the larger bench, particularly when the same instead of assisting the appellants runs counter to their contention. The Division Bench further held that decision of this Court in the case of Mohd. Shafi (supra), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over. The observation of the Apex Court in this regard is reproduced as follows:

"13. We would assume that in all cases the court may not wait till cross-examination is over for the purpose of exercising its jurisdiction. In the aforementioned decision, the learned Judges had referred to a judgment of this Court in the case of Rakesh & Anr. v. State of Haryana (2001) 6 SCC 248 wherein it was held that even without cross-examination on the basis of a prima facie material which would enable the Sessions Court to decide whether the power under Section 319 of the Code should be exercised or not stating that at that stage evidence as used in Section 319 of the Code would not mean evidence which is tested by cross-examination.

..... The decision of this Court in the case of Mohd. Shafi (supra), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over."

21. A survey of the aforesaid decisions clearly reveals that the power under section 319 CrPC is an extra ordinary power, which may be used very sparingly only if compelling or cogent reasons exist against the person sought to be summoned. The term 'evidence' used in section 319 CrPC does not necessarily mean the evidence which is tested by cross examination. The view expressed in the case of Mohd. Shafi (supra) in this regard, has not been subsequently followed by the Apex Court in the cases of Sarabjeet Singh (supra). The view expressed in the case of Sarabjeet Singh (supra) has also been expressed in the case of Rakesh (supra), Hardeep (supra) and Harbhajan (supra), therefore, a summoning order can not be set aside on the ground that the statements of the witnesses relied on by the court for passing the summoning order, have not been subjected to cross examination. It is true that a Division Bench of the Apex Court in Hardeep Singh's (supra) has referred the questions specified in paragraph 11 of this judgment to a Larger

Bench but another Division Bench of the Apex Court in Harbhajan Singh's case (supra) has observed that the same would not mean that we should wait the decision of the Larger Bench. The accused sought to be summoned, has no right to be heard on the application under section 319 CrPC, therefore, he has no right to cross-examine the witnesses being examined for the purpose of section 319 CrPC. The accused already facing the trial may or may not like to make cross-examination of the witnesses in regard to the complicity of the person sought to be summoned. Sometimes such accused may act even contrary to the interest of such persons. However, the court may, in its discretion, allow the accused already facing the trial to cross examine the witness or witnesses in relation to the complicity of the person sought to be summoned so as to enable it to render a just and proper order under section 319 CrPC. In this view of the matter, there is no compulsion to get part or full cross-examination of the witnesses done before passing a summoning order under section 319 CrPC. In appropriate cases if the complicity of a person not facing the trial and is not before the court as accused, comes in light in the statement of a witness, it is also open to the court to put relevant questions to the witness to ascertain prima facie correctness of the statement regarding complicity of that person. The Trial Judges and Magistrates have to play pivotal roles in the matter and should not act mere as silent spectators. Therefore, the summoning order under section 319 CrPC can not be quashed only on the ground that the witnesses have not been cross examined.

22. In the cases of Sarabjeet (Supra), Brindawan Das, Michael Machado (supra) and Krishnappa (supra), it has been clearly held that summoning order should be passed only when the evidence, if uncontroverted, is of such a nature as to reasonably lead to conviction of the person sought to be summoned. The standard of evidence required for summoning an additional accused should be higher than the evidence required for framing charges because the jurisdiction under section 319 CrPC is to be exercised sparingly in an extra ordinary situation. Whether or not any evidence is of such a quality as to record conviction if it remains uncontroverted, is a variable question depending upon the facts and circumstances of each case and no hard and fast rule can be laid down in this regard. However, the court considering the evidence for the purpose of section 319 CrPC is not legally required to evaluate the evidence as it is ordinarily done while rendering the final judgment but the court has to see whether or not, the evidence on record appeals to the reason for the purposes of section 319 CrPC and the story narrated by the witnesses against the person sought to be summoned is not improbable and absurd and a conviction is possible on such statements, if uncontroverted. A non observance of this legal requirement would render the summoning order illegal.

23. In the instant case the court below while passing the order under section 319 CrPC, has not recorded any specific finding as to whether or not the evidence adduced under section 319 CrPC if unrebutted, would be sufficient to record a conviction against the petitioner. In absence of such finding, the impugned order can not be sustained.

24. For the reasons discussed above, the petition under section 482 CrPC is

allowed. The impugned order dated 27.4.2010 is set aside. The matter is 319 CrPC in the light of the aforesaid observations and pass an appropriate order in accordance with law expeditiously.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 19.05.2010

BEFORE
HON'BLE SHRI KANT TRIPATHI, J.

Criminal Application No. 2162 of 2010
Case: U/S 482/378/407

Ghan Shayam ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Abdul Rafey Siddiqui
Rehan Ahmad Siddiqui

Counsel for the Respondent:
G.A.

Code of Criminal Procedure- Section 482- dismissal of Criminal Appeal in default-in absence of counsel for Appellant-the Lower appellate to fallow the procedure prescribed under section 385 and 386- even in absence of counsel for appellant the court is bound to peruse the record and the impugned judgement-then pass appropriate order on merit-held- impugned order not only causing miscarriage of justice but amounts to abuse the process of court order quashed with consequential directions.
Held: Para 9

In view of the aforesaid reasons, the impugned dismissal order has not only occasioned in causing miscarriage of justice but also amounts to abuse of the process of the court, therefore, it seems to be just and expedient to exercise inherent power under section 482 of the Code and to quash the dismissal order dated 05.09.2008.

Case law discussed:
[1996 (4) SCC 720], [AIR 2008 SC 920], [AIR 1987 SC 1500]

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

1. This petition under section 482 of the Code of Criminal Procedure has been filed to quash the impugned order 05.09.2008 passed by the Additional Sessions Judge, Ambedkarnagar in Criminal Appeal No. 17 of 2007.

2. Heard learned counsel for the applicant and the learned AGA and perused the impugned order.

3. It appears that the applicant Ghan Shyam was convicted and sentenced under section 7/16 of the Prevention of Food Adulteration Act by the Chief Judicial Magistrate, Ambedkarnagar vide the judgement and order dated 11.10.2007 rendered in Criminal Case No. 340 of 1999. The applicant preferred a criminal appeal questioning the order of conviction and sentence but the learned Additional Sessions Judge, Ambedkarnagar instead of dismissing the appeal on merit, dismissed the same in default of the applicant on 05.09.2008. The dismissal order is being reproduced as follows:

"Case called out.
Appellant absent.
Today case fixed for argument.
Appellant neither present nor move an adjournment application.
exemption application moved by appellant but none is present to press,
hence rejected.
Call repeated

It is 3.30 p.m.
Order
Appeal is dismissed on default of appellant.
sent back to concerned lower Court within 15 days to comply with the sentence order against accused.
File be consigned."

4. Dismissal of a criminal appeal in default of the appellant is not recognized in the criminal jurisprudence. If any criminal appeal is entertained for hearing and is not dismissed summarily under section 364 of the Code of Criminal Procedure (in short ?the Code?) at the stage of admission, the appellate court has to follow the procedure prescribed under sections 385 and 386 of the Code for hearing and disposal of the appeal. An opportunity of hearing to the appellant as well as to the State is necessary. In case the appellant, despite the opportunity given, fails to appear on the date fixed for hearing, the appellate court cannot dismiss the appeal in default of the appellant and is bound to peruse the record and the judgement and order appealed against on merit and pass appropriate order on the basis of the materials on record. In appropriate cases the appellate court may consider to appoint an Amicus Curie to represent the appellant and to assist the court, specially when, the appellant is in jail and is not represented by an Advocate.

5. The aforesaid proposition has been propounded by the Apex Court in various decisions and some of them are **Bani Singh & others v State of U.P. [1996(4) SCC 720] and Dharampal & others v State of U.P. [AIR 2008 SC 920].**

6. In **Bani Singh's case (supra)**, a three Judge Bench of the Apex Court while overruling the case of **Ram Naresh Yadav v State of Bihar [AIR 1987 SC 1500]** laid down the following principles:

"14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo' case appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simplicitor. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore ,does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav case that if the appellant or his pleader is not present, the proper course

would be to dismiss an appeal for non-prosecution."

7. In **Dharampal's case (supra)**, the Apex Court relied on the verdict given in Bani Singh's case (Supra) and propounded the following principles:

"When the accused does not appear, it is the bounden duty of the High Court to look into the records and the other materials on record, including the judgement of the trial court and thereafter, decide the appeal on merits which would be due compliance with Ss 385 and 386 in disposing of criminal appeals. The Appellate Court must dispose of the judgement of the trial court even if the appellant or his counsel was not present at the time of hearing of the appeal."

8. The instant petition has been filed under section 482 of the Code, which has conferred a very wide power on the High Court which should be exercised in appropriate cases to give effect to an order under the Code or to prevent abuse of the process of the court or to otherwise secure the ends of justice. The inherent power under section 482 has not limits and it is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone the courts exists.

9. In view of the aforesaid reasons, the impugned dismissal order has not only occasioned in causing miscarriage of justice but also amounts to abuse of the process of the court, therefore, it seems to be just and expedient to exercise inherent power under section 482 of the Code and to quash the dismissal order dated 05.09.2008.

10. The petition is therefore **allowed** and the order dated 05.09.2008 is set aside.

11. The learned Sessions Judge, Ambedkarnagar is directed to hear and decide the Criminal Appeal No. 17 of 2007 (Ghan Shyam v State of U.P.) himself on merits.

12. The learned counsel for the applicant submitted that the applicant is in jail on the basis of the warrant issued by the Chief Judicial Magistrate, Ambedkarnagar. If it is so, the applicant may move a bail application before the Sessions Judge, Ambedkarnagar and the same shall be considered and disposed of expeditiously, if possible on the same day.

13. Before parting with the judgement, I would like to add herewith that the learned Additional Sessions Judge, Ambedkarnagar has committed callous carelessness in dismissing the appeal in the absence of the appellant. It appears that he had no legal knowledge as to how the criminal appeals are heard and disposed of. In this view of the matter, the Registrar General of the Court is directed to send a copy of this judgement to the concerned Officer for his guidance and he may be advised to be careful in future in considering and disposing of criminal appeals.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.05.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Application No. 2521 of 2010
Case: U/S 482/378/407

Ganga Ram Pandey ...Petitioner
Versus
State of U.P. Respondent

Counsel for the Petitioner:
Amit Tripathi

Counsel for the Respondent:
G.A.

Code of Criminal Procedure Section 482-Rejection of application v/s 156(3) Cr.P.C. on ground of bar of section 195 (i) (b) (iii) Cr.P.C.-without consideration of fact whether forgery committed before filling such document before High Court on after filling the same-Forgery committed before filling the document-held-No application of bar of section 195 (i) (b) (iii)-order passed by Court below Quashed with necessary directions

Held: Para 7and 8

As per the allegations made in the petition moved by the applicant before the Magistrate, the documents which were alleged to be forged were filed in the proceeding of this Court after committing the forgery outside the court and there was no allegation that the forgery was committed in such documents after their production in the concerned judicial proceeding of this Court.

Neither the Magistrate nor the Sessions Judge was justified in rejecting the applicant's application under section 156(3) of the Code on the ground of bar of section 195(1)(b)(ii) of the Code.

Case law discussed
2005 U.P.Cr. R. Page 500 S.C., AIR 2005 SC 2119

(Delivered by Hon'bleShri Kant Tripathi, J.)

1. Heard learned counsel for the applicant and the learned counsel for the respondent no. 3 and the learned AGA and perused the record.

2. It appears that the applicant moved an application under section 156(3) of the Code of Criminal Procedure (in short "the Code") before the II-Judicial Magistrate, Faizabad vide Misc. Case No. 367 of 2009 (Ganga Ram Pandey v Vijay Kumar Shukla). The learned Magistrate rejected the application on 03.07.2009 on the ground that the forged documents were produced in the High Court, therefore, only the High Court had power to take cognizance. The learned Sessions Judge upheld the Magistrate's order vide his order dated 25.07.2009 in Criminal Revision No. 200 of 2009 relying on the decision of **K. Vengadachalam v KC Palanisamy & others [2005 U.P.Cr. R. Page 500 S.C.)** and held that the learned Magistrate had passed a justified order.

3. It may not be out of context to mention that there was no question of invoking the provisions of Section 195 of the Code at the stage of passing an order under section 156 (3) of the Code or at the stage of investigation. The provisions is attracted only when the Magistrate is required to take cognizance of the offence/offences under section 190 of the Code.

4. Section 195 (1)(b)(ii) of the Code has specifically provided that any offence

described under section 463 or punishable criminal conspiracy to commit or attempt to commit or abetment of, any such offence is cognizable only on the complaint in writing of the concerned court or on the complaint of such officer of the court as may be authorized by the court in writing in this behalf or on the complaint of such other court to which the court concerned is subordinate, if such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court. Therefore, section 195 (1)(b)(ii) of the Code is not attracted in regard to a document alleged have been forged prior to its filing in the court. Such provision is attracted when any forgery is committed after filing of the document in the court in a judicial proceeding.

5. A constitution Bench of the Apex Court in the case of **Iqbal Singh Marwah & another v Meenakshi Marwah & another [AIR 2005 SC 2119]** has very clearly held that section 195 (1)(b)(ii) of the Code would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any Court i.e. during the time when the document was in *custodia legis.*

6. It may be pertinent to mention that the Sessions Judge, Faizabad, after placing reliance on K. Vengadachalam's case (supra) himself observed that where the forgery is alleged to have taken place in respect of the document produced in evidence in any court, the bar of section 195(1)(b)(ii) of the Code is not attracted but failed to appreciate the controversy involved in the case in its correct perspective and also failed to apply the said settled principles to the facts of this case. The proper course for the Sessions Judge was to see as to what were the allegations in the complaint and whether the forgery in regard to the documents filed in the High Court was committed prior to, or after, their filing in the Court. If the forgery had been committed before filing the documents in the High Court, there was no question of applying the bar of section 195(1)(b)(ii) of the Code.

7. As per the allegations made in the petition moved by the applicant before the Magistrate, the documents which were alleged to be forged were filed in the proceeding of this Court after committing the forgery outside the court and there was no allegation that the forgery was committed in such documents after their production in the concerned judicial proceeding of this Court.

8. Neither the Magistrate nor the Sessions Judge was justified in rejecting the applicant's application under section 156(3) of the Code on the ground of bar of section 195(1)(b)(ii) of the Code.

9. For the reasons discussed above, the petition is **allowed.** The order dated 03.07.2009 passed by the II-Judicial Magistrate, Faizabad as well the order dated 25.07.2009 passed by the Sessions Judge, Faizabad are quashed. The learned Judicial Magistrate is directed to reconsider the applicant's application under section 156(3) of the Code and pass appropriate order in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2010

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

Civil Misc. Writ Petition No. 4950 of 1988

Krishnapal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri A.N. Bhargava

Counsel for the Respondents:
C.S.C.

U.P. Imposition of ceiling on Land Holding Act, Section 10 (2)-Notice to declare Surplus land issued-placing reliance on report of lokpal-without varify the actual date of death of original tenure holder-Sadashiv and Raghunandan-Petitioner 7 in number are son of Sadashiv jointly possessed less than 18 acre land-as per entry of Kitaab Register, date of death of Sadashiv is 25.11.1975 and Raghunandan died later on 12.02.1976 entries of family Register admissible in evidence u/s 74 of evidence Act-during cross examination Lekhpal admitted during long term of posting of 7 years in villages in question never seen both of them alive-burden of proof lies upon state-who failed to discharge the same-held-orders declaring surplus land, as well as of the appellants authority Quashed

Held: Para 21 & 24

The entire case of the State is, therefore, based on the alleged information of Mr. S.L. Tiwari and on the two receipts dated 19.1.1976 and 18.2.1986. The said receipts do not establish the date of death of Sadashiv or Raghu Nandan. The manner in which a deposit confers a right of bhumidhari tenure under the provisions of the then existing Section 134 to 137 of the U.P.Z.A. & L.R. Act, has been dealt with in the decision of the Apex Court in the case of Deo Nandan and another Vs. Ram Saran and others, reported in (2000) 3 SCC 440. The said proceedings are a certification of the change of tenure and they do not relate to the date of death or the date of actual physical presence of the concerned person. The reliance placed on the said receipts, therefore, do not conclude or establish the exact date of death of the tenure holders. The Prescribed Authority as well as the Commissioner both committed an error by placing heavy reliance on the said receipts and by discarding a documentary evidence which was substantial proof, namely the family register extract, indicating the exact date of birth corroborated by the mutation order in their favour. An evidence which was established and proved in law could not have been discarded on the strength of a mere information, the source whereof was neither known nor proved or also on the basis of receipts of deposit which did not indicate the date of death. The said evidence of the State, therefore, having failed to establish the date of death of Sadashiv and Raghu Nandan, the issuance of the notices on the mere information of Mr. S.L. Tiwari was absolutely erroneous and remains uncorroborated.

The Prescribed Authority has failed to take notice of the statement of Madhav Prasad, Lekhpal which itself narrates that he had not made any inquiry prior to the preparation of the Ceiling Forms and, therefore, in the absence of any such prior inquiry there was no occasion for calling upon the petitioners to file any objections. The initiation of the notice itself was absolutely unfounded and based on no evidence in relation to the date of death of Sadashiv.

Case law discussed
(2000) 3 SCC 440

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

1. All the seven petitioners are the sons of Late Sri Sadashiv, resident of Village Bardwara, Tehsil Karvi, District Banda who have come up questioning the correctness of the order of the Prescribed Authority dated 31.3.1986 and of the learned Commissioner in appeal dated 4th of February, 1988 under the provisions of **U.P. Imposition of Ceiling on Land Holdings Act.**

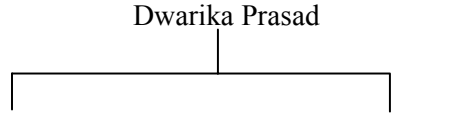
2. A notice was issued under Section 10(2) of the Act proposing to declare 13.41 acres of land surplus in the hands of the tenure holders. The petitioner Krishna Pal and others filed objections which was pursued by one of the petitioners Krishna Pal. The authorities proceeded to record the statements of the revenue officials and, thereafter the prescribed authority proceeded to hold that the land proposed as surplus deserves to be declared as such. The petitioners were called upon to offer their choices under the order dated 31.3.1986.

3. An appeal was preferred by the petitioners and the order of the prescribed authority was affirmed on 4th February, 1988. The present writ petition was instituted and an interim order was granted on 18.3.1988 restraining the respondents from dispossessing the petitioners from the land in dispute. The writ petition was admitted on 12.5.1988 whereafter a counter affidavit has been filed on behalf of the State to which a rejoinder has also been filed by the petitioners. An interim order was further passed by this Court on 19.5.1988 in favour of the petitioners. The rejoinder affidavit brings on record a judgment dated 20.6.1998 by the Sub-Divisional Magistrate in a suit under Section 229-B of the U.P.Z.A. & L.R. Act. A copy of the said rejoinder was served on the learned Standing Counsel as per endorsement thereon on 12.8.2002.

4. Learned counsel for the petitioner contends that the impugned order proceeds on erroneous assumption of facts and on a misconstruction and misconstruing of the evidence on record as a result whereof, both the authorities have arrived at a wrong conclusion. Not only this, the law which has been applied is on the basis of wrong facts and as such the impugned orders are liable to be set aside as there is no surplus land available in the hands of the petitioners.

5. Learned Standing Counsel has taken a stand that the findings recorded are based on evidence and, therefore, this Court may not interfere with these findings of fact in relation to the date of death of Sadashiv and Raghu Nandan.

The facts in short are that there is an undisputed pedigree as noted below:



1)- Krishna Pal
2)- Gomti Narain
3)- Tilak Narain
4)- Ram Prakash
5)- Madan Mohan
6)- Jay Narain
7)- Ram Badan

6. Sadashiv and Raghu Nandan were real brothers, who were admittedly the

recorded tenure holders of the entire land. The date on which the tenure has to be calculated is 24th January, 1971 and for some transactions dated 9.6.1973. These are the two dates on which the land has to be determined in the hands of a tenure holder and which cannot exceed 18 acres of land in the irrigated sense. There is no dispute that both the brothers were alive in 1971 and 1973 respectively and, therefore, both of them had equal shares in the holding. The entire holding in the irrigated sense between two brothers is reported to be 32.29 acres. If the said land is divided into half, both the brothers Sadashiv and Raghu Nandan receive less than 18 acres individually and, therefore, they could not have been proceeded against for holding surplus land in respect of the shares that would come to them in terms of calculations under the Ceiling Act.

7. The dispute arose when one Mr. S.L. Tiwari the Sub Divisional Magistrate of Karvi during his tenure received information through reliable sources, that Raghu Nandan who was issueless, predeceased his brother Sadashiv in the year 1975 or 1976 and as a consequence thereof Sadashiv became owner and recorded tenure holder of the entire land. Sadashiv also reportedly died and, therefore, notices were issued to the sons of Sadashiv mentioned in the pedigree herein above, calling upon them to show cause as to why an area of 13.41 acres of land be not declared as surplus. This information to Mr. S.L. Tiwari was reportedly received after almost 10 years of the death of the two brothers, the source whereof is not disclosed but is alleged to be reliable. The notice proceeded on the presumption that after the enforcement of the Act, the younger brother Raghunandan predeceased his elder brother. As a result, the elder brother became owner of the entire land having succeeded Raghunandan who died issueless. Thus a according to the State Sadashiv had land in access of 18 acres and therefore, the notices were issued.

8. Sri Krishna Pal S/o Late Sadashiv and his brothers filed their objections and a true copy of the same is brought on record as Annexure-2 to the writ petition dated 3.6.1985. The matter proceeded and the statements of the Revenue Officials including Madhav Prasad and Ram Lakhan have been recorded. The statement of the then Kanungo was also recorded. The petitioners filed copies of the extract of the family register prepared under the provisions of the U.P. Panchayat Raj Act and the Rules framed thereunder and also led oral evidence. The Prescribed Authority after assessing the said evidence came to the conclusion that Sadashiv was very much alive when the Ceiling Act came into force and Raghu Nandan had predeceased him. As a consequence of Raghu Nandan having predeceased Sadashiv, his entire land became the holding of Sadashiv as Raghu Nandan was issueless. For this the prescribed authority relied on certain deposits made on 19.1.1976 and 18.2.1976 by Sadashiv and Raghu Nandan respectively which were 20 times, the revenue of certain part of the holding in dispute for converting it into Bumidhari tenure under the provisions of Section 134 to 137 of the U.P.Z.A. & L.R. Act. The Prescribed Authority concluded that since these deposits were made on 19.1.1976 and 18.2.1976 respectively, it appears that the date of death as reflected by the petitioners in their objections are not correct and they had manipulated the date

of death of their own father prior to the death of Raghu Nandan by getting the mutation order recorded incorrectly.

9. On the strength of the aforesaid evidence the prescribed authority concluded that Raghu Nandan had predeceased Sadashiv and, therefore, Sadashiv was the sole tenure holder and as such there was land surplus in his hands.

10. The prescribed authority discarded the evidence of family register produced by the petitioner on the ground that the same was not proved by producing the concerned Gram Panchayat Adhikari who was the custodian of the said register. The same was, therefore, not found worth admitting in evidence.

11. The prescribed authority believed that the manner in which mutation was carried out does not inspire confidence and, therefore, the date of deaths mentioned in the mutation proceedings and recorded in the extracts of Khatauni also do not help the objectors. In effect the proceedings initiated on the reliable information of the then prescribed authority Mr. S.L. Tiwari after 10 years of the death of the tenure holders was believed to be true.

12. Having perused the entire records including the counter affidavit and the rejoinder filed on behalf of the petitioners the central issue for determination in this litigation is about the date of death of the two brothers Sadashiv and Raghu Nandan. The State led evidence by calling upon their Lekhpals and the statement of Madhav Prasad was recorded. Madhav Prasad was the concerned Lekhpal who prepared the Ceiling Forms and submitted it to the then Sub Divisional Officer, Shyam Lal Tiwari. In his statement, which is Annexure-6 to the writ petition, the said Lekhpal states that he had prepared the file on the asking of the said Sub Divisional Officer/Prescribed Authority. He further states that it was Mr. S.L. Tiwari who said that the father of the petitioners Sadashiv was alive. He further states that he had remained Lekhpal for six years but he never saw Sadashiv or Raghu Nandan alive and that the land was in the possession of the petitioners. He also stated that he did not carry out any inquiry at all before submitting this report to Mr. S.L. Tiwari, the then Prescribed Authority and Mr. Ram Sajivan, the Kanungo never went with him for enquiry on the spot. This key witness of the State has nowhere stated the exact date of death of Sadashiv or Raghunandan.

13. The aforesaid statement of the witness of the respondent State, who is said to be the initiator of the proceedings, itself indicates that there is no statement about the date of death of Sadashiv or Raghu Nandan by the said Lekhpal. Not only this, he also categorically states that he did not make any inquiry before proceeding to submit the report. Apart from this he further stated that he was Lekhpal for six years of the said village and he never saw Sadashiv and Raghu Nandan alive.

14. A perusal of the said statement of the Lekhpal who is the key witness of the initiation of the proceedings as well as the status of the tenure holders whether they were dead or alive, does not in any way establish or support the assumption of Mr. S.L. Tiwari, the then prescribed authority who is alleged to have received

some news from reliable sources. There is no disclosure as to what was the reliable source of information of Sri. S.L. Tiwari, the then Sub Divisional Officer. The impugned order neither discusses the aforesaid aspect of the statement of the Lekhpal nor does it indicate disclosure of any relevant evidence as to the source of information received by Mr. S.L. Tiwari for initiating the proceedings.

15. In the absence of any such material, either in the statement of the Lekhpal or any evidence in relation to the alleged information received by Mr. S.L. Tiwari or its source the prescribed authority appears to have proceeded to draw conclusions on mere surmises and against the weight of evidence on record. The prescribed authority has not even indicated his opinion on the said statement and has concluded that the mutation was carried out in collusion with the Officials. In my opinion, the aforesaid conclusion is founded on surmises and conjectures and against the weight of evidence on record.

16. The second issue is with regard to the date of death of Sadashiv recorded as 25.11.1975 in the family register. A family register is a public record in terms of the Evidence Act inasmuch as the same is prepared under the statutory provisions of **Section 15 (xxiii)(e) of U.P. Panchayat Raj Act read with Rule 2, Rule 67, Rule 142 to 144 of the U.P. Panchayat Raj Rules, 1947. The family register is prepared under the Uttar Pradesh Panchayat Raj (Maintenance of Family Registers) Rules, 1970.** It is to be noted that Form (A) also records the date of death of a family member. There is yet another Form namely Form (D) which is for registering the date of birth and death. Both these Forms, therefore, record the date of death of a person and they are prescribed under the Rules. Needless to say that the rules are framed by the State Government and the registers prescribed for particular purposes are notified under the rules. Reference may be had to Section 110 (vii) of the 1947 Act for the said purpose.

17. In my opinion, a presumption has to be drawn in respect of the said public document and it cannot be merely disbelieved if the Gram Panchayat Adhikari had not been produced to prove it. The copy of the family register is a public document and a presumption as to its genuineness is accepted under Section 79 of the Indian Evidence Act. No doubt was ever raised by the State of its issuance or genuineness. In such circumstances there was no occasion for the petitioners to produce the Gram Vikas Adhikari for proving a public document maintained under rules and defined in Section 74 of the Evidence Act. On the contrary, the extract of the family register was produced and filed by the petitioners, and if the authority had any doubt about it, it could have summoned the family register as also the concerned Gram Panchayat Adhikari to satisfy the correctness or otherwise of the said entries or in the alternative could have called upon the State to produce it. The petitioners, in my opinion, had discharged their burden and the onus lay on the State to disprove the same. The statements of the revenue officials do not indicate any denial of the aforesaid documents. The State did not rebut the said evidence by questioning the entry or issuance of the extract by the competent authority. In such a situation the prescribed authority committed a manifest error by not

accepting the date of death of Sadashiv as 25.11.1975 as indicated in the family register and the revenue records. The mutation orders that were in favour of the petitioners were admitted to have been recorded by the Lekhpal and Kanungo.

18. The petitioners had come out with a clear case that Sadashiv had died earlier on 25.11.1975 and Raghu Nandan died later on 12.2.1976 as is evident from the mutation orders entered in Form P.A. 11.

19. The respondent State has relied on the deposit receipts dated 19.1.1976 and 18.2.1976 of 20 times of revenue in the name of Sadashiv and Raghu Nandan respectively. On the strength of these receipts it was contended by the State that both Sadashiv and Raghu Nandan were alive and their deaths had not taken place on the dates as mentioned by the petitioners i.e. 25.11.1975 and 12.2.1976. The prescribed authority has nowhere recorded that the aforesaid receipts which had been issued were upon deposits made by Sadashiv and Raghu Nandan themselves in person. No official was produced to prove the said receipts. The petitioners or their witnesses were never put to cross-examination about any such evidence. Apart from this merely because the mutation order was carried out on the same Form recording the date of death of Sadashiv as 25.11.1975 and that of Raghu Nandan 12.2.1976 simultaneously the same cannot lead to the conclusion that it was done collusively. Collusion has to be established through actual evidence and not by mere inference or bald allegations.

20. In order to prove collusion, something more has to be indicated about the overt and covert acts of the authorities. The presumption, that the said mutation was carried out with a view to avoid the Ceiling proceeding is absolutely misconceived and an additional reason for this is that if according to the State both Sadashiv and Raghu Nandan were alive and their date of deaths had been wrongly recorded, then there was no occasion to issue any notice or take steps under the Ceiling Act as both Sadashiv and Raghu Nandan in their respective shares were entitled to hold the entire land which individually would be less than 18 acres in their hands. In such a situation, if Sadashiv and Raghu Nandan were individually holding land, there was no occasion for them to be a party to any such attempt of collusion.

21. The entire case of the State is, therefore, based on the alleged information of Mr. S.L. Tiwari and on the two receipts dated 19.1.1976 and 18.2.1986. The said receipts do not establish the date of death of Sadashiv or Raghu Nandan. The manner in which a deposit confers a right of bhumidhari tenure under the provisions of the then existing Section 134 to 137 of the U.P.Z.A. & L.R. Act, has been dealt with in the decision of the Apex Court in the case of **Deo Nandan and another Vs. Ram Saran and others, reported in (2000) 3 SCC 440.** The said proceedings are a certification of the change of tenure and they do not relate to the date of death or the date of actual physical presence of the concerned person. The reliance placed on the said receipts, therefore, do not conclude or establish the exact date of death of the tenure holders. The Prescribed Authority as well as the Commissioner both committed an error by placing heavy reliance on the said receipts and by discarding a documentary

evidence which was substantial proof, namely the family register extract, indicating the exact date of birth corroborated by the mutation order in their favour. An evidence which was established and proved in law could not have been discarded on the strength of a mere information, the source whereof was neither known nor proved or also on the basis of receipts of deposit which did not indicate the date of death. The said evidence of the State, therefore, having failed to establish the date of death of Sadashiv and Raghu Nandan, the issuance of the notices on the mere information of Mr. S.L. Tiwari was absolutely erroneous and remains uncorroborated.

22. The statement of the revenue officials fails to point out the exact date of death of Raghu Nandan or Sadashiv. In the absence of any such positive material there was absolutely no reason to disbelieve the evidence about the date of death as projected by the petitioners. The burden is always on the State to prove a fact in relation to the date of death which was being inferred on the basis of the two receipts referred to herein above. The State, in my opinion, failed to discharge that burden of fixing the date of death of the tenure holders. Conversely the petitioners had discharged their burden by producing conclusive evidence about the date of death namely their oral evidence supported by documentary evidence in the shape of a family register extract maintained as a public document and the orders of mutation under the provisions of the U.P. Land Revenue Act, 1901. Having discharged its burden, the onus stood shifted on the State to disprove the same. The State did not discharge its onus as recorded herein above. Accordingly, the State which was under an obligation to prove its facts namely the contents of the family register by leading evidence, there was no occasion for the Prescribed Authority or the Commissioner to have rejected the claim of the petitioners. The finding, therefore, recorded by the prescribed authority on this score cannot be sustained. The Commissioner has also committed the same error by recording that the petitioners did not lead any evidence to support their contention in relation to the date of death as indicated above. The petitioners led oral evidence as well as documentary evidence to establish their claim which could not be successively rebutted by the State. The Commissioner, therefore, totally ignored the aforesaid aspects of the matter and thus arrived at an incorrect conclusion.

23. The learned Commissioner instead of attending to these issues which were raised in the appeal and have been noted by him has simply reiterated all the findings of the prescribed authority and has affirmed the same. The entire inquiry which has been made by the authorities does not make out a case of any reassessment of the land in the hands of the petitioners that too even after 10 years of the death of the tenure holders on the strength of a mere hearsay information. In my opinion, the authorities have committed an error as pointed out herein above and their conclusions are absolutely erroneous. The order of the learned Commissioner is equally bad for the reasons for which the order of the prescribed authority is infirm.

24. The Prescribed Authority has failed to take notice of the statement of Madhav Prasad, Lekhpal which itself narrates that he had not made any inquiry prior to the preparation of the Ceiling

Forms and, therefore, in the absence of any such prior inquiry there was no occasion for calling upon the petitioners to file any objections. The initiation of the notice itself was absolutely unfounded and based on no evidence in relation to the date of death of Sadashiv.

25. The petitioners, in my opinion, had conclusively proved that Raghu Nandan died later on after the death of Sadashiv. The petitioners accordingly inherited the entire shares of Sadashiv to the tune of 1/7th each and when Raghu Nandan died thereafter they again inherited his share accordingly. If the aforesaid calculation is taken to be correct then there is no surplus land in the hand of the petitioners. The impugned orders, therefore, in my opinion, being erroneous are liable to be set aside. Accordingly, the order of the prescribed authority dated 31.3.1986 and that of the learned Commissioner dated 4.2.1988 hereby quashed. The prescribed authority shall accordingly, proceed to maintain the revenue records in relation to the claim of the petitioners and pass an appropriate order to that effect in the light of the conclusions and observations hereinabove.

26. The writ petition is allowed with no orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 10166 of 2008

Deena Nath and others ...Petitioners
Versus
Deputy Director of Consolidation, Ballia and others ...Proforma Respondents

Counsel for the Petitioners:
Mr. Rahul Sahai

Counsel for the Respondents:
Mr. J.P. Singh
C.S.C.

U.P. consolidation of Holding Act 1953- Section 48-Revision-against the order. passed by Settlement officer of Consolidation by Setting aside the order passed by Consolidation officer and order of remand to decide as fresh- whether Revision maintainable? held- "yes".

Held: Para 31

In view of the foregoing discussions, we are of the view that the order of the Settlement Officer of Consolidation by which appeals were finally decided was not an interlocutory order and the revision under Section 48 of U.P. Consolidation of Holdings Act, 1953 was clearly maintainable.

Our answers to the questions are as follows:-

1) an order passed in appeal under section 11 of the U.P. Consolidation of Holdings Act by the Settlement Officer Consolidation deciding the appeal finally by setting aside the order of the Settlement Officer Consolidation and

remanding the matter to the Consolidation Officer is not an interlocutory order within the meaning of section 48 of the U.P. Consolidation of Holdings Act and revision is not barred against such order under section 48.

2)the law down in Ajab Singh and others Vs. Jt. Director of Consolidation and others, reported in 1996 R.D. 104, Rajbir Vs. Dy. Director of Consolidation, reported in 1999 (90) R.D. 313, Rajit Ram Singh and others Vs. Mahadev Singh and others, reported in 2002 (93) R.D. 224 do not lay down the correct law.

Case law discussed:

1996 R.D. 104, 1999(90) R.D.313, 2002(93) R.D. 224, A.I.R. 1981 S.C.707, A.I.R.1960 S.C. 941, JT 2000(1) SC 65,1990 R.D.162, A.I.R. 1977 SC 2185, A.I.R. 1980 S.C. 962.

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

1. This Division Bench has been constituted to consider following two questions referred to it:-

"(i) Whether an order passed in appeal under section 11 of the U.P. Consolidation of Holdings Act by the Settlement Officer Consolidation deciding the appeal finally by setting aside the order of the Settlement Officer Consolidation and remanding the matter to the Consolidation Officer is an interlocutory order within the meaning of section 48 of the U.P. Consolidation of Holdings Act and revision is barred against such order under section 48.

(ii) Whether the law down in **Ajab Singh and others Vs. Jt. Director of Consolidation and others**, reported in 1996 R.D. 104, **Rajbir Vs. Dy. Director of Consolidation,** reported in 1999 (90) R.D. 313, **Rajit Ram Singh and others Vs. Mahadev Singh and others**, reported in 2002 (93) R.D. 224 lay down the correct law."

2. Brief facts of the case, which are necessary to be noted for deciding the above two questions, are; proceedings under the U.P. Consolidation of Holdings Act, 1953 were started in the village in which objections under Section 9-B of the U.P. Consolidation of Holdings Act, 1953 were filed by respondent No.2. The said objections were allowed by order dated 18th January, 2005 against which an appeal under Section 11(1) of the U.P. Consolidation of Holdings Act, 1953 was filed by the writ petitioners before the Settlement Officer of Consolidation. The Settlement Officer of Consolidation allowed the appeal by judgment and order dated 27th September, 2007 setting aside the order of Consolidation Officer dated 18th January, 2005 and remanding the matter before the Consolidation Officer for deciding the objections afresh. Against the order dated 27th September, 2007 passed by the Settlement Officer of Consolidation, revision under Section 48 of U.P. Consolidation of Holdings Act, 1953 was filed by respondent No.2. An objection was raised on behalf of the writ petitioners, who were respondents in the revision, that revision under Section 48 of the U.P. Consolidation of Holdings Act, 1953 is not maintainable since the order of Settlement Officer of Consolidation dated 27th September, 2007 remanding the matter to the Consolidation Officer was an "interlocutory order", the revision against an interlocutory order is not maintainable. The said objection was considered by the Deputy Director of Consolidation and vide order dated 13th February, 2008 the Deputy Director of Consolidation held that revision is maintainable. This writ petition has been

filed challenging the order dated 13th February, 2009 passed by the Deputy Director of Consolidation.

3. The petitioners in the writ petition claim that revision under Section 48 of the U.P. Consolidation of Holdings Act, 1953 was not maintainable, hence the order of Deputy Director of Consolidation is liable to be set-aside. In the writ petition reliance was placed by the petitioners on three judgments of this Court rendered by different learned Single Judges taking the view that revision against an interlocutory order of remand is not maintainable. The said judgments are **Ajab Singh and others Vs. Jt. Director of Consolidation and others**, reported in 1996 R.D. 104, **Rajbir Vs. Dy. Director of Consolidation**, reported in 1999 (90) R.D. 313, **Rajit Ram Singh and others Vs. Mahadev Singh and others**, reported in 2002 (93) R.D. 224. Expressing doubt over the correctness of the aforesaid judgments, two questions, as noted above, have been referred for consideration.

4. We have heard Sri Rahul Sahai, learned counsel for the petitioners, Sri J.P. Singh, learned counsel appearing for contesting respondent and learned Standing Counsel.

5. Learned counsel for the petitioners contended that order of remand by Settlement Officer of Consolidation was an interlocutory order it having not decided the lis between the parties. He further contended that revision was not maintainable in view of the express exclusion as contained in Section 48 of U.P. Consolidation of Holdings Act, 1953 itself. Learned counsel for the petitioner has placed reliance on judgments of the Apex Court in the cases of **Kshitish Chandra Bose vs. Commissioner of Ranchi** reported in A.I.R. 1981 S.C. 707, **Satyadhyan Ghosal and others vs Smt. Deorajin Debi and another** reported in A.I.R. 1960 S.C. 941 and the aforesaid three judgments of the learned Single Judges of this Court as noticed above.

6. Learned counsel for the respondent refuting the submissions of learned counsel for the petitioners, contended that the order of remand passed by Settlement Officer of Consolidation was not an interlocutory order. It is contended that appeal having been finally decided, it was a final order and the revision was maintainable under Section 48 of U.P. Consolidation of Holdings Act, 1953. Reliance has been placed on judgments of the Apex Court in the cases of **Mammu vs. Hari Mohan and another** reported in JT 2000(1) SC 65, **Preetam Singh and others vs. Assistant Director of Consolidation and others** reported in (1996)2 S.C.C. 270 and judgment of the learned Single Judge of this Court in the case of **Bhagwat and others vs. Deputy Director of Consolidation and others** reported in 1990 R.D. 162.

7. We have considered the submissions of learned counsel for the parties and have perused the record.

8. The main issue, which is to be considered in this proceedings, is as to whether the order passed by Settlement Officer of Consolidation deciding the appeal finally by setting aside the order of Consolidation Officer and remanding the matter to the Consolidation Officer, is an "interlocutory order" within the meaning

of Section 48 of the U.P. Consolidation of Holdings Act, 1953, as to whether revision against that order is barred and as to whether three judgments of the different learned Single Judges, as noticed above, holding that revision is not maintainable against an interlocutory order lay down the correct law.

9. Before proceeding to consider the respective submissions of the learned counsel for the parties, it is necessary to notice the relevant provisions of the U.P. Consolidation of Holdings Act, 1953.

10. Section 11 of the U.P. Consolidation of Holdings Act, 1953 provides for appeal before the Settlement Officer of Consolidation. Section 11(1) contemplates decision thereon by Settlement Officer of Consolidation after hearing the parties. Section 48 of the U.P. Consolidation of Holdings Act, 1953 provides for revision. By U.P. Land Laws (Amendment) Act, 1982 Section 48 of U.P. Consolidation of Holdings Act, 1953 was amended excluding revision against an interlocutory order. The words "interlocutory order" were also defined by Explanation-(2) of Section 48. Section 48, as amended by U.P. Land Laws (Amendment) Act, 1982, is as follows:-

"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 sub-section (1)

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

Explanation (2).- for the purposes 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).- for the purposes of 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."

11. One more section, which is necessary to be noted, is Section 40 of the U.P. Consolidation of Holdings Act, 1953, which provides that proceedings before the Settlement Officer of

Consolidation, Consolidation Officer and Assistant Consolidation Officer shall be deemed to be judicial proceedings. Rule 65 of U.P. Consolidation of Holdings Rules, 1954 contains provisions with regard to transfer of a case. Section 40 of the U.P. Consolidation of Holdings Act, 1953 and Rule 65 of U.P. Consolidation of Holdings Rules, 1954 are quoted below:-

"40. Proceedings before Settlement Officer Consolidation, Consolidation Officer and Assistant Consolidation Officer to be judicial proceedings. *- A proceeding before a Director of Consolidation, Deputy Director of Consolidation, Settlement Officer Consolidation, Consolidation Officer and Assistant Consolidation Officer, shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code.*

"65. [See Section 54].- *(1) The Settlement Officer, Consolidation, may withdraw any case from the file of any Consolidation Officer or Assistant Consolidation Officer subordinate to him may refer the same for disposal to any other Consolidation Officer or Assistant Consolidation Officer competent to deal therewith.*

[(1-A) The officer before whom appeals, revisions or references under the provisions of the Act or these rules are instituted may transfer any case instituted or pending before him to any other officer empowered to hear and decide such case, or recall case pending before any other officer from the file of that officer to his own file. The District Deputy Director of Consolidation of a district where Joint/Deputy/Assistant Director of Consolidation is posted may call for record of any revision or case pending before such officer for disposal and may transfer it to such officer if he is unable to decide it for some reason.]

(2) The Director of Consolidation may withdraw any case from the file of any Settlement Officer, Consolidation, and refer the same to any other Settlement Officer, Consolidation for disposal."

12. The dictionary meaning of the words "interlocutory order" according to Law Lexicon (P. Ramanath Ayer) 1997 Edition, is as follows:-

"Interlocutory order. *An interlocutory order is one which is made pending the case and before a final hearing on the merits.*

An interlocutory order is made to secure some end and purpose necessary and essential to the progress of the suit, and generally collateral to the issues formed by the pleadings and not connected with the final judgment."

13. The dictionary meaning of the words "interlocutory order" according to Halsbury's Law of England, 4th Edition, Vol.26, Paragraph 506, is as follows:-

"Interlocutory order*. An order which does not deal with the final rights of the parties, but either - (1) is made before judgment and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed "interlocutory'. An interlocutory*

order, even though not conclusive of the main dispute, may be conclusive as to the subordinates matter with which it deals."

14. The dictionary meaning of the words "interlocutory order" is, an order made during the progress of an action, which does not finally dispose the rights of the parties. Section 397 of the Cr.P.C. also uses the words "interlocutory order". The words "interlocutory order" as used in Section 397 of Cr.P.C. came for consideration before the Apex Court in the case of **Amar Nath vs. State of Haryana** reported in A.I.R. 1977 SC 2185 in which it was held that the term "interlocutory order" merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties.

15. Again in the case of **V.C. Shukla vs. State through CBI** reported in A.I.R. 1980 S.C. 962 the Apex Court held that interlocutory order has to be construed in contradiction to or in contrast with final order, it means not a final order, but an intermediate order. It is made between the commencement of an action and the entry of the judgment.

16. In the present case we are concerned with an order, which is an order of remand by which remand order the appeal filed under Section 11 of U.P. Consolidation of Holdings Act, 1953 was allowed, the order of Consolidation Officer, which was appealed against was set-aside and the Consolidation Officer was directed to decide the rights of the parties afresh. Thus our consideration in the present case has to be confined to an order of remand of the above category.

17. The Apex Court in **Kshitish Chandra Bose's** case (supra) was considering an order of remand as contemplated under Order XLI, Rule 25 of C.P.C. In the said case plaintiff's suit was decreed by the trial Court on question of title and adverse possession. The defendant filed an appeal before the Additional Judicial Commissioner which affirmed the findings of the trial Court on both the points. Thereafter defendant went up in second appeal to the High Court which held that there was no clear evidence to show that the plaintiff had obtained title by adverse possession and by its judgment dated 17.2.1967 remanded the case to the trial Court for a decision only on the question of title. After remand, the Additional Judicial Commissioner dismissed the plaintiff's suit. The plaintiff then went up in appeal to the High Court which affirmed the finding of the Additional Judicial Commissioner. Thereafter the appeal by special leave was filed in the Apex Court. It is contended before the Apex Court that plaintiff did not come in appeal before the Apex Court against the first judgment of the High Court because the order passed by the High Court was not a final order but in the nature of interlocutory order, hence the appellant could not be debarred from challenging the validity of the first judgment of the High Court even after the second judgment was passed. In the above context, following was laid down by the Apex Court in paragraphs 5 and 6 of the said judgment:-

‘"5. Secondly, it was contended that even so the finding of the High Court on the question of adverse possession was given without at all considering the materials and evidence on the basis of which the two posts had concurrently

found that the plaintiff had acquired title by adverse possession. It is contended that the plaintiff did not come up in appeal before this court against the impugned judgment of the High Court obviously because the order passed by the High Court was not a final one but was in the nature of an interlocutory order as the case had been remanded to the Additional Judicial Commissioner and if the revisional court had affirmed the finding of the trial court, no question of filing a further appeal to the High Court could have arisen. Thus, the appellant could not be debarred from challenging the validity of the first judgment of the High Court even after the second judgment by the High Court was passed in appeal against the order of remand. In support of this contention, the counsel for the appellant relied on a decision of this Court in the case of Satyadhavan Ghosal V. Shiksha Mitra. Deorajin Debi, (1960) 3 SCR 590: (AIR 1960 SC 941) where under similar circumstances this Court observed as follows:

"In our opinion the order of remand was an interlocuroty judgment which did not terminate the proceedings and so the correctness thereof can be challenged in an appeal from the final order."

In coming to this decision this Court relied on an earlier decision in the case of Keshardeo Chamria V. Radha Kissen Chamria and vice versa, 1953 SCR 136: (AIR 1953 SC 23) where the same view was taken.

6.Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of the opinion that it is open to the appellant to assail even the first judgment of the High Court and if we hold "that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order or remand would become non est."

18. Another judgment, which has been relied by learned counsel for the petitioners is judgment of the Apex Court in **Satyadhyan Ghosal's** case (supra). The Apex Court in the said case considered Sections 11 and 105 of C.P.C. and laid down as to when an interlocutory order can be challenged in appeal from final decree. In the said case the Apex Court laid down that Section 105(2) does not apply to the Supreme Court and an order of remand can be challenged while challenging the final decree. Following was laid down in paragraphs 15 and 16 of the said judgment:-

***"15**. When the code of 1877 made provisions in Chapter 43 for appeal against certain orders, S. 591 thereof provided "Except as provided in this chapter, no appeal shall lie from any order passed by any court in the exercise of its original or appellate jurisdiction" and went on to say "but if any decree be appealed against any error, defect or irregularity in any such order affecting the decision of the case, may be set forth as a ground of objecting in the memorandum of appeal". The position remained the same in the code of 1882. The present Code in its 105th section uses practically the same phraseology except that the word "any such order" has been substituted by "any order" and an*

additional provision has been made in the second subsection in respect of orders of remand. The expression "such order" in S. 591 gave rise to a contention in some cases before the Privy Council that S. 591 applied to nonappealable orders only. This contention was overruled by the Privy Council and that view was adopted by the Legislature by changing the words "any such order" to "any order". As regards the orders of remand it had been held that under S. 591 of the Code a party aggrieved by an order of remand could object to its validity in an appeal against the final decree, though he might have appealed against the order under S. 588 and had not done so. The second sub-section of S. 105 precludes an appellant from taking, on an appeal from the final decree, any objection that might have been urged by way if appeal from an order of remand.

16. *It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second sub-section did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason being that no appeal lay to the Privy Council or lies to the Supreme Court against an order of remand."*

19. It is relevant to note that in the above cases while referring to order of remand as an interlocutory order, the Apex Court laid down that in a case when appeal lay against remand order and is not filed or no appeal lay against such an order, the higher Court is not precluded from considering the correctness of remand order. The question considered by the Apex Court in the aforesaid judgments was as to whether when an appeal is not filed against remand order, the correctness of the same can be challenged or not when the appeal is filed against final order. No such ratio has been laid down by the Apex Court in the said judgment that no appeal lay against an order of remand, which is an interlocutory order. It is true that order of remand has been termed as interlocutory order in the aforesaid two judgments but the observation has been made in the judgments itself that appeal may or may not lay against such interlocutory order of remand. Thus above two judgments cannot be held to be laying down proposition that order of remand, which is an interlocutory order, cannot be appealed.

20. At this juncture, it is relevant to note the provisions of of the appeal as contained in Code of Civil Procedure with regard to an order of remand. Order XLI Rules 23 and 23A of Code of Civil Procedure provide for remand by the appellate Court. Order XLI, Rules 23 and 23A of Code of Civil Procedure Code are quoted as below:-

"23. Remand of case by Appellate Court.- *Where the Court from whose*

decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

***[23A. Remand in other cases.-** Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.]"*

21. Under Order XLIII, Rule 1(u) of the Code of Civil Procedure an order under Rule 23 or Rule 23A of Order XLI is appealable. Thus Code of Civil Procedure itself provides appeal from an order of remand.

22. We in the present case have to decide the question in the light of the statutory scheme as is delineated by Section 48 of U.P. Consolidation of Holdings Act, 1953. "Interlocutory order" has been defined in Explanation (2) of Section 48. Explanation (2) provides that 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. Thus an order deciding any matter in a case or proceeding, which does not have the effect of finally disposing of such case or proceeding, is an interlocutory order. Explanation (2) also contemplates a category of orders, which are excluded from expression "interlocutory order' i.e. those orders which have the effect of finally disposing of such case or proceeding.

23. Section 40 of the U.P. Consolidation of Holdings Act, 1953, as quoted above, provides that proceedings before the Settlement Officer of Consolidation are judicial proceedings. Rule 65 of U.P. Consolidation of Holdings Rules, 1954, as quoted above, uses the word "case'. The appeal filed before the Settlement Officer of Consolidation is a case pending before the Settlement Officer of Consolidation and is also a proceeding within the meaning of Section 40 of U.P. Consolidation of Holdings Act, 1953. By the order passed by Settlement Officer of Consolidation dated 27th September, 2007 Appeal Nos.2308/3964 and 2318/3979 both were finally decided. The order of the Settlement Officer of Consolidation thus finally disposed of the appeals or proceedings, thus on the plain wordings of Explanation (2) of Section 48 of U.P. Consolidation of Holdings Act, 1953 was excluded from the definition of interlocutory order as provided therein.

24. The order of the Settlement Officer of Consolidation, which finally decided the appeal by setting aside the order of Consolidation Officer and remanding the matter to the Consolidation Officer was an order finally deciding the

appeal and thus cannot be termed to be an interlocutory order.

25. The judgment of the Apex Court relied by learned counsel for the respondent in ***Mammu's*** case (supra) fully supports the view, which we are taking. The facts of the said case are to be noted in detail. In the said case proceedings were initiated under the Kerala Land Reforms Act, 1963 by the respondents before the Land Tribunal, who were tenant for purchase of Kudikidappukaran right under Section 80-B of the Act. The applications were dismissed by the Land Tribunal. An appeal was filed by the respondents before the appellate authority, which was allowed. The appellate order was challenged before the High Court in revision. The High Court set-aside the order of the appellate authority and remanded the matter to the appellate authority. The appellate authority again passed an order in favour of the appellants. The appellate authority remanded the matter to the Land Tribunal. The above appellate order was not challenged in revision. The Land Tribunal found that the appellant was entitled to 10 cents of land. The order was challenged in appeal by the respondents before the appellate authority. The appeal was dismissed on the finding that previous order of the appellate authority was a final order and since that order was not challenged in revision, the order has become final. The appellate order was challenged before the High Court, which was set-aside. The question, which arose for consideration before the Apex Court, was as to whether the order of the appellate authority remanding the matter to the Land Tribunal was a final order and, therefore, was available to be challenged in revision or it was merely an interlocutory order against which no revision could be filed. The Apex Court after considering the aforesaid issue held that the order of remand was a final order and revision lay against such an order. Paragraphs 8, 9 and 10 of the said judgment, which are relevant, are quoted below:-

"8. On the case pleaded by the parties and the findings recorded by the Land Tribunal, the appellate authority and the High Court in the orders passed in the proceedings, two questions emerge for consideration : (1) whether the High Court was right in holding that the order passed by the appellate authority remanding the matter to the Land Tribunal was not a final order and therefore, not challengable in revision before the High Court and (2) whether the finding of the High Court that the appellant cannot claim kudikidappu right in respect of the structure in question is sustainable in law.

9. Section 103 of the Act, so far as it is material for the present proceeding, is quoted hereunder :

"103. Revision by High Court :- (1) Any person aggrieved by-
"(i) any final order passed in an appeal against the order of the Land Tribunal or;
(ii) any final order passed by the Land Board under this Act or;
(iii) any final order of the Taluk Land Board under this Act,
xxx xxx xxx xxx
may, within such time as may be prescribed, prefer a petition to the High Court against the order on the ground that the appellate authority or the Land Board, or the Taluk Land Board, as the

case may be, has either decided erroneously, or failed to decide, any question of law.

(2) The High Court may, after giving an opportunity to the parties to be heard, pass such orders as it deems fit and the orders of the appellate authority or the Land Board, or the Taluk Land Board, as the case may be, shall, wherever necessary, be modified accordingly."

10. The question that arises for consideration in this case is whether the order of the appellate authority remanding the matter to the Land Board with a direction to pass order in the light of the observations/directions in the order is a 'final order' within the meaning of S. 103(1) of the Act? The Kerala High Court in certain decisions has taken the view that only an order which disposes of a proceeding before the Land Board, can be said to be a 'final order' and against such an order, a revision petition shall lie; any other order of the appellate authority which does not dispose of the proceeding before the Land Board cannot be said to be a 'final order' and no other revision petition shall lie against such an order. This interpretation, in our considered view, does not flow from the language of the statutory provision. Clause (i) of sub-section (1) of S. 103 provides that any final order passed in an appeal is available to be challenged in revision by any person aggrieved by such order. The clear and unambiguous language in which the section is couched conveys the meaning that a revision petition cannot be filed against an interlocutory order passed in an appeal. To put it differently, an order which does not dispose of the appeal is not a 'final order.' An order of remand in which the matter is remanded to the Land Board for disposal in accordance with law cannot be said to be an interlocutory order for the simple reason that the appeal filed before the Land Tribunal stands disposed of by such order. In a case where the Land Tribunal keeps the proceeding pending and calls for a finding on a specific issue or point formulated by it from the Land Board or any other authority, then such an order cannot be said to be a final order against which a revision can be filed before the High Court. The reasoning in some of the judgments of the Kerala High Court, particularly in Bhaskara Menon v. Gangadharan (1983 Ker LT 435) (supra) and in Joseph v. Velayudhan Pillai (1976 Ker LT 870) (supra) that a 'final order' is one which disposes of the proceeding before Land Board, in our view, is clearly erroneous. The view taken by the High Court in 1979 Ker LT 910, Mahadevan Iyer v. Bhagavaty Ammal is extracted.

"a literal understanding of sub-section (i) of S. 103 only . . . . . .means that there must be an appeal from an order of the Land Tribunal and the appellate order should be a final one as distinguished from an interlocutory order. The final order must dispose of the appeal. The words "final order in an appeal" mean only that and this is all that is contemplated by the Legislature will be clear from the nature of the appeals provided for under S. 102 of the Act to the appellate authority. An appeal will lie from any order passed by the Land Tribunal under the various sections enumerated in S. 102. Such orders may be either orders of final disposal of the proceeding taken before the Land Tribunal or may be only preliminary orders which conclusively determine the status of the parties and direct incidental enquiries leading to a final order by the

Land Tribunal closing the proceedings. Such being the character of the orders against which appeals can be filed before the appellate authority 'final order' passed in an appeal against the order of the Land Tribunal in S. 103(1)(i) can only an order finally disposing of the proceedings initiated before the Land Tribunal. Finality must relate to the appeal only and not to the Land Tribunal proceedings. To understand or to interpret the section to mean final order disposing of the Land Reform proceedings on appeal will be recasting the section which is not allowed."

That view has our approval. Therefore, the finding of the High Court in the impugned order that no revision petition could be filed against the order of remand passed by the Land Tribunal is erroneous. The first question is answered in the negative."

26. The proposition of law as laid down in the above case is fully attracted in the present case. The order of remand made by the Settlement Officer of Consolidation was, thus, a final order against which revision was fully maintainable.

27. Now comes the judgments of learned Single Judges in **Ajab Singh's, Rajbir's** and **Rajit Ram Singh's** cases (supra). In **Ajab Singh's** case (supra) following was laid down in paragraph 15:-

"15. *It is next to be seen whether the order of remand passed by Settlement Officer Consolidation was not open to revision it being an 'interlocutory order' within the meaning of section 48 of the U.P. Consolidation of Holdings Act which excludes, in no uncertain terms, an 'interlocutory order' from the purview of revisional jurisdiction. In Satya Dhayan Ghosal V. Smt. Deo Rajan Devi an order of remand has been held to be an interlocutory judgment in that it does not terminate the proceeding and its correctness can be challenged in appeal from the final order. In coming to the aforesaid conclusion the Apex Court has relied on its earlier decision rendered in Keshar Deo Chamaria Vs. Radhey Kissen Chamaria and the proposition laid down therein has been reiterated in Kshistish Chandra vs. Commissioner of Ranchi. In view of these authorities, I am of the considered view that the order of remand passed by Settlement Officer Consolidation was an 'interlocutory order' within the meaning of section 48 of the U.P. Consolidation of Holdings Act and, therefore, not open to revision. Its legality can, however, be examined in revision against the final judgments and orders rendered pursuant to the order of remand and if at that stage the Deputy Director of Consolidation finds that the order of remand was legally erroneous, all subsequent proceedings, viz. The order passed by the Consolidation Officer pursuant to the order of remand as also the appellate order passed in appeal preferred against such order of the Consolidation Officer would become non est. Since the order of remand is neither appealable nor revisable, its correctness is open to examination at subsequent stage when the matter comes up finally in revision. The impugned order is therefore, liable to be quashed on this ground as well. The decision in Bhawat and others v. Deputy Director of Consolidation and others has no application to the facts of this case and in any case it cannot be*

accepted in view of the Apex Court's direct decisions on the point."

28. Learned Single Judge relying on the judgment of the Apex Court in ***Satyadhan Ghoshal's*** *and* ***Kshitish Chandra Bose's*** cases (supra) took the view that remand order by Settlement Officer of Consolidation was an interlocutory order. Learned Single Judge did not refer to definition of "interlocutory order' as given in Section 48, Explanation (2). Learned Single Judge held that correctness of remand order is open to examination at subsequent stage when the matter comes up finally in revision. As observed above, the judgment of the Apex Court in ***Satyadhan Ghoshal's and Kshitish Chandra Bose's*** cases (supra) were not the judgments laying down any proposition that against an order of remand no appeal lay, rather the Apex Court in the above judgments held that against an interlocutory order of remand if no appeal is filed or no appeal is available, the correctness of the same can be challenged in the High Court in subsequent proceedings. There cannot be any dispute to the above proposition as laid down by the Apex Court.

29. In ***Rajit Ram Singh's*** case (supra) learned Single Judge again held that the order of remand is an interlocutory order without referring to Explanation II of Section 48 of U.P. Consolidation of Holdings Act, 1953. In paragraph 6 of the judgment even Explanation (2) has not been quoted. In ***Rajbir's*** case (supra) again the learned Single Judge without considering Explanation (2) has committed the same error taking the view that order of remand is an interlocutory order. We may notice another judgment of learned Single Judge in the case of ***Ram Bhajan and others vs. Deputy Director of Consolidation, Allahabad*** reported in 2001(92) R.D. 330. In the said case learned Single Judge opined that remand orders would be interlocutory order if they are simplicitor remand orders. However, if the Court remanding the matter has recorded finding of fact or even finding of law which would be finding after remand upon the Court to which matter has been remanded, the remand order would not be interlocutory order. Following was laid down in paragraph 3 of the said judgment:-

''3. *Learned counsel for the petitioner contends that the revision of the respondents was not maintainable because the order of S.O.C. dated 5.1.1985 passed in appeal was remand order and, therefore, interlocutory order as held by decision of this Court in the case of Ram Narayan v. Deputy Director of Consolidation and decision reported in 1999(90) RD 313. Both these decisions rely upon the decision of the Supreme Court in the case of Kshitish Chandra Bose v. Commissioner, Ranchi. The decision of the Supreme Court has been given in the context of Civil Procedure Code. Learned counsel for the respondents has relied upon a decision of the Division Bench of this Court in the case of Pritam Singh v Assistant Director of Consolidation, for the proposition that remand orders are not always interlocutory order and it depends upon the remand order. Learned counsel for the petitioner has argued that the bar of revision against interlocutory order was introduced in Section 48 of the U.P. Consolidation of Holdings Act in the year 1982 for the first time and, therefore, the decision of the Division Bench of the year 1978 cited by the respondents is no longer good law. Having considered all the*

decisions as well as logical points I am of the opinion that remand orders would be interlocutory order if they are simplicitor remand orders. However, if the Court remanding the matter has recorded finding of fact or even finding of law which would be finding after remand upon the Court to which matter has been remanded, the remand order would not be interlocutory order, as in respect of those issues it has finally decided the controversy."

30. We are of the view that no such distinction can be drawn for purposes of determining as to whether order of remand is an interlocutory order or not. The definition of interlocutory order as given in Explanation (2) does not contemplate any such distinction.

31. In view of the foregoing discussions, we are of the view that the order of the Settlement Officer of Consolidation by which appeals were finally decided was not an interlocutory order and the revision under Section 48 of U.P. Consolidation of Holdings Act, 1953 was clearly maintainable.

Our answers to the questions are as follows:-

1) an order passed in appeal under section 11 of the U.P. Consolidation of Holdings Act by the Settlement Officer Consolidation deciding the appeal finally by setting aside the order of the Settlement Officer Consolidation and remanding the matter to the Consolidation Officer is not an interlocutory order within the meaning of section 48 of the U.P. Consolidation of Holdings Act and revision is not barred against such order under section 48.

2) the law down in Ajab Singh and others Vs. Jt. Director of Consolidation and others, reported in 1996 R.D. 104, Rajbir Vs. Dy. Director of Consolidation, reported in 1999 (90) R.D. 313, Rajit Ram Singh and others Vs. Mahadev Singh and others, reported in 2002 (93) R.D. 224 do not lay down the correct law.

32. After answer to the above two questions nothing more remains to be decided in the writ petition. The order of Deputy Director of Consolidation dated 13th February, 2008 holding the revision to be maintainable against the order of remand passed by the Settlement Officer of Consolidation is fully justified. Thus we decide the entire writ petition by this order.

33. The writ petition is dismissed.

34. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.5.2010

BEFORE
HON'BLE SATYA POOT MEHROTRA, J.
HON'BLE SUBHASH CHANDRA NIGAM, J.

Civil Misc. Writ Petition No. 24595 of 2010

Smt. Shakuntala Devi and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri D.D. Kushwaha

Counsel for the Respondents:
Sri Rohit Agrawal
C.S.C.

Constitution of India Art.226- Loan for Housing purpose- default in payment of installments- Home mortgaged put on auction sale but auction could not take place on date fixed-petition willing and ready to deposit entire amount if installments fixed by the court with consent of other Party-direction to deposit entire amount with up to date interest in six installments amount already deposited shall be adjusted- in case of default- liberty given to proceed with recovery proceeding in accordance with law.

Held: Para 8

(i) The petitioners may deposit the entire amount sought to be recovered directly with the contesting respondent no.3 (Uttar Pradesh Sahkari Avas Sangh Limited) in six equal quarterly instalments with up-to-date interest.

(ii) The first instalment may be deposited by 19.8.2010, the second by 19.11.2010, the third by 19.2.2011, the fourth by 19.5.2011, the fifth by 19.8.2011, and the last/sixth by 19.11.2011. Any amount already deposited will be adjusted.

(iii) This order will not affect any auction or sale which may already have taken place.

(iv) If the petitioners deposit the instalments with up-to-date interest, as fixed by this Court, in time, the recovery shall be kept in abeyance but if the petitioners default in paying any of the instalment, this order shall stand vacated and the respondents will be at liberty to proceed against the petitioners in accordance with law.

(v) On deposit of all the instalments with up-to-date interest, as fixed by this Court, in time, the recovery proceedings against the petitioners will be dropped, and the recovery charges will not be recovered from the petitioners.

(vi) This order will not be applicable if the petitioners have filed any earlier writ petition challenging the recovery of this loan.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The petitioners had taken loan for housing purposes from the respondent no.3 (Uttar Pradesh Sahkari Avas Sangh Limited). It appears that the petitioners committed default in the payment of intalments, and consequently, recovery proceedings have been initiated against the petitioners.

2. Sale-Proclamation (Annexure 1 to the Writ Petition) was issued on 18.3.2010 for auction of the House mortgaged with the respondent no.3 as security for the said loan. The date for auction was fixed as 21.4.2010.

3. Shri Rohit Agrawal has put in appearance on behalf of the respondent no.3.

Shri Rohit Agrawal has stated that no auction could take place on 21.4.2010 pursuant to the aforesaid Sale-Proclamation.

4. We have heard Shri D.D.Kushwaha, learned counsel for the petitioners and Shri Rohit Agrawal, learned counsel for the respondent no.3.

5. Shri D.D. Kushwaha, learned counsel for the petitioners states that the petitioners are ready to deposit the entire dues of the respondent no. 3 with up-to-date interest if time to deposit the same in instalments is granted.

6. Shri Rohit Agrawal, learned counsel for the respondent no. 3 has no objection to the aforesaid proposal.

7. In the circumstances, the present Writ Petition is disposed of finally with the following directions:

8. (i) The petitioners may deposit the entire amount sought to be recovered directly with the contesting respondent no.3 (Uttar Pradesh Sahkari Avas Sangh Limited) in six equal quarterly instalments with up-to-date interest.

(ii) The first instalment may be deposited by 19.8.2010, the second by 19.11.2010, the third by 19.2.2011, the fourth by 19.5.2011, the fifth by 19.8.2011, and the last/sixth by 19.11.2011. Any amount already deposited will be adjusted.

(iii) This order will not affect any auction or sale which may already have taken place.

(iv) If the petitioners deposit the instalments with up-to-date interest, as fixed by this Court, in time, the recovery shall be kept in abeyance but if the petitioners default in paying any of the instalment, this order shall stand vacated and the respondents will be at liberty to proceed against the petitioners in accordance with law.

(v) On deposit of all the instalments with up-to-date interest, as fixed by this Court, in time, the recovery proceedings against the petitioners will be dropped, and the recovery charges will not be recovered from the petitioners.

(vi) This order will not be applicable if the petitioners have filed any earlier writ petition challenging the recovery of this loan.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2010

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE RAJESH CHANDRA, J.

Crl. Misc. Writ Petition No. 25378 of 2009

Imran and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the petitioners:
Mir Sayed

Counsel for the Respondents:
G.A.
Sri Shahabuddin

Constitution of India, Art-226-Quashing of FIR-Dispute arises out from matrimonial differences-if the Parties settled their difference out of court and compromised to settled all cases against each other-writ court should not hesitate to quash the criminal Proceeding to secure the end of justice.

Held: Para 8

In view of the above judgments of the Hon'ble the Supreme Court, it is clear that in cases where the parties have settled their disputes amicably the High Court should not hesitate in quashing the criminal proceedings so as to secure the ends of justice.

Case law discussed:
(2008) 2 SCC (Cri.) 464; 2000 SCC (Cri) 733; AIR 2003 Supreme Court 1386; (1977) 2 SCC 699.

(Delivered by Hon'ble Rajesh Chandra, J.)

1. This writ petition has been filed under Article 226 of the Constitution of India by the petitioners Imran and others for issuing a writ, order or direction in the

nature of certiorari to quash the impugned First Information Report dated 04.12.2009 in case crime no. 997 of 2009, under Sections 498-A, 323, 506 I.P.C. And 3/4 D. P. Act, P.S., Chakeri, District, Kanpur Nagar, (Annexure no. 1 to the writ petition). It has been further prayed that writ, order or direction in the nature of mandamus directing the respondents not to arrest the petitioners in the above mentioned case may also be issued.

2. The facts as are discernable from the papers filed with this writ petition are that informant Shahid Hussain lodged a First Information Report at P.S., Chakeri, District, Kanpur Nagar on 04.12.2009 at 2:00 p.m. against the petitioner Imran, his family members and relatives mentioning therein that informants Sister Smt. Salma Khatoon was married to the petitioner Imran on 04.01.2002 and an amount of Rs.35 lacs was spent in the marriage. However, the husband and in-laws were not satisfied with the dowry given at the time of marriage and they started demanding a plot of 200 Sq. Yards along with Rs.15 lacs for carrying the business. Smt. Salma Khatoon was being harassed and teased and beaten due to non-fulfillment of the said demand. When the informant expressed his inability to fulfill the demand, Smt. Salma Khatoon along with her two children was turned out from her marital home.

3. We have heard the learned counsel for the petitioners, the learned counsel for the respondent no. 4 as well as the learned A.G.A., Sri Karuna Nand Bajpayee.

In this writ petition the informant Shahid Hussain, respondent no. 4 appeared. On 26.04.2010 a compromise entered into between Imram (husband) and Smt. Salma Khatoon (wife) was produced before the Court. The execution of the compromise was ratified by Imran and Smt. Salma Khatoon.

4. In this compromise it has been mentioned that a divorce has taken place between the husband and the wife and they are living separately. It has further been mentioned that the two sons Mohd. Aman, 6 years and Mohd. Azeem, 4 years are living with their mother Smt. Salma Khatoon and they will continue to remain with her. The husband will not initiate any proceedings in any Court to take their custody. It has also been averred that the husband shall pay Rs.6,50,000/- each for the maintenance and education of the two sons and Rs.7,00,000/- for the maintenance of wife Smt. Salma Khatoon through three drafts and that the wife Smt. Salma Khatoon or two sons shall not be entitled to any money in future.

A mention was also made that the informant Shahid Hussain has lodged a report against the husband Imran and his relatives which is under challenge in this writ petition. It has further been mentioned that Ahmed Hasan a relative of husband Imran has also lodged a report against the brother and brother-in-law of the wife at P.S., Chakeri, District, Kanpur Nagar which is registered as crime no. 1001 of 2009, under Sections 323, 324, 452, 504, 506 and 147 I.P.C. In this compromise the husband and wife have agreed that they will do all that is necessary for the withdrawal of the case so that the matter ends forever. In the case crime no. 1001 of 2009 at P.S., Chakeri, the police has submitted a final report in the Court of Chief Metropolitan Magistrate, Kanpur Nagar, wherein the

informant of the case namely Ahmad Hasan shall move an application or the affidavit as the case may be. Similarly, the informant Shahid Hussain will make all endeavors for the disposal of the case under Section 498-A I.P.C. etc. registered at crime no. 997 of 2009 at P.S., Chakeri. It has also been mentioned that since the husband Imran is in jail in crime no. 997 of 2009 hence his bail application no. 6532 of 2010 (Imran V/s. State of U.P. and others) has been filed in the High Court, Allahabad, in which the hearing is yet to take place. The above said compromise has been signed by the witnesses Ahmad Hasan, Shahid Hussain, Mohd. Moin and Sageer Ahmad.

5. On 26.04.2010 the husband Imran submitted three drafts of the above said amount and the same were handed over to the wife Smt. Salma Khatoon as per the terms of the above said compromise.

6. It is clear from the above noted facts that the parties have redressed their grievance with the help of family friends as well as elderly people of the Muslim Community.

7. It has been held by the Apex Court in **Madan Mohan Abbot V/s. State of Punjab, (2008) 2 SCC (Cri.) 464** as under :-

"It is advisable in the disputes where the question involved is of a purely personal nature, the Court should ordinarily accept the terms of the compromise even in criminal proceeding as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the Courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilized in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law."

Hon'ble the Supreme Court in G.V. Rao V/s. L.H.V. Prasad, 2000 SCC (Cri.) 733 observed as under:-

"There has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about re-approachment are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a Court of law where it takes years and years to conclude and in that process the parties lose their ?young? days in chasing their ?cases? in different courts."

Hon'ble the Court further observed as under:-

"Section 498-A was added with a view to punish a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter-

productive and would act against the object for which this provision was added. There is very likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XX-A of the Indian Penal Code."

Hon'ble the Supreme Court in B.S. Joshi V/s State of Harayana A.I.R. 2003 Supreme Court 1386 referred its another judgment rendered in **State of Karnataka V/s L. Muniswamy and others (1977) 2 SCC 699** and held as under :-

"In the exercise of this wholesome power, the High Court is entitled to quash proceedings if it comes to the conclusion that ends of justice so require. It was observed that in a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice and that the ends of justice are higher than the ends of mere law though justice had got to be administered according to laws made by the legislature. This Court said that the compelling necessity for making these observations is that without a proper realization of the object and purpose of the provision which seeks to save the inherent powers of the High Court to do justice between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction. On facts, it was also noticed that there was no reasonable likelihood of the accused being convicted of the offence. What would happen to the trial of the case where the wife does not support the imputations made in the FIR of the type in question. As earlier noticed, now she has filed an affidavit that the FIR was registered at her instance due to temperamental differences and implied imputations. There may be many reasons for not supporting the imputations. It may be either for the reason that she has resolved disputes with her husband and his other family members and as a result thereof she has again started living with her husband with whom she earlier had differences or she has willingly parted company and is living happily on her own or has married someone else on earlier marriage having been dissolved by divorce on consent of parties or fails to support the prosecution on some other similar grounds. In such eventuality, there would almost be no chance of conviction. Would it then be proper to decline to exercise power of quashing on the ground that it would be permitting the parties to compound non-compoundable offences. Answer clearly has to be in 'negative'."

8. In view of the above judgments of the Hon?ble the Supreme Court, it is clear that in cases where the parties have settled their disputes amecably the High Court should not hesitate in quashing the criminal proceedings so as to secure the ends of justice.

9. In the circumstances noted above the F.I.R. of crime no. 997 of 2009 under Sections 498-A, 323, 506 I.P.C. And 3/4 D.P. Act, P.S., Chakeri, District, Kanpur Nagar against the petitioners Imran and others are quashed. It is further directed that Chief Metropolitan Magistrate, Kanpur Nagar in whose Court the final report has been submitted by the police in crime no. 1001 of 2009 under Sections 323, 324, 452, 504, 506 and 147 I.P.C., P.S., Chakeri, District, Kanpur Nagar, to

accept final report within three days after receiving the copy of this order.

10. The petitioner Imran, who is confined in jail in crime no. 997/2009, under Sections 498-A, 323, 506 I.P.C. And 3/4 D.P. Act, P.S., Chakeri, District, Kanpur Nagar is directed to be released from jail confinement forthwith.

This writ petition is allowed as above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Civil Misc. Writ Petition No 26195 of 2010

Muneem Ahmad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Suresh Chandra Verma
Sri Deepak Gaur

Counsel for the Respondents:
C.S.C.

U.P. Scheduled Commodities (Distribution) Order 2004-Provisions of G.O. Dated 12.08.08- providing allotment of fair Price Shop-Giving preference to blind person Village Gram Panchayat-if not available such candidate-at block level-blind persons-challenge made on ground of disqualification by nature to transport, maintain stock register and proper distribution held-misconceived-prohibition contained in clause 26 of Sub-agency but not about taking help of family members friend or employee to help such disable persons to run the fair price shop.

Held: Para 12

The physically disabled persons are a class by themselves. The provision for reservation of distribution of scheduled commodities under a Government grant as a largesses, to the physically disabled persons is both a social welfare measure and an affirmative action in consonance with Section 43 of the Act of 1995 to rehabilitate physically disabled (differently abled) persons in life. The reservation conforms both to the constitutional scheme and the provisions of the Act of 1995 for disabled persons.

Case law discussed:
2009(14) SCC 546, (1995) 1 SCC 85, (2009) 4 SCC 798.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard Shri Suresh Chandra Verma, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents.

2. By this writ petition, the petitioner has challenged the reservation for blind persons to run Fair Price Shops under the Public distribution Scheme vide Government orders dated 17.8.2002, as clarified by Government order dated 12.8.2008 issued under the U.P. Scheduled Commodities (Distribution) Order 2004. He has also challenged the Government Order dated 12.8.2008in so far it provides for reserving the Gaon Sabhas filling up the backlog for such disabled persons on priority by giving first preference to blind persons, and to select a person from the block, if no blind person of the village applies for allotment. The challenge is made on the ground that a blind person cannot run the Fair Price Shop. The petitioner has relied upon definition of 'Agent' and 'Person' in the Control Order and 3 & 4, and clause 26,

which prohibits the transfer of the agency or appointment of sub-agent. Clause-2 (c), clause (q), 3, 4 and clause 26 of the Control Order 2004 are quoted as below:-

*"2(c) **"Agent"** means a person or a cooperative society or a Corporation of the State Government authorised to run a fair price shop under the provisions of this order;*

*(q) **"Person"** means an individual, a partnership firm, a Cooperative Society or Company incorporated under the Companies Act, 1956;*

*3. **Setting up of fair price shop**.- With a view to effecting fair distribution of Scheduled Commodities the State Government may issue directions under Section 3 of the Act to set such number of fair price shops in an area and in the manner as it deems fit.*

*4. **Running of fair price**- (1) A fair price shop shall be run through such person and in such manner as the Collector, subject ot the directions of the State Government may decide.*

(2) A person appointed to run a fair price shop under sub-clause (1) shall act as the agent of the State Government.

(3) A person appointed to run a fair price shop under sub-clause (1) shall sign an agreement, as directed by the State Government regarding running of the fair price shop as per the draft appended to this order before the competent authority prior to the coming with effect of the said appointment.

*26. **Ban on Transfer of Agency**- No person authorized as agent by the competent officer shall appoint as sub-agent or transfer his agency to any other person by any means whatsoever and no person other than the person authorised as agent shall carry on business either as a sub-agent or as a transferee from the agent or otherwise on behalf of such agent."*

3. It is submitted that a 'person' defined in clause-2 (c) and clause 2 (q) may include an individual, but that such an individual, taking into account the nature of the business activity of a Fair Price Shop, cannot be a blind person.

4. It is submitted that a blind person is not competent to manage and run a shop. By the nature of his disability it will be difficult for him to maintain store, the stock of scheduled commodities, maintain accounts and to do public dealing. The multifarious activities of a fair price shop keeper, including supplies in different schemes and mid-day-meal scheme require a person running the shop to be educated with full ability of all functions of body and senses.

5. The 'blindness' is a class of disability, with which a person may unfortunately suffer, either from birth, or on account of any disease or accident. In all the cases of partial or total blindness, a person is handicapped to perform, a few functions in life, which a person endowed with vision may be able to perform. A blind person may be differently abled, but he may be educated before he was blinded or can learn and be educated thereafter. The modern methods of learning for blind persons allow them to read and write, maintain accounts, work on computers, and to acquire knowledge as efficiently as normal persons. There are many examples

in the society, where blind persons are successfully running business and carrying on professions. The blindness, as a disability does not restrict all the functions of normal life. The running of a shop is certainly not such an activity.

6. It is contended that the delimitation of the villages can be made only on the ground of caste as it is provided for the elections of the Gram Pradhan. The reservation for physically handicapped is not under the scheme of distribution of the scheduled commodities under the Public Distribution Scheme and that by necessity the blind person will either transfer or sublet the shop.

7. The Government, while distributing the largesses, can provide for reservation for physically challenged persons. The disability of a person, is not a bar to the grant of agency to distribute Scheduled Commodities under the Public Distribution Schemes, either under the Control Order or any other provision in law. On the contrary the law permits such reservations from Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

8. In **Union of India vs. Devendra Kumar Pant 2009 (14) SCC 546,** the Supreme Court observed that the Act of 1995, is enacted to extend helping hand to persons with disabilities so that they can lead self reliant life with dignity and freedom.

9. In **Mahinder Kumar Gupta and others vs. Union of India, Ministry of Petroleum and Natural Gas (1995) 1 SCC 85** the Supreme Court approved the reservation in grant of dealership or distributorship of petroleum products as Government largesse prescribing the eligibility criteria including physically handicapped persons. The Supreme Court relied upon Article 39 (b) of the Constitution of India, which postulates that the ownership and control of the material resources of the community are to be so distributed, as to best subserve the common good. Clause (c) prevents concentration of wealth and means of production to the common detriment. Since the grant of dealership or distributorship of the petroleum products belongs to the Government largesse. The Government in its policy of granting the largesse have prescribed the eligibility criteria. In case of physically handicapped persons only three classes of persons were made ineligible in the guidelines. The Supreme Court held that the physically handicapped persons have to be treated as a class by themselves and that any person other than physically handicapped cannot claim parity with such persons.

10. In **Prajwala vs. Union of India and others (2009) 4 SCC 798** the Supreme Court in a public interest litigation is monitoring the implementation of Section 43 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Section 43 of the Act provides:-

"43. Scheme for preferential allotment of land for certain purposes-

The appropriate Governments and local authorities shall by notification frame schemes in favour of persons with disabilities, for the preferential allotment of land at concessional rates for-

(a) house;

(b) setting up business;

(c) Setting up of special recreation centres;

(d) establishment of special schools;

(e) establishment of research centres;

(f) establishment of factories by entrepreneurs with disabilities."

11. A direction has been issued in Prajwala's case to the State Government or local authorities for allotment of land, for various purposes indicated in Section 43 of the Act and various items indicated in it, for giving preferential treatment to the disabled persons for allotment of land at concessional rates.

12. The physically disabled persons are a class by themselves. The provision for reservation of distribution of scheduled commodities under a Government grant as a largesses, to the physically disabled persons is both a social welfare measure and an affirmative action in consonance with Section 43 of the Act of 1995 to rehabilitate physically disabled (differently abled) persons in life. The reservation conforms both to the constitutional scheme and the provisions of the Act of 1995 for disabled persons.

13. Clause 26 of the Order of 2004, prohibits sub-agency or transfer of the agency. It does not prohibit taking help of a family member, friend, or employing a person to help the disabled person to run the agency.

14. The writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.04.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE K.N. PANDEY, J.

Civil Misc. Writ Petition No. 39797 of 2007

Adhikari/Karmchari Samagra Vikas Samiti (U.P.) & another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Awadhesh Mishra

Counsel for the Respondent:
Sri S.K. Shukla
Sri Chandra Shekhar Singh
C.S.C.

Constitution of India Art.-226- read with Art-75(15) of Article of Association of company-Petitioner working as officer in corporation-claiming Parity of retirement age of State Govt. employees who retire at the age of 60 yrs and the Professor working in university up to the age of 65 yrs. In pursuance of interim order worked up-to the age of 60 yrs-petitioners purposely concealed this fact regarding decision of Board of director by which proposal for extension of age of superannuation was turn down in view of provision of Art. 75(15)-cannot be allowed to work beyond 50 yrs-request for non refund of salary drawn in pursuance of interim order-also refused considering the conduct of petitioner.

Held: Para 9 & 11

The age of retirement of its employees is a policy matter to be decided by its Board of Directors having the authority to frame the service regulations. The policy has to be based upon the financial condition, recruitment policy and other

considerations. The Court does not ordinarily interfere in such policy matters unless the policy is shown to be violative of any statutory provisions of law, arbitrary or capricious.

Learned counsel for the petitioner submitted that those petitioners, who have worked upto the age of 60 years under the interim orders passed by the Court, and those, who are working after 58 years, taking advantage of the interim orders should not be subjected to recovery of the pay and that their retirement dues should be paid as if they have retired at the age of 60 years. We are not inclined to accept the submission on the ground that the petitioners did not come to the Court with clean hands. The interim orders were granted in the year 2007, whereas the Board of Directors of the Corporation in its 127th meeting held on 27.9.2006 had turned down the proposal for increasing the age of retirement to 60 years. The petitioners did not disclose this fact in the writ petition. It is difficult to believe that this fact was not within the knowledge of Adhikari/ Karmchari Samagra Vikas Samiti of the Corporation. Further the State Government and the Bureau of Public Enterprises have consistently taken a decision not to increase the age of retirement of the employees of the Public Sector Corporations in U.P. The petitioners were fully aware of the decision of the State Government and have not denied that they had knowledge of the Government Orders dated 5.2.1986, 25.7.2002 and thereafter 30.7.2007 passed by the State Government declining the request of the Corporations to increase the age of retirement. The petitioners misled the Court in obtaining the interim order and have taken advantage of their own wrong. The petitioners are, therefore, not entitled to any equitable consideration and are not entitled to keep the benefits drawn under the interim orders of the Court.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. In these three connected writ petitions the association of officers and employees of the U.P. State Food and Essential Commodities Corporation Ltd. (in short the Corporation) represented by Shri Rajendra Kumar Verma in Writ Petition No.39797 of 2007; Shri Jagvir Singh serving as Incharge District Accounts Officer, Badaun in Writ Petition No.33859 of 2007, and Shri Awadhesh Narayan Mishra serving as District Incharge, Allahabad with additional charge of District Incharge, Bahraich, have prayed for directions to quash the Government Order dated 30.7.2007 by which the State Government has in pursuance to the Government Order dated 25th July, 2002 issued by Public Sector Enterprises communicated to the Managing Director of the Corporation that his proposal for increasing the age of retirement of employees of the Corporation from 58 to 60 years was not found acceptable.

2. The petitioners have prayed for directing the respondents not to retire them, until they attain the age of 60 years, on the ground that the State Government has amended Fundamental Rule 56 of the Financial Handbook Vol.2 para II to IV vide notification dated 27th June, 2002, in exercise of its powers under the proviso to Art.309 of the Constitution of India increasing the age of superannuation of all the State Government servants from 58 to 60 years. In the 20th adjourned meeting of the Board of Director of the Corporation held on 10.1.1979 at 17 Gokhale Marg, Lucknow it was decided at Item No.16 that the orders of the Public Enterprise Bureau of the Government and the recommendations made by it will

automatically apply to the Corporation. The petitioners have also claimed discrimination in retiring them at the age of 58 years, whereas the employees of the State Government have been extended the benefit of superannuation at 60 years.

3. In all these three writ petitions the Court granted interim orders directing that since the State Government has not taken any decision on the letter of the Chairman, there is no reason as to why the age of superannuation in the Corporation should continue to remain 58 years, whereas the age of superannuation in the State Government is 60 years and in the Universities 65 years. The Court was of the prima facie opinion that for the laxity on the part of the State Government the petitioners/ members should not suffer and directed that the respondents to continue the petitioner in service till they attain the age of 60 years and to pay their salary.

4. The Corporation failed in persuading the Court to vacate the interim order filed Special Leave to Appeal (Civil) No.4004-4005 of 2008. The appeal was dismissed by the Apex Court as having become infructuous on 31.7.2009, with a request to the High Court to expedite the main matter.

5. The writ petitions were adjourned in the absence and on the illness slip of the counsel of the petitioners on 4.12.2009, 11.12.2009 and 18.1.2009. The matter was finally heard and the judgment was reserved on 16.2.2010.

6. Shri Chandra Shekhar Singh representing the Corporation has filed counter affidavit of Shri Syed Ahmad, Manager (Establishment), U.P. State Food & Essential Commodities Corporation Ltd. It is stated by him that the Corporation is duly incorporated Corporation and is an autonomous organisation having its own legal entity. It is a company incorporated under the Companies Act having its own Board of Directors, which is entitled to exercise all the powers and do all such acts and things as the company is authorised to do so. Under Art.79 (15) of the Articles of Association, the service regulations were framed, after they were duly approved in the Board of Directors in its Meeting dated 29.6.1987, and as per the Regulation 45 all employees are public servant within the meaning of Indian Penal Code. The Regulations provide for retirement age at 58 years. In paragraph 10 of the counter affidavit it is stated that neither the Board nor the State Government has accorded any approval for increasing the age of retirement. On 5.2.1986 the Government Order was issued, whereby the State Government communicated to all the Corporation that he age of retirement should not be increased by the Corporations without taking prior approval of the Government. By another Government Order dated 25.7.2002 the State Government again communicated that the age of retirement of the officer will not be increased and that the Government has taken a decision that there will not be any increase in the age of retirement of the employees of the corporation. The recommendations of the Managing Director of the Corporation were rejected by the State government on 30.7.2007 after which the matter was taken up in the 127th meeting of the Board of Directors of the Company. At Item No.9 with regard to increasing the age of retirement to 60 years, the Board of Directors rejected the proposal.

7. The averments in the counter affidavit that the State Government has decided in its orders dated 5.2.1986, 25.7.2002 and 30.7.2007 not to increase the age of superannuation of the employees of the Corporation and that Board of Directors in its 127th meeting at resolution No.9 did not accept the proposal to increase the age of retirement have not been denied.

8. The State Government has deep and pervasive control over the administration and financial affairs of the Corporation. It is government company under Section 617 of the Companies act, 1956, and is an instrumentality of the State. For the purposes of conditions of service of its employees unless the Corporation decides, with the approval of the State Government, the retirement age of its employees will continue to be governed by the regulations framed by the Board of Directors of the Corporation. The amendment to U.P. Fundamental Rules vide U.P. Fundamental (Amendment) Rules, 2002 dated 27th June, 2002 is applicable only to government servant. The employees of the Corporation are not government servants and are not regulated by Fundamental Rules. Unless the Regulations are amended by the Board of Directors, the petitioners do not have any right of increase in the age of superannuation.

9. The age of retirement of its employees is a policy matter to be decided by its Board of Directors having the authority to frame the service regulations. The policy has to be based upon the financial condition, recruitment policy and other considerations. The Court does not ordinarily interfere in such policy matters unless the policy is shown to be violative of any statutory provisions of law, arbitrary or capricious.

10. Regulation 26 of Service Regulations of the Corporations made under Art.75 (15) of the Articles of Association of the Company, clearly provides that until the Board with the prior approval of the State Government increases the period of employment, which shall not exceed the age of 60 years, every employee shall ordinarily retire at the age of 58 years.

All the writ petitions are accordingly **dismissed.**

11. Learned counsel for the petitioner submitted that those petitioners, who have worked upto the age of 60 years under the interim orders passed by the Court, and those, who are working after 58 years, taking advantage of the interim orders should not be subjected to recovery of the pay and that their retirement dues should be paid as if they have retired at the age of 60 years. We are not inclined to accept the submission on the ground that the petitioners did not come to the Court with clean hands. The interim orders were granted in the year 2007, whereas the Board of Directors of the Corporation in its 127th meeting held on 27.9.2006 had turned down the proposal for increasing the age of retirement to 60 years. The petitioners did not disclose this fact in the writ petition. It is difficult to believe that this fact was not within the knowledge of Adhikari/ Karmchari Samagra Vikas Samiti of the Corporation. Further the State Government and the Bureau of Public Enterprises have consistently taken a decision not to increase the age of retirement of the employees of the Public

Sector Corporations in U.P. The petitioners were fully aware of the decision of the State Government and have not denied that they had knowledge of the Government Orders dated 5.2.1986, 25.7.2002 and thereafter 30.7.2007 passed by the State Government declining the request of the Corporations to increase the age of retirement. The petitioners misled the Court in obtaining the interim order and have taken advantage of their own wrong. The petitioners are, therefore, not entitled to any equitable consideration and are not entitled to keep the benefits drawn under the interim orders of the Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2010

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 23997 of 2010

Dr. Anurag Kumar Tiwari and others ...Petitioners
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri P.N. Saxena
Sri Girijesh Kumar Tripathi
Sri Kamal Kumar Singh

Counsel for Respondents:
Sri V.K. Singh
Sri K.S. Chauhan
Sri Hem Pratap Singh
Sri S.S. Tiwari
A.S.G.I.

Constitution of India, Art-226- Cancellation of whole entrance examination for MD/MS screening test-Text held on 18.02.2010-result declared on 19.02.2010 on certain complaints two members committee found certain irregularities in marking the answer sheets-canceled result declares on 1.4.10-even five members committee found the re-evaluation marking as same of scanner cancellation of entire exam by Vice Chancellor.Without application of mind would meant penalizing successful candidates for no fault of theirs held Vice Chancellor Committed great error of law-as such decision not only arbitrary but unjustified impugned order and consequential Notification Quashed-necessary direction issued.

Held Para 36

Thus, the Vice-Chancellor of the University failed to address himself to the correct issue that was required to be decided. He not only committed an error of fact touching the merit of the decision but also committed an error of law as the decision taken by him is not only arbitrary and unjustified but has been taken without application of mind to any of the relevant consideration. He could not have taken such a drastic action as cancellation of the entire examination and even according to the Five Member Committee this would have meant penalizing the candidates for no fault of theirs.

Case law discussed:
AIR 2006 SC 2571, 2009 (3) ADJ 166, (2007) 6 SCC 382, (2003) 2 SCC 673, (2009) 1 SCC 59, (2005) 13 SCC 744, (2009) 9 SCC 599, (2005) 3 SCC 241, (2006) 3 SCC 208, 2007 AIR SCW 4884, AIR 2009 SC 2975, (2006) 11 SCC 67, 2009 (6) SCC 171, 2008 AIR SCW 8194, (2003) 2 SCC 673, 2006 (3) ESC 2041.

(Delivered by Hon'ble Dilip Gupta, J.)

1. Thirty six out of the fifty candidates who had appeared at the MD/MS Merit Screening Test-2010 for Institutional candidates conducted by the Institute of Medical Sciences, Banaras Hindu University, Varanasi (hereinafter referred to as the 'Institute') have sought

the quashing of the order dated 6th April, 2010 passed by the Vice-Chancellor of the University as also the consequential notification dated 13th April, 2010 issued by the Institute for cancelling the Merit Screening Test held on 10th February, 2010 and for holding of a fresh 'Merit Screening Test' for Institutional candidates on 26th May, 2010. The petitioners have also sought a direction upon the respondents to hold the counselling of the petitioners for admission to the MD/MS course as per the merit list declared on 19th February, 2010 on the basis of the Merit Screening Test held on 10th February, 2010.

2. The Institute awards degree of MD/MS in several disciplines/subjects and admission to these courses is made through an All India Test but a separate test called 'Merit Screening Test' is conducted by the Institute for Institutional/Internal Candidates who have passed the Final Professional Examination from the Institute.

3. There were 134 seats available for the MD/MS Course in the Institute for the Academic Year 2010, and the breakup of the seats is as follows:-

(i) DGHS Quota : 67 Seats (i.e. 50% of the total intake)

(ii) Institutional Quota: 43 Seats (50% of the MBBS intake)

(iii) All India Entrance Test Quota : 24 seats

4. The Merit Screening Test for admission against the 43 Institutional seats was held by the Institute on 10th February, 2010 and the All India Entrance Test for the 24 All India Entrance Test Quota seats was held on 21st February, 2010. For the purpose of conducting the Merit Screening Test for the Institutional/Internal candidates, the Vice-Chancellor of the University, by the order dated 9th November, 2009, appointed Professor L.D. Mishra, Department of Anesthesiology, as the Professor In-Charge of the MD/MS Entrance Examination-2010, while Professor S.K. Gupta, Department of General Surgery, was appointed as Co-Incharge of the MD/MS Entrance Examination-2010. A Co-ordination Committee was also constituted for conducting the aforesaid MD/MS Entrance Examination-2010 and in its meeting held on 12th November, 2009, the Co-ordination Committee at Item No. 9 resolved that the evaluation of OMR Sheets, preparation of result sheets and its pasting on the University Website will be done with the help of the Computer Centre of the University. The schedule of the MD/MS Test for Institutional candidates was also discussed and it was resolved that as per the procedure practiced last year, the date of Screening Test will be 14th February, 2010 and the date of result on website will be 3rd week of March, 2010. Along with the application form provided to the candidates, Information Leaflet about the Merit Screening Test-2010 for MD/MS admission to Institutional candidates was also provided to the candidates and the relevant information contained in the leaflet is as follows:-

"1. Eligibility: (i) Internal candidates who have passed Final Professional MBBS Examination from Institute of Medical Sciences, BHU in December, 2008 and Supplementary Examination in April, 2009 are eligible.

(ii) The Completed one year Compulsory rotating Internship by 30th April, 2010.

……..

.3. Evaluation, Result & Selection: (i) **There will be only one test paper common to all the subjects. The test paper will consist of 200 objective questions from the subject taught in MBBS. 1 mark will be awarded for each correct answer**. The qualifying marks shall be 50% of the aggregate for general candidates and 40% for SC/ST candidates.

(ii) Selection will be made on the basis of the merit index prepared according to the guidelines provided by the Institute/University for MD/MS selection-2010. Final Merit Index= aggregate % of marks obtained in all the professional examinations+ (1.5 x number of distinctions)-(1.5 x number attempts) + % of marks obtained in the Merit Screening Test-2010.

(iii) **Notwithstanding anything to the contrary contained anywhere in the ordinances of the University, no scrutiny/revaluation of the answer sheet shall be allowed on any ground.**

(iv) Roll number of qualified candidates will be displayed on the institute Notice board.

(v) Selected candidates will have to appear before the admission committee for counselling. In case of equal merit index the inter-se ranking of the candidates should be determined in the following order.

(vi) In case of equal marks the merit shall be decided on the basis of the aggregate of all the Professional Examinations of MBBS. Hence, candidates should clearly and correctly full up the marks obtained and the total marks of all the professional MBBS Examinations in item 11 of the application form (to be verified at the time of counselling). Otherwise any claim for correctness of inter-se merit shall not be entertained.

(vii) If the marks at the above also happens to be the same, the date of birth would be the basis i.e. the candidate senior in the age would rank higher."

(emphasis supplied)

5. Fifty internal candidates appeared at the Merit Screening Test for MD/MS course-2010 which was held on 10th February, 2010 and the result of the Merit Screening Test for internal candidates was declared on 19th February, 2010 after manual checking of the OMR Sheets. Two candidates namely Dr. Rohit Kumar and Dr. Arpit Jain filed applications under the Right to Information Act, on 23rd February, 2010 demanding their OMR Sheets and Answer Keys as well as the OMR sheets of the whole batch. Dr. R. Bharadwaj also moved an application on 9th March, 2010 under the Right to Information Act with a similar prayer. This request was denied but the Two Member Committee constituted by the Vice-Chancellor of the University consisting of two Professors took a decision to re-check the OMR sheets of these three candidates and on manual checking found that in one OMR sheet a major error had occurred because the candidate had actually obtained 135 marks as against 108 marks calculated earlier, but the marks in the other two OMR Sheets remained unchanged. The Committee brought this fact to the notice

of the Director of the Institute and sought his approval for rechecking all the OMR Sheets by the Computer Centre through a Scanner. The Director gave his approval but also advised for a fresh manual checking of all the OMR Sheets. Subsequently, manual rechecking of all the OMR Sheets was done by the Two Member Committee and a few more mistakes were detected. The rechecking through the scanner was also done on 1st April, 2010 and the revised merit list of the Merit Screening Test was put up on the notice board in which there was a change in the marks of 7 out of the 50 candidates.

6. The declaration of the revised result on 1st April, 2010 led to the filing of a representation by ten candidates before the Vice-Chancellor of the University on 3rd April, 2010 with a prayer that the counselling should be done on the basis of the result earlier declared on 19th February, 2010 and not on the basis of the result subsequently declared.

7. On 4th April, 2010, the Vice-Chancellor of the University constituted a Five Member Committee consisting of the Director of the Institute, the Dean Faculty of Medicine, Controller of Examinations and the Deputy Registrar to inquire into the complaints made against the subsequent revision of the examination result and the Committee was asked to submit its report within three days. This Five Member Committee, in turn, asked the Two Professors who had conducted the Merit Screening Test to submit a report. The Two Member Committee then submitted a report dated 5th April, 2010 and it will be useful to reproduce the entire report which is as follows:-

"The Rector Date: 05.04.2010
Banaras Hindu University.
Re: MD/MS Screening Test 2010 for institutional candidates

Respected Sir,

This is with reference to our meeting on 4th April, 2010 (Sunday) in your office (Holkar Bhawan) regarding the rescrutiny of the answer sheets of the MD/MS 2010 screening test for institutional candidates and putting up of the revised computer checked merit list. As directed by you we are herewith presenting to you the circumstance and the sequence of events leading to the above.

1. The MD/MS screening test 2010 for institutional candidate (Total 50 candidate) was held on 10th February, 2010, and the results were put up on the notice board on 19th February, 2010 after manual checking of the OMR (answer) sheets. **The checking had to be done manually because (a) both the scanning machines (one in PMT Cell and other in the Controller's Office) were non-functional and despite our best efforts we could not get either of them rectified and (b) There was immense pressure upon us to declare the results before the BHU All India MD/MS Entrance Test scheduled on February 21, 2010**. In the exam in question, there were 200 questions with one mark for each correct answer. There was no negative marking. (copy of information leaflet enclosed).

2. The BHU All India MD/MS Entrance Test was held on February 21, 2010 for which 3874 candidate had applied. The result was declared on February 25th, 2010 after scanning of the OMR (answer) sheets and computing of

the results in the Computer Centre of BHU. This was possible because of our continued efforts, we could get one of the scanning machines repaired and made functional. There were 200 questions with four marks for each correct answer and minus one mark for each incorrect answer (copy of information leaflet enclosed).

3. Three institutional candidates submitted separate applications under RTI Act to the Dy. Registrar (Admin.1) & CAPIO dated 23.2.2010 and 9.3.2010, which were forwarded to us on 17.3.2010 by Asstt. Registrar & CPIO, IMS. Two of these candidates wanted their OMR sheets (Answer sheets) and answer key and copy of the OMR sheets of the whole batch. We then talked to the Dy. Registrar (Admin.1) & CAPIO on the phone. He told us that OMR sheets have never been given in the past but he also said that we should talk to Dr. K.P. Upadhyay, Controller of Examinations regarding this. We then talked to Dr. Upadhyay and he told us that they had to provide the question booklet and answer key of one of the university entrance examination to one student under RTI Act some time ago **based on a precedence wherein a candidate was provided the question booklet and answer key of the BHU PMT test on the directive of the Central Information Commissioner Mr. Shailesh Gandhi.** Based on the above inputs, we denied the request of all the candidates citing the relevant clause mentioned in the information booklet for candidates for MD/MS 2010 Entrance Test to the same effect.

4. We, however, realized that if the above candidates appealed to the Central Information Commission or went to Court, we might be forced to provide their OMR sheets and the answer key to the Court or its representative/candidate.

5. One of the institutional candidates who had requested for the OMR sheet met us and stated that he was extremely disappointed with the results of the said examination as he had scored more marks than many of his batch mates in the All India PGME as well as in the PG entrance exam of AIIMS, New Delhi.

6. Meanwhile we got another application dated 26th March, 2010 from Shreyas Pandey (who had not qualified in the MD/MS Screening test 2010) under RTI requesting for copy of his OMR sheet, question booklet, answer key and copies of OMR sheets of the whole batch stating that he was not satisfied with his result.

7. Based on 4, 5 and 6 above, we decided that it was worth rechecking the OMR (answer sheets once again because the first time we had checked these sheets manually and had realized that manual checking was very tedious, time consuming and cumbersome and thereby suspecting that mistake might have been made. On manual rechecking of the 3 OMR sheets, we found a major error in the total marks of one of the candidates. In the rechecking he got 135 marks instead of 108 marks that he had been given earlier. The marks of the other 2 candidates were unchanged.

8. This matter was brought to the notice of our Director and we told him that **in the interest of fair-play and justice** we should get all the OMR (Answer) sheets rechecked by the Computer Centre. We also believed that

since the **Counseling had not yet been held results had to be re-declared when it was found that an error had occurred earlier. More recently, the CPMT results (combined entrance exam for entrance in the U.P. Medical Colleges) conducted by VBS Purvanchal University also had to be redeclared because of errors in the initial results**. The Director gave his approval for rechecking by the Computer Centre, but at the same time asked us to check all the OMR (Answer) sheets manually before going to the Computer Centre.

9. On manual rechecking a few more mistakes were detected in the results which **reinforced the need of a computerized checking to prevent hardship to affected students as well as future litigation**. The rechecking was done on 1st April, 2010 using the OMR scanner and revised merit list of the screening test was put up on the notice board on 2nd April, 2010. There was a change in the marks of 7 out of 50 candidates.

We trust, this clarifies the sequence of events and the circumstances which made us embark upon this course of action."

8. The Five Member Committee thereafter submitted a report dated 5th April, 2010 to the Vice Chancellor of the University. It found, on a comparison of the scores announced on 19th February, 2010 and 1st April, 2010, that there was a change of scores in the case of seven candidates. In one case there was a decrease of three marks while in the case of the remaining six candidates, the increase was of one mark each in four cases, three marks in one case and 27 marks in the case of Dr. Rohit Kumar. The Committee also compared the scores contained in the list announced on 1st April, 2010 with that of the computer generated list and both the lists tallied and were in order. The Committee submitted its report dated 5th April, 2010 to the Vice-Chancellor of the University with following 'Analysis and Findings' and 'Conclusion'.

"Analysis and Findings

It may be seen that Professor Incharges of the MD/MS screening test had reiterated that no revaluation can be done in response to the RTI applications of some of the candidates. **However, without any formal request they themselves decided to reevaluate the OMR sheets without seeking permission of the competent authority.** After having done this they obtained the permission of the Director, IMS, for computer evaluation of the OMR sheets, without informing him about the RTI applications and their disposal. **Further, they were fully aware that the rule 3(iii) of the test does not permit such scrutiny/reevaluation.** The rule 3(iii) of the said screening test reads as under:

3(iii) "Notwithstanding anything to the contrary contained anywhere in the ordinance of the university no scrutiny/reevaluation of the answer sheet shall be allowed on any ground." (Annexure I)

In addition, there are several disturbing facts/questions pertaining to the whole affair, some of which are noted below:

1. The candidate protested on 25.2.2010 i.e. 6 days after declaration of the scores on 19.2.2010.

2. The Professor Incharges themselves evaluated the OMR sheets together and did not bother to have the scores verified, preferably, by some independent persons.

3. They have not bothered to maintain any record of either the first or the second manual evaluation.

4. They undertook reevaluation on 26.2.2010 without any formal request for the same, and that too after they had denied the same to RTI applicants in view of rule 3(iii).

5. It is difficult to understand as to how one can miss evaluation of 50 questions of an OMR sheet.

Conclusion

We feel that the entire process of the test including evaluation of OMR sheets for admission to various courses in IMS needs an expert review and possible lacunae need to be identified and corrective measures taken.

We are forced to conclude that the evaluation process of the OMR sheets was done without due care required in such a sensitive matter, and in total contravention of the relevant rules.

There are three possible options with regard to the MD/MS internal screening test of 2010 in question.

a) The entire test may be cancelled and fresh test may be conducted. This would, however, mean penalizing the candidates for no fault of theirs and may arouse genuine protests from them.

b) The result declared on 01.04.2010 may be cancelled since this is in contravention of the explicit rule 3(iii) of the said test. However, this would lead to acceptance of the Mark list which has been shown to be incorrect on subsequent computer verification.

c) The mark list declared on 19.02.2010 may be withdrawn and that declared on 01.04.2010 may be declared as valid. However, in this case, rule 3(iii) will stand violated."

(emphasis supplied)

9. The Vice-Chancellor of the University thereafter passed an order on 6th April, 2010 for cancellation of the MD/MS Entrance Examination held for internal candidates and for holding of fresh examination and the relevant portion is as follows:-

"After carefully considering the entire matter, the facts of the case on record, the report of the committee constituted to find out the facts of the case under reference, legal opinion of Senior Standing Counsel at High Court, Allahabad in the matter and **having regard to the sanctity of the examination and the results thereof and to the fact that the fairness, transparency and adherence to the established norms in the entire examination process are of paramount importance for the credibility of it and the slightest of slackness or deviation from the established norms vitiates the entire process and raises doubts on the credibility of the system. I have come to the conclusion that in order to maintain**

the sanctity and the credibility of the examination, it would be in the fitness of the things and would be in all fairness to cancel the entire MD/MS Entrance Examination 2010, IMS, BHU (for internal candidates) and to hold it afresh expeditiously.

The entire MD/MS Entrance Examination 2010, IMS, BHU (for internal candidates) is therefore cancelled and the said examination be conducted afresh expeditiously only for those eligible applicants who have applied in response to the advertisement for the above said MD/MS Entrance Examination 2010, IMS, BHU (for internal candidates).

All the applicants of the said examination be informed individually accordingly.

The Professor Incharges of the said MD/MS Entrance Examination 2010, IMS, BHU be not involved in the fresh conduct of examination.

A circular giving direction to all bodies entrusted with the job of Examination/Test to ensure the keeping of Answering Sheets etc. in sealed cover signed by authorized Committee be issued.

A Committee of the following is constituted to suggest curative measures to eliminate such recurrence in the examination in future:

1. The Rector -Chairman
2. The Director, IMS -Member
3. Prof. K.M. Srivastava
Dept. of Geophysics -Member
4. Prof. B.N. Singh,
Dept. of Zoology -Member
5. The Controller of Examinations
or his nominee -Member
6. Prof. I/c, PMT Cell -Member
7. The Asstt. Registrar (UET)
- Member Secretary

An inquiry committee consisting of the following is constituted to inquire into the entire episode and to fix the responsibility for the lapses:

1. The Rector -Chairman
2. Prof. K.M. Srivastava
Dept. of Geophysics -Member
3. Prof. B.N. Singh,
Dept. of Zoology -Member
4. The Dy. Registrar (RAC)
Member secretary"
(emphasis supplied)

11. Pursuant to the aforesaid order passed by the Vice-Chancellor of the University, a notification dated 13th April, 2010 was issued by the Institute for holding the fresh Merit Screening Test for Institutional candidates for admission to the MD/MS course on 26th May, 2010.

12. The petitioners have sought the quashing of the order dated 6th April, 2010 passed by the Vice-Chancellor of the University as also the consequential notification dated 13th April, 2010 issued by the Institute.

13. It needs to be mentioned that eight candidates who had appeared at the aforesaid Merit Screening Test on 10th February, 2010, filed an application in this petition for impleadment as respondent Nos. 6 to 13. This application was allowed by the order dated 11th May, 2010. These newly added respondents have supported the order of the Vice-Chancellor of the

University for holding the fresh examination on 26th February, 2010 after the cancelling the earlier Merit Screening Test held on 10th February, 2010.

14. Another application has been filed by these newly impleaded respondents with a prayer that in the examination to be conducted, the respondents should supply the copies of the OMR sheets with carbon paper so that the carbon copy can be retained by the candidates and the result should also be published on the internet so that they can compare the marks awarded to them in order to maintain complete transparency and sanctity of the examination.

15. I have heard Sri Ashok Khare, learned Senior Counsel appearing for the petitioners assisted by Sri Kamal Kumar Singh. Sri V.K. Singh, learned Senior Counsel assisted by Sri Hem Pratap Singh has made submission on behalf of the respondent-University and the Institute. Sri P.N. Saxena, learned Senior Counsel assisted by Sri G.K. Tripathi has made submissions on behalf of the candidates subsequently impleaded as respondents.

16. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners stated at the time of hearing of the petition that instead of pressing the second relief claimed by the petitioners for holding counselling on the basis of the result declared on 19th February, 2010, the petitioners would be satisfied if the counselling is held on the basis of the result declared on 1st April, 2010 since the petitioners have now realised that there were mistakes in the result earlier declared on 19th February, 2010. It is his submission that the Vice-Chancellor of the University, in the facts and circumstances of the case, particularly in view of the report submitted by the Two Member Committee and the Analysis, Findings and Conclusion of the Five Member Committee, was not justified in cancelling the Merit Screening Test held on 10th February, 2010. He has submitted that the mistakes that had occurred in the manual checking had been subsequently rectified and no mistake whatsoever has been pointed out after the declaration of the result on the basis of the evaluation done by the scanner. He further submitted that in any case, the entire examination could not have been cancelled in view of the decision of the Supreme Court in **Inderpreet Singh Kahlon & Ors., Vs. State of Punjab & Ors., AIR 2006 SC 2571** and the Division Bench of this Court in **State of U.P. & Ors., Vs. Pawan Kumar Singh & Ors., 2009(3) ADJ 166.**

17. Sri V.K. Singh, learned Senior Counsel appearing for the respondent-University and the Institute, however, submitted that the Vice-Chancellor of the University has passed the order after a thorough examination and careful consideration of the facts and circumstances of the case as well as the report of the Inquiry Committee in order to maintain sanctity and credibility of the Examination and this decision of the Vice-Chancellor of the University does not call for any interference by this Court under Article 226 of the Constitution. It is his submission that even if two views are possible, then the view taken by the Authority should not

be interfered with by the Court while exercising powers of judicial review in view of the decisions of the Supreme Court in **S. Sethuraman Vs. R. Venkatraman & Anr., (2007) 6 SCC 382 and Onkar Lal Bajaj & Ors., Vs. Union of India & Anr., (2003) 2 SCC 673.** He further submitted that purity in examination has to be maintained and for this he has placed reliance on the decisions of the Supreme Court in **Director (Studies), Dr. Ambedkar Institute of Hotel Management Nutrition & Catering Technology, Chandigarh & Ors., Vs. Vaibhav Singh Chauhan (2009) 1 SCC 59 and in Manish Ujwal & Ors., Vs. Maharishi Dayanand (2005) 13 SCC 744.** It is also his submission that an Examiner has to be very careful and cautious in the evaluation of the answer sheets to maintain the faith in the examination and so the Vice-Chancellor of the University was justified in cancelling the examination. In support of this contention he has relied upon the decision of the Supreme Court in **Sahiti & Ors., Vs. Chancellor, Dr. N.T.R. University of Health Sciences & Ors., (2009) 9 SCC 599.**

18. He further pointed out that when specific directions had been issued by the Co-ordination Committee on 12th November, 2009 that the evaluation of the OMR sheets and preparation of the result sheet should be done with the help of the Computer Centre of the University, there was no occasion for the two Professors who held the MD/MS Merit Screening Test to check the OMR sheets manually and declare the result in haste on 19th February, 2010 even though the Co-ordination Committee had taken a decision to declare the result on the website by the third week of March, 2010. According to him, the Two Member Committee could not have taken a decision to recheck the answers after the result was declared on 19th February, 2010 and that too without obtaining any order from the Competent Authority in view of Clause 3(iii) of the Rules supplied with the Information Leaflet which provides that notwithstanding anything to the contrary contained anywhere in the Ordinances of the University, no scrutiny/re-evaluation of the answer sheet shall be allowed on any ground.

19. Sri P.N. Saxena, learned Senior Counsel appearing for the newly impleaded students has adopted the submissions advanced by the learned Senior Counsel for the University and has submitted that in the facts and circumstances of the case, the order passed by the Vice-Chancellor of the University for cancelling the examination is justified and does not call for any interference by the Court under Article 226 of the Constitution.

I have considered the submissions advanced by learned Senior Counsel for the parties.

20. There can be no dispute that purity and fairness in examination is of paramount importance and has to be maintained at all costs and that an examiner has to be careful and cautious while evaluating the answer books so that no doubts are cast on the credibility of the examination.

21. In the present case, it is not in dispute that the Merit Screening Test for

internal candidates of the Institute which was held on 10th February, 2010 consisted of 200 objective questions set out in the OMR Sheet with four answers to each question and the candidates were required to select the most appropriate answer. One mark was to be awarded for the correct answer and there was no negative marking. The qualifying marks for the General Category Candidate was 50% while that for the Reserved Category Candidate was 40%. Fifty internal candidates appeared at the said MD/MS Merit Screening Test-2010 and the result for admission to the 43 seats was declared on 19th February, 2010. The Five Member Committee considered the report submitted by the Two Member Committee and also examined the record. It found that there was a change in the marks of seven candidates in the two results declared on 19th February, 2010 and 1st April, 2010 and what is important is that it also found that the scores contained in the list announced on 1st April, 2010 and the scanner generated list were identical and in order.

22. A perusal of the Analysis and Findings of the Five Member Committee shows that it felt highly disturbed by the fact that when Clause 3(iii) of the Rule did not permit scrutiny/re-evaluation of the answer sheets, the Two Member Committee, which conducted the Merit Screening Test, should not have re-evaluated the OMR Sheets without seeking permission of the Competent Authority. The Five Member Committee also noted the following additional disturbing facts pertaining to the whole affair:-

"1. The candidate protested on 25.2.2010 i.e. 6 days after declaration of the scores on 19.2.2010.

2. The Professor Incharges themselves evaluated the OMR sheets together and did not bother to have the scores verified, preferably, by some independent persons.

3. They have not bothered to maintain any record of either the first or the second manual evaluation.

4. They undertook reevaluation on 26.2.2010 without any formal request for the same, and that too after they had denied the same to RTI applicants in view of rule 3(iii).

5. It is difficult to understand as to how one can miss evaluation of 50 questions of an OMR sheet."

23. After having noted the aforesaid, the Five Member Committee concluded that the evaluation process of the OMR sheets was done without due care required in such a sensitive matter and was also in total contravention of the relevant Rules. It is for this reason that it gave three options to the Vice-Chancellor of the University namely:-

"a) The entire test may be cancelled and fresh test may be conducted. This would, however, mean penalizing the candidates for no fault of theirs and may arouse genuine protests from them.

b) The result declared on 01.04.2010 may be cancelled since this is in contravention of the explicit rule 3(iii) of the said test. However, this would lead to acceptance of the Mark list which has been shown to be incorrect on subsequent computer verification.

c) The mark list declared on 19.02.2010 may be withdrawn and that declared on 01.04.2010 may be declared as valid. However, in this case, rule 3(iii) will stand violated."

24. The Vice-Chancellor of the University in his order dated 6th April, 2010 observed that fairness, transparency and adherence to the established norms in the entire examination process are of paramount importance for its credibility and any slackness or deviation from the established norms vitiates the entire process and raises doubts in the credibility of the system. He, therefore, in order to maintain the sanctity and the credibility of the examination, decided to cancel the entire MD/MS Entrance Examination 2010 held for the internal candidates and ordered for holding of a fresh examination expeditiously. This order of the Vice-Chancellor of the University has, therefore, to be examined in the light of the conclusion arrived at by the Five Member Committee that the "evaluation process of the OMR sheets was done without due care required in such a sensitive matter and in total contravention of the relevant Rules".

25. However, before proceeding to do so, it is necessary at this stage to consider the scope of judicial review in such matters. The Supreme Court has repeatedly emphasized that an Authority has to pose to itself a correct question so as to arrive at a correct finding and a wrong question may lead to a wrong answer. An error of fact touching the merit of the decision vis-a-vis the decision making process will also come within the purview of the power of judicial review, apart from other factors like, illegality, irrationality and procedural impropriety. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or substantially inadequate and that all actions of public functionary must be guided by reasons and not by whims or caprice of the persons entrusted with the task.

26. In this connection, reference needs to be made to the decision of the Supreme Court in **Cholan Roadways Ltd. Vs. G. Thirugnanasambandam,** reported in **(2005) 3 SCC 241,** in which the Supreme Court pointed out:

"It is now well settled that a quasi-judicial authority must pose unto itself a correct question so as to arrive at a correct finding of fact. A wrong question posed leads to a wrong answer.....

Errors of fact can also be a subject-matter of judicial review. (See E. v. Secy. of State for the Home Deptt.) Reference in this connection may also be made to an interesting article by Paul P. Craig, Q.C. titled "Judicial Review, Appeal and Factual Error" published in 2004 Public Law, p.788."

(emphasis supplied)

In S.N. Chandrashekar v. State of Karnataka reported in (2006) 3 SCC 208, the Supreme Court also observed:

"It is now well known that the concept of error of law includes the giving of reasons that are bad in law or (where there is a duty to give reason) inconsistent, unintelligible or substantially inadequate. (See de

Smith's Judicial Review of Administrative Action, 5th Edn., p. 286.)

The Authority, therefore, posed unto itself a wrong question. What, therefore, was necessary to be considered by BDA was whether the ingredients contained in Section 14-A of the Act were fulfilled and whether the requirements of the proviso appended thereto are satisfied. If the same had not been satisfied, the requirements of the law must be held to have not been satisfied. If there had been no proper application of mind as regards the requirements of law, the State and the Planning Authority must be held to have misdirected themselves in law which would vitiate the impugned judgment."

(emphasis supplied)

The Supreme Court in **State of Kerala & Ors., Vs. K.Prasad & Anr. 2007 AIR SCW 4884** held as follows:-

"This Court in Shrilekha Vidyarthi (Kumari) Vs. State of U.P. (1991) 1 SCC 212 held that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rule of law, the system which governs us, arbitrariness being the negation of the rule of law. **Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power."**

(emphasis supplied)

In **Uttamrao Shivdas Jankar Vs. Ranjitsinh Vijaysinh Mohite-Patil** reported in **AIR 2009 SC 2975** the Supreme again examined the scope of judicial review and observed:-

"Even in applying the standard of judicial review, we are of the opinion that the scope thereof having been expanded in recent times, viz., other than, (i) illegality, (ii) irrationality and (iii) procedural impropriety, an error of fact touching the merit of the decision vis-a-vis the decision making process would also come within the purview of the power of judicial review."

(emphasis supplied)

27. In this connection reference can also be made to the decisions of the Supreme Court in **Indian Airlines Ltd. Vs. Prabha D. Kanan (2006) 11 SCC 67 and Meerut Development Authority Vs. Association of Management Studies & Anr. 2009 (6) SCC 171.**

28. It is in the light of the aforesaid principles stated by the Supreme Court that the order passed by the Vice-Chancellor of the University has to be examined.

29. The Vice-Chancellor of the University had constituted a high powered Five Member Committee to examine the complaint made by the students about the revised declaration of result on 1st April, 2010. What transpires from the 'Analysis and Findings' and the 'Conclusion' of the Five Member Committee is that it found fault in the evaluation process of the

OMR sheets by the Two Member Committee as manual evaluation of the OMR Sheets was done instead of evaluation by the Scanner as was recommended by the Co-ordination Committee and that manual re-evaluation was done on 26th February, 2010 in contravention of the provisions of Rule 3(iii) under which no scrutiny/re-evaluation of the answer sheets can be allowed on any ground. Learned Senior Counsel appearing for the respondent-University has also placed much emphasis on Rule 3(iii) and has contended that in view of the clear provisions contained in this Rule, it was just not possible for the Two Member Committee to re-evaluate all the OMR Sheets first manually and then by the Scanner.

30. Such observations of the Five Member Committee and the submissions of learned Senior Counsel for the respondent-University cannot be accepted. Rule 3 (iii) will not apply if the Authority holding the examination considers it necessary, in the facts and circumstances of the case, to re-evaluate the OMR Sheets. The fairness in the conduct of an examination has to be ensured and for the credibility of the examination to be maintained, the Authority will be justified in rectifying any mistake that they may have crept in while evaluating the OMR Sheets. This is precisely what has happened in the present case. The Two Member Committee felt the need to re-evaluate the OMR Sheets as three candidates had filed applications under the Right to Information Act and on re-evaluation of these three OMR Sheets it was found that there was a mistake in one out of the three OMR sheets. They then sought the approval of the Director of the Institute for re-evaluation of all the OMR Sheets by Scanner so that if there was any other discrepancy, it could also be rectified. The Director of the Institute, by way of abundant caution, also directed the Two Member Committee to first conduct a manual re-evaluation of all the OMR Sheets before the Scanner re-evaluation was done. On manual re-evaluation, the Two Member Committee found mistakes in seven OMR Sheets. It needs to be emphasized that after the manual re-evaluation of all the OMR Sheets was done, the OMR Sheets were also scanned by the Scanner and no mistake was detected by the Scanner in the manual result. In such circumstances Rule 3(iii) is not violated.

31. The Supreme Court in **Sahiti & Ors., Vs. Chancellor, Dr. N.T.R. University of Health Sciences & Ors., 2008 AIR SCW 8194** has also observed that such a Rule only prohibits the student from applying for re-evaluation and does not prohibit the University from re-evaluating the answer sheets. The portion of the order of the Supreme Court dealing with this issue is quoted below:-

".....The plea that there is absence of specific provision enabling the Vice-Chancellor to order re-evaluation of the answer scripts and, therefore, the Judgment impugned should not be interfered with, cannot be accepted. Re-evaluation of answer scripts in the absence of specific provision is perfectly legal and permissible. In such cases, what the Court should consider is whether the decision of the educational authority

is arbitrary, unreasonable, mala fide and whether the decision contravenes any statutory or binding rule or ordinance and in doing so, the Court should show due regard to the opinion expressed by the authority......It was admitted before the Supreme Court that the regulation of the Board of Secondary education, Orissa did not make any provision of re-evaluation of answer books of the students. The Supreme Court was of the opinion that the question whether in absence of any provision to that effect an examinee is entitled to ask for re-evaluation of his answer books was examined by the Supreme Court in Pramod Kumar Srivastava v. Chairman, Bihar Public Service Commission (2004) 6 SCC 714. It was noticed by the Supreme Court that in the said decision it was held that in absence of rules providing for re-evaluation of the answer books no direction should be issued because a direction for re-evaluation of the answer books would throw many problems and in the larger public interest such a direction must be avoided. Therefore, the Supreme Court expressed the opinion that the order of the High Court directing re-evaluation of the answer books of all the examinees securing 90% or above marks was clearly unsustainable in law and set aside the same. **The above decision deals with the right of the student or candidate to claim re-examination/re-evaluation of his answer sheet and the power of the High Court to order revaluation of answer sheets. It does not deal with the power of the Board to order re-evaluation of answer books if factual scenario so demands. Award of marks by an examiner has to be fair and considering the fact that re-evaluation is not permissible under the Statute at the instance of candidate, the examiner has to be careful, cautious and has the duty to ensure that the answers are properly evaluated. Therefore, where the authorities find that award of marks by an examiner is not fair or that the examiner was not careful in evaluating the answer scripts re-evaluation may be found necessary.** There may be several instances wherein re-evaluation of the answer scripts may be required to be ordered and this Court need not make an exhaustive catalogue of the same. However, if the authorities are of the opinion that re-evaluation of the answer scripts is necessary then the Court would be slow to substitute its own views for that of those who are expert in academic matters."

(emphasis supplied)

32. It is true that Scanner evaluation would have been more desirable since there is no scope for any mistake, but the Two Member Committee has given reasons that the Scanner evaluation was not possible since both the Scanners were out of order. It cannot, by any stretch of imagination, be said that the sanctity of the examination has been vitiated because manual evaluation was done since the mistakes that had been crept in the manual evaluation had been subsequently rectified when the revised result was declared on 1st April, 2010.

33. It also needs to be mentioned that even in the 'Conclusion' part of their report, the Five Member Committee only observed that it was the evaluation process of the OMR Sheets

that was done without due care and in contravention of the Rules. The Five Member Committee has not found any defect in the holding of the Entrance Examination and there is no finding that it suffered from any illegality or that the students had resorted to use of unfair means. Comments have only been made on the manual evaluation mode adopted by the Two Member Committee but whatever mistakes had occurred in this evaluation process had been rectified after manual re-evaluation and Scanner re-evaluation. Such manual re-evaluation and scanner evaluation had been done by the Two Member Committee after seeking approval of the Director of the Institute and it cannot be said that permission had not been taken.

34. These are the factors that were required to be examined by the Vice-Chancellor of the University, but a perusal of the order passed by the Vice-Chancellor of the University shows that he has only made general observations about the fairness and transparency in holding of examinations though he was required to deal with the findings and the conclusion arrived at by the Five Member Committee. The broad and general observations made by the Vice-Chancellor of the University are no doubt true, but he failed to address himself to the correct questions so as to arrive at correct findings. In fact, one of the option that was given by the Five Member Committee was to make admissions on the basis of the merit list declared on 1st April, 2010 and the only reservation expressed was that it will result in violation of Rule 3(iii). This reservation expressed by the Five Member Committee has not been found to be correct. While dealing with the option for cancelling the entire examination and holding fresh examination, the Five Member Committee itself pointed out that this will penalize the candidates for no fault of theirs and may arouse genuine protests from them but this has not been taken note of by the Vice-Chancellor of the University.

35. The Vice-Chancellor of the University without making any specific reference to any fact that may have persuaded him to hold that the sanctity of the examination had been vitiated and fairness and transparency had not been maintained, ordered for cancellation of the examination. What was required to be seen was whether there was any defect in the holding of the examination or there was any mistake in the evaluation of the OMR Sheets because any mistake in the evaluation of the OMR Sheets could be corrected and was indeed corrected but any defect in the holding of the examination could not have been rectified, except by cancellation of the examination. The Analysis and the Conclusion of the Five Member Committee highlight only the defects in the evaluation of the OMR Sheets and do not mention any defect in the holding of the examination. Thus, in the absence of any finding about any defect/irregularity in the holding of the examination, the Vice-Chancellor of the University was not justified in cancelling the examination.

36. Thus, the Vice-Chancellor of the University failed to address himself to the correct issue that was required to be decided. He not only committed an error of fact touching the merit of the decision but also committed an error of

law as the decision taken by him is not only arbitrary and unjustified but has been taken without application of mind to any of the relevant consideration. He could not have taken such a drastic action as cancellation of the entire examination and even according to the Five Member Committee this would have meant penalizing the candidates for no fault of theirs.

37. Sri V.K. Singh, learned Senior Counsel appearing for the respondent-University has, however, placed reliance upon the decision of the Supreme Court in **Onkar Lal Bajaj & Ors., Vs. Union of India & Anr. (2003) 2 SCC 673** in support of his submission that if two views are possible then the view expressed by the Vice-Chancellor of the University should be accepted and should not be interfered with.

38. As noticed hereinabove, the present is a case where there was no need at all to cancel the examination and it is not a case where, in the facts and circumstances of the case, any other view except ordering for declaration of the result on the basis of the list declared on 1st April, 2010 could possibly have been taken.

39. In fact in Onkar Lal Bajaj (supra) the Supreme Court set aside the decision taken by the Government for en masse cancellation of allotments of petrol pumps since it was unjustified and arbitrary and taken without application of mind to any of the relevant consideration. The Supreme Court further held that a decision has to be tested on the touchstone of justice, equity and fair play and if the decision has taken into consideration other matters, though on the face of it, the decision may look legitimate, if the reasons are not based on values but to achieve popular accolade, the decision cannot be allowed to operate. It further held that mere reason that a "controversy" has been raised cannot itself clothe the Government with the power to pass such a drastic order for en masse cancellation. The relevant portion of the judgment is quoted below:-

"Article 14 guarantees to everyone equality before law. Unequals cannot be clubbed. The proposition is well settled and does not require reference to any precedent though many decisions were cited. Likewise, an arbitrary exercise of executive power deserves to be quashed is a proposition which again does not require support of any precedent. **It is equally well settled that an order passed without application of mind deserves to be annulled being an arbitrary exercise of power. At the same time, we have no difficulty in accepting the proposition urged on behalf of the Government that if two views are possible and the Government takes one of it, it would not be amenable to judicial review on the ground that other view, according to the Court, is a better view.....**

In the case in hand, the only reason for the en masse cancellation was that a 'controversy' had been raised. There was no application of mind to any case. Admittedly, none of cases was examined. In Shrilekha Vidyarthi case, this Court held that arbitrariness is writ large on the impugned circular. In State action public interest has to be the prime guiding consideration. In Shrilekha

Vidhartyi case, it was held that the impugned State action was taken with only one object in view, i.e., to terminate all existing appointments irrespective of the subsistence or expiry of the tenure or suitability of the existing incumbents and that by one omnibus order, the appointments of all Government Counsel in the State of Uttar Pradesh were terminated. It was also noticed that no common reason applicable to all of them justifying their termination in one stroke on a reasonable ground had been shown. The position is similar in the present case.....The roll model for governance and decision taken thereof should manifest equity, fair play and justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision making was motivated on the consideration of probity. The Government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions. **Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade, that decision cannot be allowed to operate.**

The mere reason that a "controversy" has been raised by itself cannot clothe the Government with the power to pass such a drastic order which has a devastating effect on a large number of people. In governance, controversies are bound to arise. In a given situation, depending upon facts and figures, it may be legally permissible to resort to such en masse cancellation where the executive finds that prima facie a large number of such selections were tainted and segregation of good and bad would be difficult and time consuming affair. That is, however, not the case. **Here the controversy raised was in respect of 5 to 10%, as earlier indicated. In such a situation, en masse cancellation would be unjustified and arbitrary. It seems that the impugned order was a result of panic reaction of the Government. No facts and figures were gone into. Without application of mind to any of relevant consideration, a decision was taken to cancel all allotments. The impugned action is clearly against fair play in action. It cannot be held to be reasonable. It is nothing but arbitrary."**

(emphasis supplied)

40. Learned Senior Counsel for the respondent-University also submitted that the Two Member Committee had proceeded to declare the result in haste on 19th February, 2010 since the Co-ordination Committee had decided that the result should be declared in the 3rd week of March, 2010. The Two Member Committee in its report dated 4th April, 2010 submitted to the Five Member Committee has pointed out that the students themselves were wanting an early declaration of the result before the All India MD/MS Entrance Test of the University was to be held on 21st

February, 2010. This explanation seems to be satisfactory and in any case an early declaration of result cannot be made a ground to hold that the fairness or transparency in the examination had not been maintained.

41. Learned Senior Counsel for the respondent-University has placed reliance upon the decision of a Division Bench of the Delhi High Court in Secy. D.S.S.S.B. Vs. Neeraj Kumar & Ors., 2006(3) ESC 2041 wherein it has been observed:-

"In our opinion in such cases where there are allegations of use of unfairness means in an examination, it is open to the authorities to cancel the entire examination if the authorities feel that the fairness and transparency in the examination could have been affected. This can be done even if there is no clinching evidence that cheating or use of unfair means was resorted to. There may be instances where the authorities get some information on the basis of which they have reasonable apprehension of use of unfairness means in the examination, but it may not be possible to find out to what extent that was done. In such cases it may not be possible to cancel the result of individual students as it may not be possible to know which particular student did cheating and which did not. Hence in such cases very often the authorities resort to cancellation of the whole examination, and this Court will not interfere in such administrative decisions as has been repeatedly held by the Supreme Court e.g. in Union of India and Others vs. Tarun K. Singh and Others (2003) 11 SCC 768."

(emphasis supplied)

42. This decision also does not help the respondents since there were allegations of use of unfair means in the said examination and it is for this reason that the examination was cancelled.

43. In view of the aforesaid, it is not necessary to deal with the submissions advanced by Sri Ashok Khare, learned Senior Counsel for the petitioners that the entire examination was not required to be cancelled in view of the two decisions referred to by him and nor is it necessary to pass any order on the application filed by the newly impleaded respondents for issuing directions to supply carbon copies of the OMR Sheets and other documents.

44. Thus, for all the reasons stated above, it is not possible to sustain the order dated 6th April, 2010 passed by the Vice-Chancellor of the University as also the consequential notification dated 13th April, 2010 issued by the Institute for cancelling the Merit Screening Test held on 10th February, 2010. In normal circumstances, the matter would have been remitted to the Vice-Chancellor of the University for passing a fresh order, but in view of the discussion made above, the irresistible conclusion that follows is that there is no infirmity or illegality in the declaration of Merit Screening Test result on 1st April, 2010. It is, therefore, not necessary to remit the matter to the Vice-Chancellor of the University for a fresh consideration. The University shall, therefore, proceed to make admissions on the basis of the merit list declared on 1st April, 2010.

45. In the result, the order dated 6th April, 2010 passed by the Vice-Chancellor of the University as also the

consequential notification dated 13th April, 2010 issued by the Institute for cancelling the Merit Screening Test held on 10th February, 2010 are set aside and a direction is issued to the respondent-University and the Institute to make admissions to the MD/MS Course for the Institutional seats in accordance with the list declared on 1st April, 2010. The writ petition is, accordingly, allowed.
