APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.05.2011

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE ARVIND KUMAR TRIPATHI, J.

Capital Cases No. - 59 of 2010

Prabhakar Singh and another ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Apul Misra
Sri Dhriendra Kumar Srivastva
Sri P.N. Misra

Counsel for the Respondents:
A.G.A.
Km. Usha Kiran

Criminal Appeal-offence under section 302-punishment of life imprisonment with fine of Rs. 25000/-on each-heinous crime deceased done to death-body hacked into pieces-non disclosure of incident by star-eye witness-costs great doubt of reliability-in such circumstances-extra cautions duty cost upon Court-prosecution failed to established the complexities of appellants-held-appellants are not guilty of all offences-entitled-fair acquittal.

Held: Para 36

It is true that the nature of this crime is heinous. The deceased appears to have been done to death and his body was hacked into pieces, placed in a sack and thrown into the Gorma river. But that is precisely the reason why we must be extra cautious in assessing the credibility of the evidence. As held in Kashmira Singh v. State of M.P., AIR 1952 SC 159 and Ashish Botham V. State of M.P., (2002) SCC 317 hard cases should not make bad law. Extra caution is needed in handling such cases and the Courts are not to be carried away by the gravity of the allegations.

Case law discussed:
AIR 1952 SC 159

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

1. The abovementioned Capital Criminal Appeal, Criminal Appeal and Criminal Reference arise out of the judgement of the Additional Sessions Judge/F.T.C. Court No. 4, Allahabad dated 21.12.2009.

2. The Capital Criminal Appeal No. 59 of 2010 has been preferred by the appellants Prabhakar Singh and Kamlakar Singh. The said appellants have been awarded a sentence of death and a fine of Rs. 25,000/- each under section 302 IPC. A reference No. 3 of 2010 for confirmation of their death sentence has also been received from the Sessions Court. under section 366 Cr. P. C.. Criminal Appeal No. 298 of 2010 has been preferred by the appellants Dev Sharan Singh, Raj Narain Singh, Ram Narain Singh @ Daroga Singh, Narendra Pratap Singh, Diwakar Singh and Baj Bahadur Singh who have been awarded imprisonment for life under section 302 IPC and fines of Rs. 20,000/- each. All the 8 appellants above named have also been sentenced to 5 years' R.I. under section 201 IPC and fines of Rs.5,000/- each. All the appellants have further been convicted to one year's R.I. under section 147 IPC with fines of Rs. 1000/- each and two years R.I. under section 25 of the Arms Act and fines of Rs. 2000/- each. In default of payment of fine regarding the sentence under section 302 IPC, the appellants will have to undergo three years' simple imprisonment. For default of payment of fine under section 201 IPC one year's simple imprisonment, for the sentence under section 147 IPC,

three months' simple imprisonment and for default of fine under section 25 Arms Act six months' simple imprisonment have been awarded. All the sentences were to run concurrently.

3. We have heard Sri P.N. Misra, Senior Advocate assisted by Sri Devendra Kumar Srivastava for the appellants and Km. Usha Kiran, learned A.G.A. for the State.

4. The informant Raj Kumar Tiwari, P.W.1 has lodged a report at P.S. Koraon on 24.12.2002 alleging that he had lodged a report regarding missing of his brother Kaushal Kishore Tiwari, *Pradhan, gram panchayat* Chapar on 19.12.2002. He had learnt from informed sources that his brother had been murdered in the *"Arhar"* field of Laxmi Narain Tiwari in village Hanumanganj. After that the body had been thrown into the *Gorma* river. On that information, the informant Raj Kumar Tiwari, his father Kamla Shankar and uncle Uma Shankar and Vidya Kant Tiwari, P.W. 2 and Dev Kant Tiwari @ Sharma and other villagers searched for the body on the banks of the river. When they reached Kau Ghat, P.S. Shahpur, in district Rewa, they recovered the dismembered corpse of Kaushal Kishore Tiwari from a plastic bag which also contained some stones. They gave information about these facts to Police Station Shahpur, district Rewa on 22.12.2002, where inquest was performed and post mortem was done. After the last rites, Raj Kumar Tiwari lodged a written F.I.R. on 24.12.2002 at 4.30 p.m. at P.S. Koraon on the basis of which a case was registered at Crime No. 298 of 2002 under sections 147, 302, 201, 506 IPC at P.S. Koraon, district Allahabad (Ext. Ka-1).

5. As per the post-mortem conducted at C.H.C., Hanumana, district Rewa by P.W. 8 Dr. Basant Lal on 22.12.2002 at 12.30 p.m. the dead body was lying flat on a platform surface. Foul smell was coming out. Multiple blisters were present. Some of them had been destroyed. Palms of both the hands which had remained in dirty water bore the look of a dhobi's hand. The body was putrefied. The head was missing. Both thighs were cut transversely, and the upper 1/3rd portion of both thighs were missing and separated from the body. The Following ante-mortem injuries were seen:-

1. Head was amputated transversely from back of neck behind thyroid.

2. Incised wound 6" x 2" x bone deep situate obliquely anterior aspect of left upper arm.

3. Incised wound 4" x 2 " x bone deep situate anterior aspect of of right upper arm obliquely.

4. Both thighs were cut transversely (slight obliquely in the upper 1/3rd of arm muscle and bones were cut.

6. Cause of death was haemorrhage, because of cutting of the greater blood vessels of the neck and both thighs. The time of death was 8 to 10 days earlier.

The prosecution has examined 12 witnesses in this case. P.W. 1 Raj Kumar Tiawari, who was the informant and brother of the deceased. P.W. 2 Vidya Kant Tiwari, who was a witness of the recovery of the dead body. P.W. 3 Surendra Prasad Misra, who was the witness of recovery of blood near the *"arhar"* field of Laxmi Narain Tiwari on

24.12.2002. P.W. 4 Suresh Kumar Tiwari, P.W. 5 Kamleshwar Prasad, P.W. 6 Ram Awadh, P.W. 7 K.K. Pandey, P.W. 8 Dr. Basant Lal, P.W. 9 Anil Kumar Singh, P.W. 10 Constable Sant Ram Yadav, P.W. 11 S.I. Kedar Nath Singh, P.W. 12 S.I. Gulam Nizamuddin.

P.W. 1 Raj Kumar Tiwari, is the informant of this case and brother of the deceased Kaushal Kishore Tiwari. In his evidence in court he has reiterated his version in his F.I.R. lodged on 24.12.2002. He has deposed that his brother was the *pradhan* of village *Chapar*. On 13.2.2002 his brother, had gone to the Tehsil to collect the pensions of the old age pensioners. As he did not return that day, the informant and other villagers searched for him for 4 or 5 days. Then they lodged his missing report on 19.12.2002, and kept searching for him. During the course of search they learnt that the appellants Dev Sharan, Raj Narain Singh, Ram Narayan Singh @ Daroga, Baj Bahadur, Kamlakar Singh, Prabhakar Singh, Diwakar Singh, Narendra Singh had murdered the deceased in Dr. Laxmi Narain's *Arhar* field. and cut his body into pieces, put the pieces in a sack and thown it in the *Gorma* river at P.S. Shahpur, district Rewa. Then they made a search in the field of Laxmi Narain Tiwari, where they saw some blood stains. Thereafter they searched on the banks of the Gorma river and at Kau Ghat they spotted some blood stains. Then some persons entered the Gorma river, where they retrieved the dismembered corpse , whose head and both legs were missing, which was kept in a plastic bag. Due information was given at P.S. Hahpur on 22.12.02, in which jurisdiction inquest and post mortem was performed. After post mortem they were given the dead body for cremation. Thereafter the FIR was lodged on 24.12.02 at P.S. Koraon.

7. P.W. 4 Suresh Kumar Tiwari is the eye witness in this case. He states that on 13.12.2002 this witness and one Vijay Shankar (who was not examined) were returning after meeting Ram Gopal Shukla resident of village Hardaun. When they reached near Laxmi Narain Tiwari's *"arhar"* field at about 6.30 p.m. they saw a drain and they stopped there to ease themselves. A large number of persons including the appellants Prabhakar Singh, Kamlakar Singh, Diwakar Singh, Narendra Singh, Devsaran, Ram Saran, Raj Narain and Baj Bahadur Singh were present there with lathis, dandas, and sharp edged weapons. They were still sitting there when at about 7.30 pm they saw the deceased Kaushal Kishore Tiewari, the village *pradhan* passing the *Arhar* field, and Prabhakar Singh and Kamlakar Singh assaulting the deceased Kaushal Kishore the *Pradhan* with hammers. As a result of the hammer injuries, the deceased fell down, whereupon all the 8 accused persons are said to have assaulted him with various weapons and to have cut his body into pieces. Thereafter Baj Bahadur Singh brought two sacks and lathis from appellant Devsaran's house. They put cut body of the deceased into two sacks. They hung the first sack on to a lathi, which Kamlakar Singh, Prabhakar Singh and Narendra Singh carried in the western direction. The second sack was carried in the southern direction by Baj Bahadur Singh, Devsaran Singh, Ram Narain and Ram Saran. He, however, did not disclose the incident to any one as he was afraid, but he revealed this fact after 5 or 6 days to Kamla Shankar Tiwari, father of Kaushal Kishore. Later, he learnt that Kaushal Kishore's corpse was found in the Gorma

river. He disclosed this fact before the appellants went to jail, when they were absconding.

8. P.W. 5 Kamleshar Prasad Tiwari deposes that on 13.12.2002 when he was returning from the jungle and after he crossed Hanumanganj village, then he saw Raj Narain, Devsaran Singh, Prabhakar Singh, Diwakar Singh carrying some thing tied to a sack on a lathi at about 9.30-10 p.m. There was moon light. He disclosed this fact to Raj Kumar Tiwari next morning. He then took Raj Kumar to the spot where he had seen the appellants carrying a sack on a lathi. They saw blood stains on the ground. After one week on 21.12.2002 when Kaushal Kishore body was not recovered, they came to the spot again and followed the trail of blood. They proceeded about 6 kms. at the bank of Gorma river in M.P., where they saw some blood marks. With the help of 10 to 20 co-villagers, they entered the river. In the river, they found a sack tied with a rope. In the sack there was a headless dead body, which they identified to be that of the deceased Kaushal Kishore Tiwari @ Bhuwar.

P.W. 6 Ram Awadh has deposed that on 13.12.2002, the deceased Kaushal Kishore had returned to Hanumanganj at about 6.30-7 p.m. on the same Commander Jeep on which he was travelling. He was not carrying any bag at that time.

9. Apart from the aforesaid witnesses of fact, P.W. 2, P.W. 3, P.W. 7, P.W. 8, P.W.9, P.W. 10, PW.11 and P.W. 12 are the other formal witnesses in this case.

P.W. 2 Vidya Kant Tiwari is the private witness of recovery of the dead body. He deposes that on 13.12.2002 the deceased had gone to Devghat Tehsil to find out about the old age pension of co-villagers, after he did not return in the evening, the father of the deceased Kamla Shankar and brother Raj Kumar searched for him amongst his relatives. When he was still not found, Raj Kumar gave information at P.S. Koraon and kept searching for the deceased. At the "*arhar*" field of Laxmi Narain Tiwari in Hanumanganj, they saw some blood stains, then their suspicion arose that the deceased had been murdered. The villagers and Koraon police reached the Gorma river, whilst searching for the deceased on the banks of the river, blood marks were seen on the way. They searched in the river, where they found the dead body lying in a sack. The sack was tied with a nylon rope. The head and both legs of the deceased were missing. He was wearing a half vest and light blue underwear. Raj Kumar Tiwari gave information about the discovery of the corpse to P.S. Shahpur, distrct Rewa. He also signed on the recovery memo of the dead body. The recovery memo was marked as (Ext. Ka-3).

10. P.W. 3 Surendra Prasad Mishra has deposed that on 24.12.2002, the Investigating Officer collected the plain and blood stained mud from the field of Laxmi Narain Tiwari, which he kept in two separate boxes which he sealed.

P.W. 7 S.I. Krishna Kumar Pandey is the first Investigating Officer of this case. The F.I.R. was registered in his presence on 24.12.2002 at P.S. Koraon. On 15.1.2003 he also collected the earlier report No. 22 dated 19.12.2002 and the report dated 24.12.2002 and entered the same in his case diary. He inspected the spot on the pointing out of the informant,

then proceeded to the *'arhar"* field in village Hanumanganj, and collected plain and blood stained earth in two boxes. He got the thumb marks of the witnesses Raj Kumar, Surendra Prasad Mishra affixed on the recovery memo on 28.12.2002. He inspected the place, where the dead body was recovered and prepared the site plan of the said place at Kaughat, jungle Gauri beat, at the *Gorma* river and prepared the site plan on the pointing out of the informant (Ext. Ka-1). He also collected the papers relating to the post-mortem and inquest and other formalities from the M.P. Police.

11. He recorded the statement of the accused on 6.1.2003 in jail. He also recorded the statement of the eye witnesses Suresh Tiwari, Vijay Shankar and Kamleshwar Prasad and the other witnesses. On 14.12.03, this witness, Constable Anil Singh, Sant Ram Yadav, Raj Ram Pandey, Constable Gyan Singh, Constable Ved Tiari and driver Shiv Kumar Mishra took the accused persons Raj Narain Singh, Ram Narain Singh, Narendra Pratap Singh, Prabhakar Singh, Diwarkar Singh, Baj Bahadur Singh and Devsaran on police remand from Naini jail. After getting their medical examination done they then reached the Belan river. The appellants Raj Narain Singh, Narendra Pratap Singh got down the Jeep and after removing some mud in the Belan river, Raj Narain Singh took out a *gandasa*, Narendra Pratap Singh took out a *banka* from near by. The accused claimed to have thrown the severed neck of the deceased, which they had amputated it into the river, but the said portion of the body could not be recovered, in spite of search. Then they came along with the accused persons to village Hardaun. Appellants Prabhkar Singh got down from the Jeep and took out a hammer and a knife from the front of his roof over a *dhanni*. After that appellant Baj Bahadur Singh took them to the wheat field in front of his house, from where he got recovered a *banka*. The appellant Devsaran got a banka recovered from the garden in front of his house. Then appellant Diwakar got a knife recovered after digging the earth near a mango tree. The appellant Ram Narain Singh got a knife recovered from a *"charahi"* situate in front of his house. The accused persons admitted to the police to have committed the murder of Kaushal Kishore with these weapons. He also submitted a report of a case under section 25 of the Arms Act against the appellants on the basis of these recoveries. From appellant Kamlakar Singh a knife was got recovered on 28.1.2003.

P.W. 8 Dr. Basant Lal has conducted the post-mortem as detailed above.

12. P.w. 9 Constable Anil Kumar Singh who is also one of the witnesses has deposed about the recovery of the knife on 28.1.2003 at the instance of appellant Kamlakar, who was also taken into custody from jail on a police remand. He got the knife recovered from the Belan river.

P.W.10 Constable Sant Ram Yadav is also an eye witness of recovery of weapons from various accused on 15.1.2003 after the accused persons were taken on police remand as already described in the evidence of P.W. 7 S.I. Krishna Kant Pandey.

13. P.W. 11, Kedar Nath Singh is the second I.O. in this case, who assumed investigation of this case after the transfer of S.O. K.K. Pandey. On 7.2.2003 he

submitted the charge-sheet (Ext. Ka-28) after perusal of the earlier papers prepared by the first Investigating Officer.

14. P.W. 12 S.I. Gulam Nizamuddin has deposed that on 16.1.2003 he registered a case under sections 25/4 Arms Act at Crime Nos. 11, 12, 13, 14, 15, 16 and 17 of 2003. He entered the statements of the accused in the case diary and also prepared the recovery memos and site plans of the recoveries. He conducted the investigation and also submitted charge sheets under section 25/4 of the Arms Act against all the accused persons.

15. It was submitted by Sri P.N. Misra that there is no reliable evidence to connect the appellants with this offence. Even though, the solitary eye witness PW 4, Suresh Kumar Tiwari and other witnesses of fact claim to have seen the murder, or the accused carrying away some thing in a sack and also there was evidence that the deceased was travelling along with the witness (P.W.6 Ram Awadh) in a Commander Jeep on 13.12.2002, yet in the missing report, which was lodged on 19.12.2002 at P.S. Koraon it was mentioned that some unknown persons had committed the crime. Even in the information that was given at P.S. Shahpur, district Rewa, M.P., on 22.12.2002 after the amputated corpse was recovered in a sack from the *Gorma* river, at Kaughat, M.P., it was mentioned that some unknown persons had committed the crime. This is admitted in the cross-examintion of the I.O., PW 7 K.K. Pandey.

16. There was no mention about the source of the names of the accused persons, even in the F.I.R., which was registered on 24.12.2002 at 4.30 p.m. at P.S. Koraon. The person, who had informed the informant about the participation of the appellants, was not mentioned, but simply their involvement was alleged. No blood was seen on the weapons, which were said to have been recovered. There is also no confirmatory Serologist report. So far as the alleged confessions before the police are concerned, they are not admissible in evidence. The disclosure by the alleged eye witnesses and other witnesses of fact was highly delayed, which casts doubt as to their reliability. The witnesses P.W. 4 and 5 were relative and chance witnesses. The witness P.W. 4 claims to be easing himself in the darkness. There was no mention of any torch light etc.

17. Learned A.G.A. Km. Usha Kiran argued that this was a ghastly murder, where the body of the deceased was cut into pieces and carried away in a sack and thrown in the *Gorma* river and there was an eyewitness account. Considering the terror that must have been generated in this incident, the non disclosure of the incident by the witnesses was very natural. The statement of P.W. 4, the eye witness was also a natural statement and he gave a good explanation for his presence at the spot.

18. We have carefully gone through the record of this case and judgerment and submissions of the learned counsel for parties.

19. In our view, if P.W. 4 Suresh Kumar Tiwari, the star eye witness had reached the spot at the time of incident and was present at the spot for easing himself, and the incident had taken place in his presence as detailed above, his non disclosure of the incident to any other person immediately after the incident casts a grave doubt as to his reliability. As the

other allegedly accompanying person, Vijay has not even been examined, this witness would be the solitary eye witness in this case, and hence his evidence needs to be examined with great care and circumspection.

20. PW 4 appears to be a chance witness as he resides in village Devghat which was 10 kms away. His explains his presence at the spot by saying that he had gone to visit Ram Gopal Shukla, who was a resident of village Hardaun and he was sitting at that spot from 6.30 p.m. till 7.30 p.m., simply for easing himself. He admits in his evidence in his cross examination that his house is 10 kms. from the place of incident. Ram Gopal's house was 1 km. away in the south westerly direction. There is an Amedkar road, which is 2 Kms. from Ram Gopal's house and he could have proceeded directly to reach the said road, without making a detour to the place of incident, where he went to ease himself which was 400 meters away from the passage of the road. He also admits that the villagers of Ram Gopal Shukla's village used to ease themselves in the same village, but he states that he did not ease himself in Ram Gopal Shukla's village, because he was not feeling the need to ease himself there. He, therefore, happened to ease himself at the spot as a chance witness, who actually did not appear to have any good reason to be present there.

21. PW 4 further admits that the uncle of the informant and deceased Uma Shankar Tiwari was his own maternal uncle, therefore, there was a close relationship of the informant's family and this witness. He further admits that from the field of Laxmi Narain, the house of Raj Kumar was only 400 meters away. In spite of the fact that he was closely related to Raj Kumar, he did not even go the distance of 400 meters to inform Raj Kumar about this incident, which casts a grave doubt about his presence at the spot.

22. P.W. 4 also mentioned that he had disclosed about this incident after 5 or 6 days to Kamla Shankar Tiwari, father of Kaushal Kishore. In spite of this disclosure, in the gumsudagi report, which was lodged on 19.12.2002, it was claimed by Raj Kumar Tiwari, the son of Kamla Shankar Tiwari and another brother of the deceased that some unknown persons had committed the crime, As admitted by the I.O., PW 7 K.K. Pandey, in the information given by the informant Raj Kumar Tiwari at P.S. Shahpur, district Rewa, M.P., after the discovery of the hacked corpse from a sack in the Gorma river at Kaughat, M.P., it was mentioned that unknown persons had committed the crime. These facts are wholly inconsistent with the alleged disclosure by this witness after 5 or 6 days of the incident to Kamla Shankar Tiwari father of PW 1 Raj Kumar Tiwari, the informant and the deceased Kaushal Kishore Tiwari.

23. He further states that he had arrived in Ram Gopal's house at 10 a.m. and had no good reason for his remaining there till evening. He simply states that he had gone to meet Ram Gopal, even though a lot of agricultural operations were needed in the fields such as weeding, irrigation etc., at that time. His ostensible reason given in Court for going to Ram Gopal's place simply to meet Ram Gopal's son, appears unworthy of credence.

24. He did not show the spot, where he was easing himself to the Investigating Officer.

He further admits that one hour before the incident, the sun had set and they had no torch or other source of light. The lamps had burnt in the houses about 1 hour earlier. Therefore, there was absence of light at the place of incident. His case that he saw Kamlakar Singh assaulting the deceased with a hammer on his head was not mentioned to the Investigating Officer. He claims to have given his statement to the Investigating Officer 5 or 6 days after this incident, that would be by 18 or 19th December, 2002. However according to the Investigating Officer, PW 7 K.K. Pandey, his statement was only recorded as late as on 23rd January, 2003 and the witness had never contacted the Investigating Officer for a period of one month and 10 days after the incident, although, the witness claims that he was in the village, when the police had come to the *"arhar"* field of Laxmi Narain, that would be on 24.12.2002.

He is unable to state as to which accused was carrying what weapon.

25. For all these reasons the testimony of this witness is highly suspect and it would hazardous for the Court to rely on the testimony of this solitary eye witness.

26. So far as the evidence in this case regarding the recovery of the dead body of the deceased from the Gorma river after some blood stains were seen at Kaughat in M.P, the said body not having been retrieved at the instance of the accused persons, the retrieval of the body also does not provide any corroborative evidence of the complicity of the accused in this case.

P.W. 1, the informant Raj Kumar Tiwari has also not been able to advance the case of the prosecution. Even though he had learnt about the names of the appellants' parents after 4 or 5 days of the incident, which took place on 13.12.2002, in the *gumsudagi* (missing report) which was lodged on 19.12.2002, the accused were described as unknown persons. Also even in the application, which was given on 22.12.2002 at P.S. Shahpur, district Rewa, it was claimed that some unknown persons had murdered his brother Kaushal Kishore alias Bhunwar by cutting his neck and legs in the field of Laxmi Narain in village Hanumanganj and had thrown the amputated dead body into the Gorma river after putting a stone in the sack containing the amputated corpse. Although Suresh Tiwari and another were present, when the body was recovered, yet in the application dated 22.12.2002, given at P.S. Shahpur, it was claimed that the murder had been committed by unknown persons.

27. It was alleged that there was a dispute of the informant Raj Kumar Tiwari and others with the appellants over gram sabha land as the appellants had earlier been given a lease by Sita Devi, the earlier *Pradhan*. But after the deceased became Pradhan, he wanted them to return the land and he had even approached the Civil Court in this regard. But he was unable to mention the year, when the *patta* was given by Sita Devi in favour of the appellants. Subsequently, he admits that Sita Devi had not given any lease in favour of the appellant Devsaran and others. He also admits that he had no knowledge whether the deceased had initiated any civil proceedings against the appellants for return of the land. Thus, he gives up even the weak motive earlier set up by him in his further cross examination. In the examination-in-chief, as noted above, no motive for the crime was mentioned.

28. He also admits that 15 or 16 persons had fought the Village *Pradhani* election against his brother Kaushal Kishore and some of the appellants, Baj Bahadur, Dev Saran, Kamlakar Singh and Prabhakar Singh had supported Kaushal Kishore Tiwari, the deceased, in the Pradhani elections. If that was the case, then there would have been some *inter se* dispute between the appellants, and all the 8 appellants were unlikely to have come together for committing this crime. Also the accused who supported the deceased during the elections would not have a motive for committing his murder.

29. P.W. 5 Kamleshar Prasad Tiwari, claims to have seen the appellants Raj Narain, Dev Saran Singh, Prabhakar Singh, Diwakar Singh carrying a sack tied to a *lathi* on 13.12.2002 at 9.30-10 p.m, only because he claims to be returning from the jungle at that time. He, therefore, claims to have given information of this fact to Raj Kumar Tiwari the next morning and to have shown him the spot, where the blood marks were seen on the way. On 21.12.2002 they again went to the spot where the blood stains were seen. They proceeded for a distance of 2, 5 or 6 kms., till they reached the banks of Gorma river, where with the help of 10-20 persons, who entered the river, they retrieved the sack contained the dead body and some boulders. If PW 5 Kamleshar Prasad Tiwari was speaking the truth when he deposed that he had seen the appellants Raj Narain, Dev Saran Singh, Prabhakar Singh, Diwakar Singh carrying a sack on a lathi near the place of incident on 13.12.02, about which he informed PW1, Raj Kumar Tiwari the informant the next morning, there was no reason for them not following the trail of blood the next morning itself to reach the banks of the Gorma river at Kaughat on 14.12.02 itself, but to have conducted this exercise only on 21.12.02. The absence of these facts in the *gumsudagi* report dated 19.12.2002, and in the application given at P.S. Shahpur on 22.12.2002 and also in the F.I.R. dated 24.12.2002 gives a lie to the claim of this witness to have seen the aforesaid appellants carrying a sack tied to a lathi in the night of 13.12.2002. This witness also claims that the informant was the son of his elder grand father. His closeness with the informant is also clear from his admission that both Raj Kumar Tiwari and his father were in jail at the time of cross examination in connection with Sukh Ram Kol's murder, althought he denied the suggestion that his father and Raj Kumar Tiwari were in jail for the murder of Sukh Ram @ Ukua Kol.

30. It is also doubtful whether he could have seen the accused carrying a sack on a *lathi* from the *pahari* from a distance of 90 metres from where he was coming. There is a conflict in his testimony as he had told the I.O. that he had been coming from Arvind Shukla's house, but in Court he stated that he was coming from the *pahari*.

31. His version of having seen some of the appellants carrying a sack on a lathi is absent in the three applications dated 19.12.2002, 22.12.2002 and 24.12.2002.

32. He also seems to have no good reason to be present at the spot at 9.30 or 10 p.m. and his plea that he was returning from the *pahari* at that time, does not seem too credible. For all these reasons we think that this witness is also a got up witness.

33. The testimony of P.W. 6 Ram Awadh that on 13.12.2002 he was

travelling on a Commander Jeep, on which Kaushal Kishore Tiwari, Pradhan was also sitting and had got off at Hanumanganj at about 6.30-7 p.m. was a neutral circumstance as the accused persons are not said to be present at that time

There is also a suggestion that there was some enmity of Ram Gopal and the appellants as it was the ceiling surplus land of Ram Gopal which had been transferred to the appellants Dev Saran and others which Ram Gopal had tried to save from ceiling proceedings by wrongfully transferring the same to his sons. An application against Ram Gopal disclosing this fact was given by Ram Saran, a relation of the appellants before the C.R.O. which was supported by the deceased. This was opposed by the appellant and therefore, Ram Gopal had a significant role in launching this false case for implicating the appellants.

34. There was a further suggestion that actually the informant has no idea, who had committed the crime. They were suspecting that Sukh Ram Kol had murdered Kaushal Kishore and that the informant and Uma Shankar Tiwari were under the impression that Sukh Ram Kol had committed his murder, and hence they had committed the murder of Sukh Ram Kol in retaliation. Although, he denies this fact too, he admits that they (i.e. Raj Kumar Tiwari, Uma Shankar and Khooni Nai) were implicated for the murder of Sukh Ram Kol, but the report had been wrongly lodged.

In this connection the trial judge has observed that Sukh Ram could not have committed this murder and taken the body all the way to the Gorma river alone, 6 kms from the field of Laxmi Narain Tiwari and thrown it there. The reasoning is faulty. The question for consideration is not whether Sukh Ram Kol or the appellants actually committed the murder of the deceased. But the suggestion is that initially the informant and others were suspecting that Sukh Ram Kol had committed the murder and not the appellants. Hence the retaliatory murder of Sukh Ram and the great delay before the names of the present appellants surfaced in the FIR dated 24.12.2002 and the unsatisfactory manner in which their complicity is mentioned in the FIR, without any dislosure as to who gave out their names.

35. So far as the alleged recoveries of different weapons from all the eight accused persons after they were taken on police remand from jail on 15.1.2003 and 28.1.03 (in the case of appellant Kamlakar Singh) by P.W. 7 S.I. Krishna Kumar Pandey and P.W. 10 Constable Sant Ram Yadav and PW 9 Constable Anil Kumar Singh are concerned, we think that the said recoveries of gandasa, banka, hammer, knife etc., are too artificial to be believable. Moreover, on 15.1.2003 and 28.1.2003 at the instance of appellant Kamlakar Singh a knife was recovered, as deposed to by P.W. 9 Constable Anil Kumar Singh. But no blood etc., was seen on even one of the large number of weapons that were recovered from all the accused, nor were they sent to Forensic Laboratory for confirmation of the presence of blood on them. The said weapons, therefore, appear to have been falsely planted for implicating the accused persons in a fruitless bid to create evidence because the other testimony collected in this case does not inspire much confidence. Furthermore, no public witnesses have been produced for supporting these recoveries.

36. It is true that the nature of this crime is heinous. The deceased appears to have been done to death and his body was hacked into pieces, placed in a sack and thrown into the *Gorma* river. But that is precisely the reason why we must be extra cautious in assessing the credibility of the evidence. As held in *Kashmira Singh v. State of M.P., AIR 1952 SC 159 and Ashish Botham V. State of M.P., (2002) SCC 317* hard cases should not make bad law. Extra caution is needed in handling such cases and the Courts are not to be carried away by the gravity of the allegations.

37. For all the aforesaid reasons we are of the opinion that the prosecution has failed to establish the complicity of the appellants in the crimes for which they were charged. The judgement of the trial court dated 21.12.2009 convicting and sentencing the appellants under the various provisions mentioned above are set aside. The appellants are held not guilty of all of the offences for which they have been charged and acquitted. All the appellants are in jail. They may be released forthwith unless wanted in connection with some other case.

Accordingly, Capital case No. 59 of 2010 and the Criminal Appeal No. 298 of 2010 are allowed and the Reference No. 3 of 2010 is hereby rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.05.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

First Appeal From Order No. - 545 of 2007

National Insurance Compnaney Ltd.Thr.Manager ...Petitioner
Versus
Smt.Seema Dhal ...Respondent

Counsel for the Petitioner:
Sri Rajesh Nath

Counsel for the Respondent:
Sri R.K.Dwivedi

Motor Vehicle Act, 1988-Section 170-Right to appeal-once the permission to contest the claim granted by Tribunal-Status of Insurance Camp became as owner-against the award of Tribunal-appeal by Insurance Company very well maintainable-so far Quantum of compensation is concern-learned Tribunal rightly assessed the income of deceased-can not be termed as excessive-No interference called for

Held: Para 10

From a plain reading of Section 170 of the Act, it is evident that once permission under Section 170 of the Act is granted, then Insurance Company will have same status as of the owner of the vehicle. Hence after grant of permission under Section 170 of the Act, the Insurance Company will have right to prefer appeal. In view of the facts of the case, the provisions of Section 149 will not be applicable. In the case of Chinnama George (supra), Section 170 has not been considered by the Hon'ble Supreme Court. The power conferred by Section 170 is statutory power and in derogation of Section 149 of the Act, as

is evident from the provisions itself. Accordingly, the appeal is very well maintainable. In view of the above, though the appeal is maintainable but on the question of quantum of compensation, impugned appeal, does not seem to survive. The compensation does not seem to be excessive.

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

1. Heard learned counsel for the appellant and perused record.

2. Present appeal under Section 173 of Motor Vehicles Act, 1988, has been preferred against the impugned Award dated 24.2.2007, passed by the Motor Accident Claims Tribunal/District Judge, Lakhimpur Kheri in MAC No.19 of 2001 (Smt. Seema Dhal and another. Vs. Shyam Sunder and others).

3. One Jagdish Dhal, son of Nanak Chandra, resident of Punjabi Colony, City Lakhimpur, District Kheri aged about 30 years, was coming on his Scooter No.U.P. 31-A/4625 after visiting Hanuman Temple to his town Lakhimpur. On 30.5.2000, while he was on his way, at about 12:30 P.M. on Lakhimpur-Sitapur Road, near village Saraiya a Truck No.DIL 1359 driven rashly and negligently, hit the scooter. In connection thereof, Jagdish Dhal succumbed to injuries on spot. An FIR was lodged and the dependents of deceased approached the Tribunal. Jagdish Dhal was having business of videography and photography in Lakhimpur Kheri. Smt. Seema Dhal and Master Sagar Dhal filed claim petition before the Tribunal.

4. The Tribunal framed issues with regard to accident in question, insurance cover and driving license etc.

5. Before the Tribunal, Smt. Seema Dhal wife of deceased, appeared as witness and corroborated the relationship and incident occurred on the aforesaid date. PW-2 Munendra Kumar Misra is eyewitness who supported the prosecution version stating that the truck was being driven rashly and negligently and that the deceased was coming towards Lakhimpur Kheri on his Scooter. PW-2 Munendra Kumar Misra stated that on the date of incident i.e., 30.5.2000, he was going from Lakhimpur on his scooter along with one Om Prakash and as soon as they reached near the place of incident, the Truck No.DIL 1359, going towards Hargaon, was being driven rashly and negligently, dashed the deceased Jagdish Dhal on his Scooter and the accident was caused due to rash and negligent driving of the truck.

6. The Tribunal on the basis of statement given by the witness, recorded finding that the deceased was having business of videography and photography and he was having a shop in Lakhimpur Kheri having an income of Rs.5000/- per month. Rs.500/- was deducted by the Tribunal out of Rs.5000/- and assessed monthly income of the deceased as Rs.4,500/- per month. A deduction of Rs.500/- was in lieu of daily expense which the deceased might have incurred while maintaining the shop. One third amount was taken out of Rs.4,500/- in lieu of personal expenses in terms of schedule 2 of the Motor Vehicles Act, 1988 and the compensation was awarded on the basis

of net income of Rs.3,000/- per month which comes to Rs.3,23,500/- after addition of funeral expenses Rs.2,000.00, loss of consortium Rs.5,000.00, loss of estate Rs.2,500.00 and damage to Scooter Rs.2,000.00.

7. While assailing the impugned award, it has been submitted by the learned counsel for the appellant that the income assessed by the Tribunal is excessive since no documentary evidence was laid by the claimant respondents before the Tribunal. The argument advanced on behalf of appellant to the extent of documentary evidence is concerned, is correct but for assessment of income in some matters, there may not be documentary evidence, more so, when a citizen does not come within the purview of Income Tax Act. Moreover, it has not been disputed that the deceased was having a shop of videography and photography. The income assessed by the Tribunal to the extent of Rs.4,500.00 from the shop in question, does not seem to be excessive. Even income of small shop owner with regard to videography and photography, may be, more than Rs.4,500.00. Accordingly, submission of the appellant's counsel does not seem to be sustainable.

8. During the course of argument, a preliminary objection has been raised on behalf of claimant respondents that the appeal is not maintainable since it has been preferred on the quantum of compensation. Learned counsel for the claimant respondents relied upon the judgment reported in **2000 (2) T.A.C. 207 SC: Chinnama George and others. Vs. N. K. Raju and another.** In the said judgment of Chinnama Goerge (supra), it has been held that under Section 149 of the Act, it shall be the duty of the insurer to satisfy the award against the person insured in respect of third party risks. For convenience, para 5, 6 and 7 of the aforesaid judgment are reproduced as under:

5."Under Section 149 of the Act, it is the duty of the insurer to satisfy the award against the person insured in respect of third party risks. It is not that liability of the insurer in the present case is being disputed. Insurer can defend the proceedings before the Claims Tribunal on certain limited grounds. Sub-sections (1), (2) and (7) of Section 149 of the Act are relevant, which are as under :

"149. *Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.*- (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) or under the provisions of section 163A is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in

respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment.

(2) No sum shall be payable by an insurer under sub- section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal, and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle--

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) to (6) ...

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of the reciprocating country, as the case may be."

(6) Admittedly, none of the grounds as given in sub-section (2) of Section 149 exist for the insurer to defend the claims petition. That being so, no right existed in the insurer to file appeal against the award of the Claims Tribunal. However, by adding N.K. Raju, the owner as co-appellant, an appeal was filed in the High Court which led to the impugned judgment. None of the grounds on which

insurer could defend the claims petition was the subject matter of the appeal as far as the insurer is concerned. We have already noticed above that we have not been able to figure out from the impugned judgment as to how the owner felt aggrieved by the award of the Claims Tribunal. The impugned judgment does not reflect any grievance of the owner or even that of the driver of the offending bus against the award of the Claims Tribunal. The insurer by associating the owner or the driver in the appeal when the owner or the driver is not an aggrieved person cannot be allowed to mock at the law which prohibit the insurer from filing any appeal except on the limited grounds on which it could defend the claims petition. We cannot put our stamp of approval as to the validity of the appeal by the insurer merely by associating the insured. Provision of law cannot be undermined in this way. We have to give effect to the real purpose to the provision of law relating to the award of compensation in respect of the accident arising out of the use of the motor vehicles and cannot permit the insurer to give him right to defend or appeal on grounds not permitted by law by a backdoor method. Any other interpretation will produce unjust results and open gates for the insurer to challenge any award. We have to adopt purposive approach which would not defeat the broad purpose of the Act. Court has to give effect to true object of the Act by adopting purposive approach.

(7) Sections 146, 147, 149 and 173 are in the scheme of the Act and when read together mean : (1) it is legally obligatory to insure the motor vehicle against third party risk. Driving an uninsured vehicle is an offence punishable with an imprisonment extending up to three months or the fine which may extend to Rs.1,000/- or both; (2) Policy of insurance must comply with the requirements as contained in Section 147 of the Act; (3) It is obligatory for the insurer to satisfy the judgments and awards against the person insured in respect of third party risks. These are sub-sections (1) and (7) of Section 149. Grounds on which insurer can avoid his liability are given in sub-section (2) of Section 149."

9. A plain reading of judgment (supra), shows that their Lordships of Hon'ble Supreme court have not considered provision of Section 170 of the Act. In case Section 170 is granted to contest, the case, then the position shall be same as owner of vehicle and the Insurance Company will have right to prefer appeal. For convenience, Section 170 of the Motor Vehicles Act, 1988 is reproduced as under:

"170- Impleading insurer in certain cases.--

Where in the course of any inquiry, the Claims Tribunal is satisfied that -

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall

thereupon have, without prejudice to the provisions contained in sub-section (2) of section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

10. From a plain reading of Section 170 of the Act, it is evident that once permission under Section 170 of the Act is granted, then Insurance Company will have same status as of the owner of the vehicle. Hence after grant of permission under Section 170 of the Act, the Insurance Company will have right to prefer appeal. In view of the facts of the case, the provisions of Section 149 will not be applicable. In the case of Chinnama George (supra), Section 170 has not been considered by the Hon'ble Supreme Court. The power conferred by Section 170 is statutory power and in derogation of Section 149 of the Act, as is evident from the provisions itself. Accordingly, the appeal is very well maintainable. In view of the above, though the appeal is maintainable but on the question of quantum of compensation, impugned appeal, does not seem to survive. The compensation does not seem to be excessive.

11. The appeal is accordingly dismissed. Let amount deposited in this Court, be remitted to the Tribunal. Whatever amount is due it shall also be deposited within two months. The Tribunal shall release the amount in terms of award immediately after two months.

12. The appeal is accordingly dismissed.

No order as to costs.

ORIGINAL JURISDICTIONS
CIVIL SIDE
DATED: LUCKNOW 03.06.2011

BEFORE
THE HON'BLE UMA NATH SINGH,J.
THE HON'BLE DR. SATISH CHANDRA,J.

Writ Petition No. 1010(MB) of 2011

Pankaj Shrivastava and another ...Petitioners

Versus

High Court of Judicature at Allahabad and another ...Respondents

<u>Constitution of India, Article 226</u>-Power of Chief Justice-being King of roster can even transfer a tied-up Part-heard case-PIL (Criminal)-against Sushri Mayawati challenging the order of Governor refusing sanction for prosecution-as required under Section 19 of Prevention of Corruption Act, 1988, read with Section 197 of Cr.P.C.-as per note of Registry-being unaware with the shortage of strength of Judges-under bonafide impression bifurcated in two separate wings 'Civil PIL' and 'Criminal PIL' to expedite hearing-can not be connected with malafide and arbitrary exercises of Power-nor can be connected with meeting with Chief Minister in connection with Fast Track Courts and Evening Courts-Court express its great concern with mode of addressing Hon'ble Judges-Petition dismissed.

Held: Para 32 and 39

We may now come to the question as to whether the proposal to bifurcate the PIL matters emanated from the office of Hon'ble Chief Justice or it had been mooted earlier and remained in offing, and then surfaced for receiving the approval of His Lordship, Hon'ble Chief Justice? His Lordship, present Hon'ble Chief Justice took over the charge in this High Court only in the last week of June, 2010. Every Judge from his experience of working in one High Court or different

High Courts develops his own perception and views regarding the solution to perennial problem of docket management, and generally it always keeps occupying his mind, if the Judge wants to contribute something to the judicial system in order to prove the worth of his existence. Thus, if given the opportunity, he would definitely try to experiment and implement his experience, of course, in the interest of institution and for a bonafide cause. Thus the present Hon'ble Chief Justice is not an exception. He has longer experience as an Hon'ble Judge of Hon'ble High Court of Judicature at Bombay, one of the premier High Courts of the country. A huge pendency of over ten lacs cases in this High Court has always been a big challenge for every Hon'ble Chief Justice as well as Hon'ble Judges irrespective of the fact that the High Court is working at the less than half of the sanctioned strength of Hon'ble Judges, and thus out of determination to reduce the pendency, even if a move originated from the office of Hon'ble Chief Justice for bifurcation of PIL matters, which ordinarily consume more time of Courts because of monitoring of the subject matters than other types of litigations it can only be said to be a purely bonafide exercise of administrative powers for achieving a bonafide end and in our view there is nothing to read between the lines against the present Hon'ble Chief Justice who had no direct and practical knowledge about the functioning of this High Court till before he has worked for some time.

Thus, if Chapter XXII Rule 1 of the High Court Rules is read conjointly with Chapter V Rule 1 and 14, then the picture about the powers of Hon'ble Chief Justice regarding the Constitution of Bench and posting of part heard and tied up matters becomes clear. The High Court Rules, thus, clearly provides that the Hon'ble Chief Justice can even shift part heard matters to some other Bench though normally he may and should not do like that. Besides, the writ petitions have always been classified in different categories like Tax Writs, Criminal Writs, Civil Miscellaneous Writs etc. and are presented before different Benches and also before the Bench dealing with Civil Miscellaneous Writs etc. Moreover, we also notice that PIL Writ Petition No. 2087 (MB) of 2010 never remained part heard on merit and that is why in the order dated 23.09.2010 the Hon'ble Bench dealing with this case has observed that when the matter had become ripe for final hearing, the application for withdrawal was moved.

Case law discussed:

(1998) 3 SCC 72; (1995) 1 SCC 203; (2001) 2 SCC 386; (1997) 7 SCC 463; (1996) 2 SCC 405; (2006) 8 SCC 200; (2009) 7 SCC 1(1998) 1 SCC Page 1; (2008) 3 SCC 542; (2010) 10 SCC 320; 2001(4) AWC 2688; 1996 (2) AWC 644(Alld FB)

(Delivered by Hon'ble Uma Nath Singh,J.)

1. This order shall also dispose of connected Writ Petition No. 630 (MB) of 2011 (Kashi Prasad Yadav vs. Registrar General and others), as both these matters impugn the same cause of action namely, bifurcation of PIL matters as PIL (Civil) and PIL (Criminal) under the orders of Hon'ble Chief Justice of this court dated 28.8.2010; and dated 31.8.2010, and listing of the same separately before two Benches.

2. Brief facts of the case leading to filing of these writ petitions are that Hon'ble Chief Justice passed the impugned two orders of bifurcating the PIL matters into PIL (Civil) and PIL (Criminal). According to the petitioners, the aforesaid bifurcation under the orders of Hon'ble Chief Justice is without any authority of law and further that this exercise has been undertaken only for the Lucknow Bench of Allahabad High

Court, and not for the Principal Seat at Allahabad. The petitioners have inter alia alleged that the bifurcation orders have been passed to extend undue favour to the present Chief Minister Sushri Mayawati in respect of the pending three writ petitions namely, Writ Petition No. 2087 (MB) of 2009 (Smt. Anupama Singh vs. Central Bureau of Investigation and others), Writ Petition No. 2795 (MB) of 2009 (Mohd. Kateel Ahmad vs. Union of India and others), and Writ Petition No. 2019 (MB) of 2009 (Kamlesh Verma vs. Union of India and others) and also in pending other matters wherein, the arguments of both parties are almost near conclusion. The petitioners have contended that the impugned bifurcation orders have been passed also to facilitate the transfer of the aforesaid three writ petitions from the Court generally hearing /assigned the jurisdiction of PIL matters to another Court.

As per averments made in writ petition [No.1010[M/B] of 2008], the Hon'ble Supreme Court in IA Nos. 376 and 386 filed in Writ Petition (Civil) No. 13381 of 1984 (M.C.Mehta vs. Union of India) on the allegation of bungling to the tune of 17 Crores in connection with beautification of Taj Mahal directed the Central Bureau of Investigation (For short 'the CBI') vide order dated 16.07.2003 to conduct an inquiry into the execution of Taj Heritage Corridor Project launched under the Taj Trapezium Zone Area at Agra, and in furtherance there of, the CBI registered preliminary inquiry no. PE 0062003 A 004. On 14.08.2003, it submitted a report before the Hon'ble Apex Court, and thereafter, the Hon'ble Court directed the Investigating Agency to verify the assets of the Officers/individuals connected with decision making process for the said project. The CBI, thus, submitted two reports on 11.09.2003 and 18.09.2003 before the Hon'ble Apex Court when, the Hon'ble Court directed the CBI to register an FIR against the Officers/individuals involved in the project and to further investigate,which led to registration of RC No. 006200380018 under Sections 120B, 42, 467, 468 and 473 I.P.C. read with Sections 13(2) and 13(1) and (d) of the Prevention of Corruption Act, 1988, against the accused persons including Sushri Mayawati and a member of her cabinet, Shri Naseemuddin Siddiqui, who were arrayed as parties in the writ petition.

3. The Hon'ble Apex Court, thereafter, vide the order dated 27.11.2006 (reported as M.C.Mehta vs. Union of India 2007 1 SCC Page 110] directed as under:

We, accordingly, direct CBI to place the evidence/ material collected by the Investigating team along with the report of the SP as required under Section 173(2) Cr.P.C. before the Court/Special Judge concerned who will decide the matter in accordance with law. It is necessary to add that, in this case, we were concerned with ensuring proper and honest performance of duty by CBI and our above observations and reasons are confined only to that aspect of the case and they should not be understood as our opinion on merits of accusation being investigated. We do not wish to express any opinion on the recommendations of the SP. It is made clear that none of the other opinions/recommendations including that of the Attorney General for India, CVC shall be forwarded to the court/Special Judge, concerned."

4. Thereafter, the CBI filed a report under Section 173 Cr.P.C. before the learned Special Judge [Anti-corruption], CBI, Lucknow. It appears that the report contained a specific mention that in order to prosecute Sushri Mayawati and Shri Naseemuddin Siddiqui, a sanction as contained in Section 19 of the Prevention of Corruption Act, 1988 was not required. The learned Special Judge did not accept this submission, which according to learned counsel for the petitioners suffer from the vice of non application of mind. The learned Judge failed to consider the point as to whether a sanction for prosecution as provided under Section 197 Cr.P.C. or under Section 19 of the Prevention of Corruption Act 1988 was in fact required. The learned Judge also ignored the fact as mentioned in the police report filed under Section 173, Cr.P.C. by the CBI that the sanction for prosecution was not required.

5. Under the circumstances, the CBI approached the sanctioning authority namely His Excellency the Governor of Uttar Pradesh to consider grant of sanction under Section 197 Cr.P.C. and Section 19 of the Prevention of Corruption Act 1988 (For short 'the P.C. Act') against the accused persons. In connection therewith, on request, learned Additional Solicitor General of India gave an opinion on 31.5.2007 clarifying that the sanction as provided in Section 197 Cr.P.C. and Section 19 of the Prevention of Corruption Act, 1988 was necessary for the prosecution of Sushri Mayawati and Shri Naseemuddin Siddiqui. Thereafter, His Excellency the Governor of Uttar Pradesh vide order dated 03.06. 2007 declined the request of CBI to accord sanction for the prosecution of accused persons. The CBI thus moved an application before the learned Special Judge along with the opinion of learned Additional Solicitor General of India dated 31.05.2007 and the order dated 03.06.2007 passed by His Excellency the Governor of Uttar Pradesh declining the request for grant of sanction. The learned Judge in the absence of sanction to prosecute, declined to take cognizance and issue process against Sushri Mayawati and Shri Naseemuddin Siddiqui vide the order dated 5.6.2007 as reproduced hereinbelow:

".....

As observed earlier by the Court in the Order dated 15.02.2007, that in absence of sanction to prosecute Ms Mayawati and Shri Naseemuddin Siddiqui, this Court has no jurisdiction either to take cognizance or to proceed further in respect of Ms Mayawati and Shri Naseemuddin Siddiqui in this case....."

6. The CBI did not challenge this order in higher Forum. Therefore, the aforesaid three writ petitions namely, Writ Petition No. 2087 (MB) of 2009 (Smt. Anupama Singh vs. Central Bureau of Investigation and others), Writ Petition No. 2795 (MB) of 2009 (Mohd. Kateel Ahmad vs. Union of India and others) and Writ Petition No. 2019 (MB) of 2009 (Kamlesh Verma vs. Union of India and others) were filed in this Court.

7. As per the further averments of the instant writ petition, the Court assigned with the roster of hearing the PIL matters heard the parties on the aforesaid three writ petitions at length and then issued notices to Sushri Mayawati and Shri Naseemuddin Siddiqui. In the

meantime, there were certain peculiar developments and one of the petitioners namely Smt. Anupama Singh filed an application on 22.02.2010 for the withdrawal of her PIL before the next dates fixed for hearing on the application for interim relief and the main petition on 05.03.2010 and 18.03.2010 respectively. A Division Bench headed by the then Hon'ble Acting Chief Justice passed the following order:

" It has been contended before us that the matter was heard by Bench comprising Hon'ble Pradeep Kant, J and Hon'ble Shabihul Hasnain. Therefore, it is desirable that the matter may be placed before that Bench for the purpose of appropriate consideration along with Writ Petition No.2795 (MB) of 2009 and 2019 (MB) of 2009 preferably in the week commencing from 8.3.2010."

8. It further appears that the Joint Registrar (Listing), Lucknow Bench, put up a submission on 23.07.2010 for bifurcation of fresh PIL matters, as there was a huge pendency of PIL cases, say about 677 at that time, as per the report of Computer Section. Relevant portion of the submission along with the order of Hon'ble Chief Justice, on reproduction, reads as under:

A. "My Lord, it is also kindly mentioned that Hon'ble Pradeep Kant,J. The Senior Judge presiding the Division A Bench in Court No.1 is the senior most Court dealing with all civil matters and Hon'ble A. Mateen J. presiding the Division Bench in Court No.25 is the senior most Court dealing with all criminal matters.

B. In view of the aforesaid facts, it is most respectfully submitted before your Lordship that all the pending PIL matters in different Courts which are tied up and part-heard B may kindly be ordered as released and to revert them back in the prescribed Court of PIL i.e. Court No. 1 which is presided over by Hon'ble Senior Judge.

C. It is also humbly prayed before your Lordship to consider henceforth, the procedure to classify the fresh P.I.L. C cases into civil and criminal nature where as such till date there is no procedure for bifurcation of fresh PIL cases in this Bench.

Therefore, if your Lordship most respectfully consider to specifically nominate the Courts to deal with such matters with the condition as to their non-transferability to any other Court. It may accelerate the speedy disposal of cases and decrease the pendency thereof.
Submitted. Sd/-
Vikas Kumar Srivastava)
Joint Registrar (Listing)
23.07.2010

"Approved in term of A, B and C for Lucknow Bench. Please take steps to categorize PIL (C) and PIL (Crl.)"

Sd/-
30.07.2010"

9. It further appears that petitioner Smt. Anupama Singh also filed C.M.A. No. 27890 of 2010 later for the withdrawal of her Vakalatnama given in favour of Shri C.B.Pandey and Shri Rohit Tripathi, Advocates. Both applications namely for the withdrawal of her PIL petition, and the withdrawal of

vakalatnama moved by petitioner Smt. Anupama Singh were heard at length by the Court entrusted with PIL jurisdiction, and the orders were reserved on 23.08.2010. A month later, on 23.09.2010, the Court rejected the application for withdrawal of writ petition, but allowed Advocates Shri C.B.Pandey and Shri Rohit Tripathi to withdraw their powers. The Court took an exception to the conduct of petitioner Smt. Anupama Singh in moving the application for withdrawal of main writ petition at the stage when the petition after consuming a lot of precious time of the Court, had become ripe for hearing. The Court, thus, imposed the costs of Rs. 20,000/-.

10. As per further narration of the sequence of events, a Division Bench, which had been assigned the jurisdiction of Crl. Misc. Bench matters, in W.P. No. 8254 (MB) of 2010 (M/s Pepsi Co. India Holdings [Pvt.] Ltd. And Another Vs. State of U.P. Through its Secy. Food and Civil Supplies Lko.) passed the following order:-

"An objection has been raised that the matter is cognizable by a Division Bench dealing with civil miscellaneous matters as the main relief claimed is for quashing the Executive Circular/Government Order dated 11.05.2010 whereas this bench has been assigned writs relating to quashing of FIRs as per the roster.

A perusal of the reliefs clause shows that the first relief is for quashing of the G.O. Dated 11.05.2010 and the consequent relief is for quashing the FIR dated 11.08.2010 registered pursuant to the aforesaid Government Order.

Under these circumstances, Registry is directed to place the matter before Hon'ble the Chief Justice for appropriate orders. It is informed at the bar that Hon'ble The Chief Justice would be available on 28.08.2010 at Lucknow.

List this matter on 30th August, 2010 before the appropriate bench alongwith connected matters."

Thereafter Hon'ble Chief Justice passed an order dated 28.08.2010 towards the same as given below:-

"Since the ultimate relief sought is to quash the F.I.R., it will fall within the criminal jurisdiction of the Court.

Sd/-

C.J.

28.08.2010"

On 31.08.2010, Joint Registrar (A/C)/OSD (PIL) on an office note/proposal being approved by Hon'ble Chief Justice, issued the following order for classification of PIL:

"(A) Matter pending as PIL wherein sanction/non sanction or refusal to grant sanction U/s 196 or 197 Cr.P.C. as well as U/s 19 of the Prevention of corruption act is involved would be classified as Criminal PIL.

(B) Matter wherein main relief is against an Executive order/ Govt. Order/ Administrative Orders and other relief/ reliefs seeking quashing of FIR or any criminal proceeding pursuant thereto, it should be classified as Criminal Misc. Bench petition.

(C) Matter wherein main relief is against an Executive order/ Govt. Order/ Administrative orders and other relief/ reliefs seeking quashing of FIR or any criminal proceeding pursuant thereto, should be classified as Criminal Misc. Bench if the writ petition is filed in the nature of PIL or is converted later on, by the Court, into PIL shall also be send to Court prescribed for PIL (Criminal).

10. It also appears that a three judges' Committee of this High Court vide its report dated 19.08.1998 framed some guidelines for PIL matters. Besides, the petitioners have also referred to the judgment dt. 18.01.2010 passed by the Hon'ble Apex Court in Civil Appeal Nos. 1134-1135 of 2002 (State of Uttranchal Vs. Balwant Singh Chaufal) to argue that though the Hon'ble Court has extensively discussed all the judgments passed on PIL matters right from its origin till date and has also examined the ambit, scope, use and misuse of PIL but there is no observation whatsoever regarding the bifurcation of PIL matters like PIL (Criminal) or PIL (Civil), in the judgment.

11. It seems that considering the abuse of process of Court, the Hon'ble Apex Court also directed all High Courts to frame rules for encouraging genuine PILs and discouraging PILs filed with oblique motives.

12. The petitioners have briefly referred to, in the writ petition, about the rules framed by various High Courts on PIL in the light of directions of the Hon'ble Supreme Court, to contend that there is no bifurcation of PIL matters.

13. The petitioners have also made averments in respect of the article dated 04.09.2010 which appeared in the Hindustan Times, a daily newspaper, and the article dated 04.10.2010 that was published in the 'Outlook', a weekly magazine, containing contemptuous allegations against Hon'ble Chief Justice that he withdrew the PIL matters challenging closure of Taj Heritage Corridor Case from a particular Bench. They have also questioned the need and motive behind issuance of a Press Note by the Registrar General of this Court justifying the orders dated 28.08.2010 and 31.08.2010 passed by Hon'ble Chief Justice.

14. It is also mentioned in the averments that on 28.09.2010, the Registrar General called for explanation from the Editor-in-Chief, 'Outlook', New Delhi, in respect of the allegations in the Article published on 04.10.2010 relating to certain facts [which essentially pertain to administrative orders passed by Hon'ble Chief Justice] like mentioning about the withdrawal of a specific case challenging the refusal of grant sanction for Criminal prosecution against the Chief Minister from a particular Bench. Thus the article attributed motives to the high office of Hon'ble Chief Justice. The Press Note also clarified that on 21.07.2010, Hon'ble Chief Justice had met the Chief Minister to discuss only about the matters relating to Higher Judicial Service and continuity of Fast Track Courts.

15. As per averments containing further sequence of events that followed, a learned Senior Advocate of this High Court filed contempt petition (Criminal) No.17 of 2010 for punishing the contemners under the Contempt of Courts Act. On 11.10.2010, a Division Bench at Allahabad took cognizance and issued

notice to all such persons who appeared to be involved in the publication of news-items as aforesaid.

16. In this background, learned counsel Shri Prashant Bhushan appearing for petitioners, submitted that the impugned orders dated 28.08.2010 and 31.08.2010, bifurcating the PIL matters into Civil and Criminal PILs, appear to be of unusual nature, which, on being given effect to, would send a wrong message about the independence of hearing on the question of refusal to grant sanction under Section 196 or 197 Cr.P.C. as also under Section 19 of the Prevention of Corruption Act. Shri Prashant Bhushan also submitted that in none of the provisions of the Rules on PILs framed by different High Courts towards the compliance of directions in the judgment rendered by the Hon'ble Supreme Court in the case of Balwant Singh Chaufal (supra), there is any mention about the classification of PILs as Criminal and Civil PILs, nor has the Hon'ble Supreme Court made any observation on that point. Further, according to learned counsel, the subject of PIL is already dealt with vide newly inserted Sub-rule (3-A) (vide notification dt. 01.05.2010) in Chapter 22 of the Allahabad High Court Rules (Vol. I). Sub-rule (3-A) on reproduction, reads as under:

"(3A) In addition to satisfying the requirements of the other rules in this Chapter, the Petitioners seeking to file a Public Interest Litigation, should precisely and specifically state, in the affidavit to be sworn by him giving his credentials, the public cause he is seeking to espouse; that he has no personal or private interest in the matter; that there is no authoritative pronouncement by the Supreme Court or High Court on the question raised; and that the result of the Litigation will not lead to any undue gain to himself or anyone associated with him, or any undue loss to any person, body of persons or the State."

17. Thus, learned counsel submitted that the impugned orders of bifurcation of PIL passed by Hon'ble Chief Justice are contrary to and in the teeth of the statutory rules framed by the Full Court of High Court, which is duly notified in gazette. It was also submitted by learned counsel that there are other pending cases of different nature filed by individual litigants which are, comparatively, of more urgent nature, and thus should have immediately drawn the attention of Hon'ble Chief Justice for disposal on priority basis than the issue of bifurcation of the PIL matters. In the first administrative order, the case of Taj Corridor was treated to be civil, whereas in the second one dt. 31.08.2010, it was categorized as PIL Criminal and thus, it seems that the impugned orders were passed only with reference to a specific case. Besides, such orders passed by Hon'ble Chief Justice are not only contrary to the statutory High Court Rules, but are also subject to the provisions of Cr.P.C. There is no doubt that Hon'ble Chief Justice is the Master of Rosters, but that power is to be exercised only within the ambit of statutory High Court Rules. It cannot be exercised arbitrarily or in malafide manner or for extraneous considerations.

18. Learned counsel also submitted that the press note issued by the Registrar General of this Court clarifying the impugned orders has, rather, confounded the confusion and seem to be actuated

with malafide. Thus, according to learned counsel, the impugned orders are arbitrary and malafide in nature. They have been apparently issued with the sole motive to favour the Chief Minister and one Cabinet Minister by shifting the PIL impugning the question of refusal of prosecution sanction in Taj Corridor's Case in the garb of the bifurcation orders from a Bench of High Court which was hearing the said PILs since 2009 and had since also passed several interim orders. Both the impugned orders are also in total contravention of the rule of the High Court which permits classification of writ petitions into two namely (i) Writ petitions filed enforcing fundamental rights (writ of habeas corpus) and (ii) Writ petitions other than habeas corpus. Further as per rule, writ other than habeas corpus has to be heard by the Bench hearing Civil matters. The Bench hearing three writ petitions connected with Taj Corridor's case vide its detailed order dated 18.09.2009 issued notices to respondent nos. 3 & 4 and the writ petition filed against the said order was also dismissed by The Hon'ble Apex Court. It is also submitted that there was a meeting of Hon'ble Chief Justice with the Chief Minister on 19.08.2010. Learned counsel submitted that on the very next date i.e. 20.08.2010 as is apparent from the press note issued by the High Court, Hon'ble Chief Justice approved a proposal moved by the Registry for bifurcating PILs into Civil and Criminal on the reports of its Computer Section. On 28.08.2010 a formal order was signed by Hon'ble Chief Justice bifurcating PILs into PIL (Criminal) and PIL (Civil). The PIL (Criminal) work at Lucknow Bench was assigned to another Bench. As per submissions, even the part heard matters were sifted to the newly designated Bench.

19. Learned counsel further submitted that as the order dated 28.08.2010 could not give a desired result, a clarificatory order was issued on 31.08.2010 explaining that the PIL wherein the issue of grant of sanction or refusal to grant sanction under Section 196 or 197 as well as Section 19 of the Prevention of Corruption Act was involved, it would be classified as Criminal PIL. Learned counsel further submitted that this clarificatory order was clearly meant to cover the PILs pending against respondent no.3, as these are the only cases which would be affected by the impugned orders.

20. Learned counsel also submitted that the second order dated 31.08.2010 although enumerated two-three other categories of PILs also, but the list was not exhaustive. Learned counsel further submitted that several other kinds of PILs like PIL for seeking an independent investigation were not included in the list. Learned counsel for petitioner contended that the Registrar General of the High Court issued a press note justifying the aforesaid two orders on the ground of administrative convenience but it also stated that:

" it is misleading to suggest that Hon'ble Chief Justice has passed any orders withdrawing the aforesaid case, from the Bench presided by Hon'ble Pradeep Kant, J. rather the same Bench (Hon'ble Pradeep Kant, J. and Hon'ble Shabihul Hasnain,J.) is still ceased with the matter..."

21. It is also a contention of learned counsel that the main matter after bifurcation was being listed before a new Bench and it was only the application for

withdrawal of a PIL that was reserved by the Bench which heard the matter earlier. The Bench delivered judgment on the application on 23.09.2010. Learned counsel in particular assailed that part of the press note which referred to an order dated 23.08.2010 passed in Pepsi. Co. matter which contained composite prayers namely, one for quashing some executive order and other for quashing of the F.I.R.,wherein directions were given to place the matter before Hon'ble Chief Justice to seek clarification as to whether that matter was to be listed before the Bench which had been assigned the jurisdiction of quashment of F.I.Rs. On 28.08.2010, Hon'ble Chief Justice issued an order classifying this matter as PIL (Criminal). Learned counsel took exception to the order for the reason that the petitioner Pepsi Co. had filed writ petition for quashment of some executive order as also an F.I.R. and thus it was purely a private matter. Categorisation of the writ petition as PIL had no basis save a justification for passing the impugned orders of bifurcating of PILs into Civil and Criminal matters. A statement in the press note that the move to bifurcate PIL matters actually originated in some office note of the Computer Section of the High Court on account of the huge pendency of PILs invited criticism of learned counsel mainly on the ground that the Computer Section is not assigned the job of moving any such proposal and if the object of bifurcation was quick disposal of a large number of pending PILs, then there was no logic behind sending the part heard matters to a new Bench and thus it defeated the very object of issuing the impugned administrative orders. According to learned counsel, the impugned orders appear to suffer from the vice of arbitrariness and malafide and apparently seem to have been issued with the sole motive for protecting private respondent nos. 3 and 4. The immediate effect of the impugned orders was that the PILs dealing with refusal of prosecution sanction against respondent nos. 3 and 4 in Taj Corridor's matters by stood shifted to a new Bench from the Bench which was earlier seized with these cases. These PILs had been heard on about forty dates by the said Bench out of which hearing on merit also took place at least on twenty dates. Thus Hon'ble Chief Justice issued unusual specific administrative orders which affected the one and only case. Chapter XXI and XXII of the High Court Rules permit classification of writ petitions into writ of Habeas Corpus and writ other than Habeas Corpus. Learned counsel referred to Rule 1 of Chapter XXII which provided as under:

"(1) An application for a direction or order or writ under Article 226 [and Article 227] of the constitution other than a writ in the nature of habeas corpus shall be made to the Division Bench appointed to receive applications or, on any day on which no such Bench is sitting, to the Judge appointed to receive applications in Civil matters....."

Thus, as per the Rule, all writ petitions other than Habeas Corpus have to be heard only by the Bench hearing Civil matters.

22. Learned counsel further reiterated that the justification given in the press note was done for administrative convenience but the same cannot be done in violation of the High Court Rules framed by the Full Court and also notified in the gazette. Hon'ble Chief Justice has full liberty to take any administrative

decision regarding rosters or bifurcation of the writ petitions but the same can be done only within the framework of rules and any classification or bifurcation of roster in contravention thereof by an administrative order is definitely invalid. While referring to the ratio of judgement rendered by The Hon'ble Apex Court in the case of ***High Court of Judicature for Rajasthan vs. Ramesh Chand Paliwal, (1998) 3 SCC 72,*** learned counsel in particular relied on the observation of the Hon'ble Court in regard to the powers of Hon'ble Chief Justice as under:

"Hon'ble Chief Justice has been vested with wide powers to run the High Court administration independently so as not to brook any interference from any quarter, not even from his brother Judges who, however, can scrutinise his administrative action or order on the judicial side like the action of any other authority."

23. Learned counsel also cited other judgments in support of the arguments. In the case of ***High Court of Madhya Pradesh vs. Mahesh Prakash (1995) 1 SCC 203, at page 211,*** the Hon'ble Apex Court has held that a writ petition can be filed under Article 226 of the Constitution in the High Court challenging its administrative orders. Learned counsel also submitted that administrative orders like the ones passed by Hon'ble Chief Justice can be challenged on "Wednesbury Principles" on the ground of illegality, irrationality and bad faith as laid down by the The Hon'ble Apex Court in the catena of decisions like ***Om Kumar vs. Union of India, (2001) 2 SCC 386, at page 399, Union of India vs.G.Ganayutham, (1997)7 SCC 463, at page 472, Delhi Science Forum vs. Union of India, (1996) 2 SCC 405, at page 418,Jayrajbhai Jayantibhai Patel vs. Anilbhai Nathubhai Patel, (2006) 8 SCC 200, at page 209 and Kanna Dason vs. Ajoy Khose (2009) 7 SCC 1 at page 50.***

24. In the case of Kanna Dason (supra) it has been held in para nos. 105, 106 & 107 that the power of judicial review, although is very restricted, cannot be denied to be exercised when a relevant fact in not considered.

25. On the other hand, learned Sr. counsel Shri S.P.Gupta appearing for the High Court submitted that the impugned orders of have not been passed in violation of the provisions of Chapter XXII Rule 1 of the Allahabad High Court Rules for the reason; (I) that Chapter XXII Rule 1 has to be read along with Chapter V Rule 1 and Rule II (viii) and (ii). Besides writ petitions have always been classified in different categories like Tax writs, Criminal Writs, Civil Misc. Writs etc. and are presented before different Benches and also before the Bench dealing with Civil Miscellaneous Writs. Regarding the submission of malafide and arbitrariness it has been contended that the order in W.P. No. 2087 (MB)/10, was passed on 23.09.2010 whereas the impugned orders were passed on 28.08.2010 and 31.08.2010. This case never remained part-heard on merit. In fact, there is observation in the order that it had become ripe for final hearing when the withdrawal application was filed. The last line of the order of 23.9.2010 says that the matter may now be listed before the regular bench. Thus according to learned counsel, no one could anticipate that the matter would be kept by the Bench hearing it. The argument of learned

counsel for petitioners is founded on the brazenly false plea that the matter had been heard on merits on several dates and that it remained part-heard. Both these pleas are totally incorrect and are, in fact, conscious lies. Thus there absolutely nothing to allege arbitrariness and the impugned orders are manifestly general.

26. While dealing with the submission as to why these matters be listed before the Bench which heard it earlier, Learned Sr. counsel as well as Learned counsel on record for High Court have submitted in the written reply that the present writ as PIL (i.e. NO. 630) is 'unashamedly malicious and malafide.' It has been filed in disregard to the impartiality and integrity of Hon'ble judges of this Court. It is rather an aspersion cast on the integrity of the Hon'ble judges of two Division Benches, namely, the one headed by Hon'ble Mr. Justice Pradeep Kant and, the other, headed by Hon'ble Mr. Justice Abdul Mateen. It creates a wrong impression that the Bench of Hon'ble Justice Pradeep Kant may have decided the writ against the Chief Minister and that the Bench of Hon'ble Mr. Justice Abdul Mateen may give a decision favourable to the Chief Minister. Learned Counsel for the High Court have also submitted in the written reply that the element of malafide behind filing the present writ petition in the nature of PIL is clear from the fact that though the objection to the jurisdiction of bench headed by Hon'ble Mr. Justice Abdul Mateen in respect of hearing of W.P. No. 2087 (MB)/09 had been rejected by that bench on 21.12.2010, and that order has since also become final and thus binding on the petitioner in that case, yet the petitioners have filed these writ petitions to raise the same issues under the cover of PIL in a different name in an attempt to beguile this Hon'ble Court.

27. Learned Senior Advocate as well as learned counsel on record for High Court placed heavy reliance upon the judgment rendered by the Hon'ble Apex Court in the case of ***State of U.P. vs. Prakash Chand & others (1998) 1 SCC Page 1*** to argue that Hon'ble Chief Justice being the master of roster can even transfer part heard cases from one Bench to another Bench. They also referred to the judgement of Hon'ble Apex Court rendered in the case of ***Divine Retreat Centre Vs. State of Kerala and others reported in (2008) 3 SCC Page 542*** to argue that the constitution of Benches and allocation of work to Judges/Benches is the sole prerogative of Hon'ble Chief Justice and the Judges cannot pick and choose any case pending in High Court and assigned the same to themselves for disposal without appropriate orders of Hon'ble Chief Justice.

28. There is also a reference to a latest judgement of the Hon'ble Apex Court rendered in the case of ***State of U.P. vs. Neeraj Chaubey, (2010).10.SCC.320*** to strengthen the argument that Hon'ble Chief Justice has full power, authority and jurisdiction in the matter of allocation of business of the High Court which flows not only from the provisions contained in Sub-section (3) of Section 51 of the States Re-organisation Act 1956 but inheres in him in the very nature of things. Hon'ble Chief Justice enjoys special status and he alone can assign work to a Judge sitting alone or to the Judges sitting in Division Bench or Full Bench. He has jurisdiction to decide which case will be heard by which Bench. If Judges were free to choose their

jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial work of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. A Judge or a Bench of Judges can assume jurisdiction in a pending case only if the case is allotted to him or them by Hon'ble Chief Justice.

29. Learned Senior Advocate, Shri S.P. Gupta also cited a judgment of Full Bench of this High Court passed in the case of **Prof. Y.C. Simhadri Vs. Deen Bandhu Pathak, 2001 (4) AWC 2688** to argue that Hon'ble Chief Justice is the master of roster. He has full power, authority and jurisdiction in the matter of allocation of business of the High Court. There is also a reference to another judgment rendered by a Full Bench of this High Court which is reported in the case of ***Sanjay Kumar Shrivastava Vs. Acting Chief Justice, 1996 (2) AWC 644 (Alld FB)*** to argue that in respect of constitution of the Bench under the Allahabad High Court Rules 1952 (Rules (1), (2) and (14) of Chapter V), Hon'ble Chief Justice alone has jurisdiction, and a part heard case ordinarily is to be listed before the same Bench for disposal, but it can not be invariably placed. In special circumstances, Hon'ble Chief Justice can list a part heard case before other Benches.

30. In the written rejoinder to the reply on behalf of the High Court, learned counsel for the petitioners Shri Prashant Bhushan has submitted that Chapter V which related to the roster of Hon'ble Single Benches and Hon'ble Division Benches has no bearing whatsoever on the issue in question. According to learned counsel, the issue in question was not decided by the Bench headed by Hon'ble Mr. Justice Abdul Mateen vide the order dated 21.12.2010, and on the contrary, the learned counsel has narrated the facts as follows:

" In view of the Order dated 28.08.2010 and the Clarification dated 31.08.2010 the Registry of the Court classified Taj Corridor matter as a Criminal PIL and placed it before the new bench comprising Hon'ble Mr. Justice Abdul Mateen and Hon'ble Mr. Justice Yogendra Kumar Sangal on 27.10.2010. On this date, an oral objection was raised before the said Bench for placing the matter before the earlier Bench, on which the Bench asked the Registrar General to place the clarification on record. (at page no.134)

On 17.11.2010 an application for intervention/modification being C.M.Appln. No. 117093/2010 was moved by one Mamta Singh in a writ petition filed by Smt. Anupama Singh. (at page nos. 135-140)

On the next date, i.e. 18.11.2010, the Counsels reminded the Bench about the earlier order with respect to the jurisdiction of the Bench. Upon this, the Bench issued notice to the Registrar General for appearing in person on the next date to clarify the position. (at page nos. 141-142)

On 20.12.2010, the Bench comprising Hon'ble Mr. Justice Abdul Mateen and Hon'ble Mr. Justice Yogendra Kumar Sangal proceeded to hear the intervention/modification application without seeking any

clarification from the Registrar General and pronounced an order rejecting the objections on the question of jurisdiction and the modification/intervention application on 21.12.2010. (at page nos. 144.146)

The Bench comprising Hon'ble Mr. Justice Abdul Mateen and Hon'ble Mr. Justice Yogendra Kumar Sangal simply held that they have jurisdiction to hear these PILs as these PILs have been categorized as Criminal PIL in view of the administrative orders issued by Hon'ble Chief Justice of the High Court of bifurcating the PILs into Civil and Criminal. The aforesaid Bench never decided the validity of the impugned administrative orders. In fact, they could not have decided this issue because at that point of time no such application or petition challenging these impugned orders was pending before them.

In fact, when the present writ petition was filed challenging the validity of these two administrative orders, it was first listed before the Bench presided over by the Hon'ble Mr. Justice Pradeep Kant on 20.01.2011 but he recused himself from hearing the said matter as his name was figuring in the impugned administrative orders, thereafter, on the same day, the matter was transferred to the Bench presided over by Justice Abdul Mateen who also recused from hearing the said matter on the same ground."

We have heard learned counsel for both parties at length and perused the materials placed on record.

On due consideration of rival submissions and careful reading of the narration of facts, it appears to be more a classic case of some high drama which can be titled as 'the tragedy of comedies' and also seems to have been staged and played inside and around the High Court premises, a highly respected institution, which not more than 3 decades ago, like any ecclesiastical institution, used to command the highest reverence from all, sheer out of immense public faith.

The present Hon'ble Chief Justice assumed the office on elevation from the Bench of Hon'ble High Court of Judicature at Bombay where, as per a copy of roster brought to our notice, there is a bifurcation of PIL matters into PIL (Civil) and PIL (Criminal). It appears from the office note/submissions dt. 23.07.2010 placed by Joint Registrar (listing), Lucknow Bench, before Hon'ble Chief Justice that for a better docket management of PIL matters, based on a report of the Computer Section on account of pendency of about 677 such matters only in Lucknow Bench itself, it was thought necessary to seek bifurcation thereof. It seems that the proposal was accorded immediate approval of present Hon'ble Chief Justice, however, in stead of evoking warm cooperation from the relevant corners, this move led to embroiling the institution of Chief Justice into unnecessary controversy. But why? Perhaps, for the cravings in some Hon'ble Judges to get rosters of their choice. It is a common knowledge to all of us that some rosters/jurisdictions like writ petition (Civil) [Miscellaneous Bench and Service matters], writ petition (Criminal), PIL (Civil and Criminal) and Bail matters etc generally, with less efforts yield higher disposal and at the same time keep the Judges under the media glare in comparison with pure civil, criminal and tax matters which lay pending for years.

Now even the Bar has lost interest beyond obtaining interim orders in such cases. Perhaps, this fact was well within the knowledge of the Hon'ble Apex Court in passing the judgment in Neeraj Chaubey's case (supra). The Hon'ble Apex Court has forewarned that If Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial work of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case.

31. With great respect to the institution of Hon'ble Chief Justice, if we may suggest, the ideal solution to the problem appears to lie in issuing only a mixed roster containing all types of cases including also from the oldest to the latest ones for every Bench, (Sitting Single or as Division Bench, as the case may be) according to its competence of jurisdiction. Asking or aspiring for a particular jurisdiction or case is generally un-welcomed by any Hon'ble Chief Justice and at the High Court level, a Judge is expected to sit in and decide all types of matters with equal proficiency and lucidity. One cannot be both a Judge of High Court (Constitutional Authority) and at the same time a member of an Specialized Tribunal generally entrusted to decide the cases of only one branch of law.

32. We may now come to the question as to whether the proposal to bifurcate the PIL matters emanated from the office of Hon'ble Chief Justice or it had been mooted earlier and remained in offing, and then surfaced for receiving the approval of His Lordship, Hon'ble Chief Justice? His Lordship, present Hon'ble Chief Justice took over the charge in this High Court only in the last week of June, 2010. Every Judge from his experience of working in one High Court or different High Courts develops his own perception and views regarding the solution to perennial problem of docket management, and generally it always keeps occupying his mind, if the Judge wants to contribute something to the judicial system in order to prove the worth of his existence. Thus, if given the opportunity, he would definitely try to experiment and implement his experience, of course, in the interest of institution and for a bonafide cause. Thus the present Hon'ble Chief Justice is not an exception. He has longer experience as an Hon'ble Judge of Hon'ble High Court of Judicature at Bombay, one of the premier High Courts of the country. A huge pendency of over ten lacs cases in this High Court has always been a big challenge for every Hon'ble Chief Justice as well as Hon'ble Judges irrespective of the fact that the High Court is working at the less than half of the sanctioned strength of Hon'ble Judges, and thus out of determination to reduce the pendency, even if a move originated from the office of Hon'ble Chief Justice for bifurcation of PIL matters, which ordinarily consume more time of Courts because of monitoring of the subject matters than other types of litigations it can only be said to be a purely bonafide exercise of administrative powers for achieving a bonafide end and in our view there is nothing to read between the lines against the present Hon'ble Chief Justice who had no direct and practical knowledge about the functioning of this High Court till before he has worked for some time.

33. His Lordship's meeting with the Chief Minister appears to be a courtesy call wherein some routine administrative matters like selection in higher judicial service and continuity of Fast Track Courts also surfaced for discussion. Thus, it was not shrouded with any mystery. Such meetings are not uncommon today due to rapid change in the nature of litigation and the justice delivery system, and also due to growing expectation of the society from the judiciary and the challenges it is facing on account of tremendous increase in the volume of litigation. Lok Adalats, Mediation and Conciliation Activities, legal literacy and the slogan of justice at door step have gradually reduced the distance of two other organs of the State from the judiciary created due to strict separation of powers, though the grips of checks and balances on each other have not yet loosened. Moreover, on a careful scrutiny of the materials available before us, we do not find any incriminating fact except an unfounded apprehension on the part of petitioners in alleging motive to Hon'ble Chief Justice for according approval on the proposal for bifurcation of PIL matters, which according to learned counsel was designed to help the Chief Minister and her cabinet colleague, little realising the amount of damage it would cause to the Institution of Chief Justice in the eye of litigant public, and the society at large. Now coming to other aspect of this matter that related to an order passed by a Division Bench of this High Court which was entrusted with the jurisdiction of deciding writ petitions (criminal) [generally filed for quashment of FIR, and for interim orders like grant of stay of arrest] in ***Writ Petition No. 8254 (MB) of 2010 (M/s Pepsi Co. India Holdings (Pvt.) Ltd. and another vs. State of U.P. through its Secretary (Food & Civil Supplies), Lucknow,*** We notice that on account of impugned order issued on 28.08.2010 on approval of the proposal by Hon'ble Chief Justice, there was some confusion about the classification of the Writ Petition containing composite prayers, namely, one for grant of relief of Civil nature and the other of Criminal nature in the sense that in one part of the writ petition an administrative order passed by the Government was challenged, while in the other, an FIR registered against the petitioners was sought to be quashed. Hon'ble Chief Justice while clarifying the position passed the following order;

"Since the ultimate relief sought is to quash the F.I.R., it will fall within the Criminal jurisdiction of the Court.

Sd/-

C.J.
28.08.2010"

34. The above order passed by Hon'ble Chief Justice is self explanatory as it has nothing to do with bifurcation of PIL matters, and thus, no oblique motive much less to say a motive to justify the order of bifurcation of PIL can be attributed to Hon'ble Chief Justice.

35. In so far as the news item which appeared on 04.09.2010 in Hindustan Times, a daily newspaper, and the article dated 04.10.2010 published in the 'Outlook', a weekly magazine, are concerned, a Division Bench of the Principal seat at Allahabad is already seized with the matter and taken cognizance on the Contempt Petition (Criminal) No. 17 of 2000 filed by a

learned Senior Advocate of this Court. Thus, it may not be proper for us to make any observation. However, the subject matter of the Articles since relate to the 'Taj Corridor Heritage Case' and the connected writ petitions are pending before the Lucknow Bench, Hon'ble Chief Justice may consider to shift the contempt matter to the Bench at Lucknow, hearing other pending writ petitions on the same subject matter.

36. Regarding the clarificatory Press Note issued by the Registrar General of this Court in respect of the news items that appeared in the Hindustan Times and weekly magazine 'Outlook', it appears to be only a hasty act which has rather confounded the confusion that arose out of meeting of Hon'ble Chief Justice with the Chief Minister and also from passing of the orders of bifurcation of PIL matters into PIL (Criminal) and PIL (Civil) soon thereafter on 28.08.2010 and 31.08.2010.

37. Though Mr. Shri S.P.Gupta, an octogenarian learned Senior Advocate appearing for the High Court also registered his disapproval of the act of the Registrar General by very fairly conceding that the Registrar General should not have issued this Press Note with irrelevant reference and explanation, but he also prayed for a pardon. Thus, we refrain from making any adverse observation against the Registrar General, lest it may affect his future prospects who like many other Judicial Officers has learnt the art of survival. In this background we are of the considered view that Hon'ble Chief Justice and Hon'ble Full Court of the High Court, should not permit any Judicial Officer to over stay at one place, be he the Registrar General or any other Judicial Officer.

38. Regarding the questions of law that the administrative order passed by Hon'ble Chief Justice cannot contravene the statutory High Court rules framed by Full Court of the High Court which is also published in the official gazette, there is no quarrel about the legal proposition that an administrative order/executive direction cannot contravene, and have over-riding effect on an statutory rule except that it can have the force of statutory rule till the framing of rule, to cover a vacant space in the Area, the rules has been notified to operate. Here the question that requires our answer is as to whether Hon'ble Chief Justice has exceeded the powers given to him in Chapter V Rule 1 and 14 of the Allahabad High Court Rules, which empower him to constitute Benches and assign Judicial Works to Hon'ble Judges The said rules, on reproduction read as under:

"1. Constitution of Benches.-- *Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.*

.....
.....

14. Tied up cases.-

(1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench.

(2) When a criminal revision has been admitted on the question of severity

of sentence only, it shall ordinarily be heard by the Bench admitting it."

39. Thus, if Chapter XXII Rule 1 of the High Court Rules is read conjointly with Chapter V Rule 1 and 14, then the picture about the powers of Hon'ble Chief Justice regarding the Constitution of Bench and posting of part heard and tied up matters becomes clear. The High Court Rules, thus, clearly provides that the Hon'ble Chief Justice can even shift part heard matters to some other Bench though normally he may and should not do like that. Besides, the writ petitions have always been classified in different categories like Tax Writs, Criminal Writs, Civil Miscellaneous Writs etc. and are presented before different Benches and also before the Bench dealing with Civil Miscellaneous Writs etc. Moreover, we also notice that PIL Writ Petition No. 2087 (MB) of 2010 never remained part heard on merit and that is why in the order dated 23.09.2010 the Hon'ble Bench dealing with this case has observed that when the matter had become ripe for final hearing, the application for withdrawal was moved.

40. In view of all the aforesaid discussion, we do not find any element of extraneous consideration behind passing of impugned orders dated 28.08.2010 and 31.08.2010 as alleged in the petition. Moreover, we fail to understand from the materials placed before us as to why, there should be a preference for a particular Bench and objection to, for the other. Exercise of such choice may shake the public faith in the justice delivery system beyond redemption.

We may also notice that the order dated 21.12.2010 passed by a Division Bench headed by Hon'ble Mr. Justice Abdul Mateen holding that the Bench has got jurisdiction to hear and decide the writ petition (Criminal) filed in the Taj Corridor's case on merit, has since attained finality and the Special Leave Petition (Civil) No. 942 of 2011 filed against that order in respect of rejection of the intervention application by the High Court has also been dismissed with liberty.

41. Lastly, before parting with the matters, we think it expedient in the interest of this Institution to record our disapproval of vigorous trading of strong language by learned counsel for parties during the course of hearing and in their written submissions as well. Even in the reply filed on behalf of the High Court, learned counsel have not shown proper respect to two Hon'ble sitting Judges of this Bench and they have been addressed by names as 'Justice Pradeep Kant' and 'Justice Abdul Mateen' (without addressing even as 'Mr. Justice' although it should be 'Hon'ble Mr. Justice'). Use of words like *'brazenly false plea, conscious lies, unashamedly malicious and malafide'* in the reply of the High Court also need to be noticed and deserve to be cautioned.

42. In the premises, discussed hereinabove, we do not find any merit in both these writ petitions [W.P. No.1010(M/B) of 2011 and W.P.No. 630(M/B) of 2011]. Therefore, the same are hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2011

BEFORE
THE HON'BLE SATYA POOT MEHROTRA,J.
THE HON'BLE S. S.TIWARI,J.

First Appeal From Order No. - 2851 of 2010

National Insurance Company Ltd.
...Petitioner
Versus
Nathu Ram Sharma and others
...Respondent

Counsel for the Petitioner:
Sri S.K. Mehrotra

Motor Vehicle Act, 1988 Section 173- Appeal against award of Accident Claim Tribunal-vehicle involve in accident found insured-permission to contest the case under section 170 rejected-hence the insurance company cannot be allowed to challenge except liability under section 149(2)-no infirmity or illegality found-Appeal Dismissed.

Held: Para 17

Reading Sections 170 and 149(2) of the Act together, it is evident that in case the Tribunal grants permission to the insurer under Section 170, the insurer will get right to contest the Claim Petition on all or any of the grounds that are available to the person against whom the claim has been made. However, if such permission is not granted by the Tribunal, then the insurer will be entitled to contest the Claim Petition on the limited grounds mentioned in sub-section (2) of Section 149 of the Act. It follows, therefore, that in case an appeal is filed by the insurer against an Award in a case where its application under Section 170 of the Act was rejected by the Tribunal, it (insurer) will be able to challenge the Award only on the limited grounds mentioned in sub-section (2) of Section 149 of the said Act.

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

1. The present Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988 (in short "the Act") against the judgment and order / award dated 6.4.2010 passed by the Motor Accidents Claims Tribunal, Etawah in Motor Accident Claim Petition No. 738 of 2008 filed by the claimant-respondent nos. 1 to 3 on account of the death of Vijay Kumar in an accident, which took place on 25.10.2008.

2. It was, interalia, averred in the Claim Petition that on 25.10.2008, the said Vijay Kumar boarded Bus No. UP75A-7639 (hereinafter also referred to as 'the vehicle in question') after paying fare for going from Etawah to his house; and that when the said Bus starting from Etawah reached near Kachaura Ghat under Police Station Belari, District - Etawah, the Driver of the said Bus did not slow-down the speed of the said Bus, and he could not see the black stone gitti spread on the road, and the said Bus suddenly over-turned on the gitti, as a result of which, the said Vijay Kumar, aged 26 years, died; and that the Driver of the said Bus at the time of the accident was Rashid Ahmad, son of Mushtaq Ahmad; and that had the said Bus been driven by the Driver carefully and following Traffic Rules, the accident could have been avoided; and that the said Vijay Kumar was working on the post of Supervisor in Mohan Dairy, Mahavir Ganj, Auraiya for the last about two and half years.

3. The Claim Petition was contested by Smt. Shitla Devi, owner of the vehicle in question (respondent no.4 herein) as well as by the Appellant-Insurance

Company. In the Written Statement filed on behalf of the said Smt. Shitla Devi (respondent no.4 herein) through her Special Power of Attorney Holder, Arun Kumar, the averments made in the Claim Petition were denied. The involvement of the vehicle in question in the accident was denied. It was alleged that Vijay Kumar collided with some other vehicle and he died on account of his own mistake, and the liability could not be fastened on the vehicle in question and its Driver. It was further alleged that at the time of the alleged accident, all the papers in respect of the vehicle in question were valid and the Driver of the vehicle in question was having valid Driving Licence. It was further alleged that in any case, the liability for payment of compensation was on the Appellant-Insurance Company.

4. The Appellant-Insurance Company in its Written Statement denied the averments made in the Claim Petition. It was alleged that the death of the said Vijay Kumar did not occur in the alleged accident nor was the said Vijay Kumar travelling in the said Bus (vehicle in question) after purchasing ticket. It was further alleged that the death of the said Vijay Kumar occurred due to some other vehicle or some other cause. It was further alleged that the terms of the Insurance Policy had been violated.

The Tribunal framed four Issues in the case.

Issue No.1 was regarding factum of the accident having taken place on 25.10.2008 on account of rash and negligent driving by the Driver of the vehicle in question resulting in the death of the said Vijay Kumar.

Issue No.2 was as to whether the vehicle in question was insured with the Appellant-Insurance Company on the date of the accident.

Issue No.3 was as to whether the Driver of the vehicle in question was having valid and effective Driving Licence on the date of the accident.

Issue No.4 was as to whether the claimant-respondent nos. 1 to 3 were entitled to get any compensation, and if yes, the quantum of such compensation, and against which opposite party in the Claim Petition.

6. The claimant-respondent nos. 1 to 3 examined three witnesses on their behalf. Further, the claimant-respondent nos. 1 to 3 filed documentary evidence including photostat copies of the Insurance Policy, General Diary, Application of Ram Autar, Panchayatnama, Post-Mortem Report, Registration Certification, Permit, Driving Licence, Voter Identity Card and Licence in respect of the Dairy. Original Salary Certificate issued by Mohan Dairy was also filed.

7. The owner of the vehicle in question, Smt. Shitla Devi (respondent no.4 herein) filed documentary evidence, namely, photostat copies of the Registration Certificate, Insurance Cover Note, Permit and Driving Licence.

8. The Appellant-Insurance Company filed documentary evidence, namely, attested copy of the Insurance Policy and Form No. 54 containing verification report in respect of the Driving Licence.

9. On consideration of the material on record, the Tribunal recorded its findings on various Issues.

10. As regards Issue No.1, the Tribunal held that the accident in question took place on account of the rash and negligent driving by the driver of the said Bus (vehicle in question), which resulted in the death of the said Vijay Kumar. Issue No.1 was accordingly decided in the affirmative.

11. As regards Issue No.2, the Tribunal held that the vehicle in question was insured with the Appellant-Insurance Company on the date of the accident in question. Issue No.2 was accordingly decided in the affirmative.

12. As regards Issue No.3, the Tribunal held that the Driver of the vehicle in question (Rashid Ahmad) was having valid and effective Driving Licence on the date of the accident. The Tribunal further held that there was valid Permit in respect of the vehicle in question. Issue No.3 was decided accordingly.

13. As regards Issue No.4, the Tribunal held that the claimant-respondent nos. 1 to 3 were entitled to get compensation amounting to Rs. 5,50,500/- with simple interest @ 6% per-annum with effect from the date of presentation of the Claim Petition till the date of actual payment.

14. On the basis of the above findings, the Tribunal gave the impugned Award awarding Rs. 5,50,500/- as compensation to the claimant-respondent nos. 1 to 3 with simple interest @ 6% per-annum with effect from the date of presentation of the Claim Petition till the date of actual payment.

15. The Appellant-Insurance Company has filed the present Appeal against the said Award.

We have heard Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company, and perused the record filed with the Appeal.

16. From a perusal of the record, it is evident that an Application under Section 170 of the Act was filed on behalf of the Appellant-Insurance Company. However, by the order dated 21.11.2009, the Tribunal rejected the said Application interalia, observing that the witnesses had been cross-examined on behalf of the owner of the vehicle in question (respondent no.4 herein).

Section 170 of the Act lays down as under :

"170 Impleading insurer in certain cases- *Where in the course of any inquiry, the Claims Tribunal is satisfied that-*

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are

available to the person against whom the claim has been made."

Section 149 of the Act referred to in Section 170 of the said Act is reproduced below:-

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. *(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the

nondisclosure of a material fact or by a representation of fact which was false in some material particular.

(3) Where any such judgment as is referred to in sub-section (1) is obtained from a Court in a reciprocating country and in the case of a foreign judgment is, by virtue of the provisions of Section 13 of the Code of Civil Procedure, 1908 (5 of 1908) conclusive as to any matter adjudicated upon by it, the insurer (being an insurer registered under the Insurance Act, 1938 (4 of 1938) and whether or not he is registered under the corresponding law of the reciprocating country) shall be liable to the person entitled to the benefit of the decree in the manner and to be the extent specified in sub-section (1), as if the judgment were given by a Court in India:

Provided that no sum shall be payable by the insurer in respect of any such judgment unless, before the commencement of the proceedings in which the judgment is given, the insurer had notice through the Court concerned of the bringing of the proceedings and the insurer to whom notice is so given is entitled under the corresponding law of the reciprocating country, to be made a party to the proceedings and to defend the action on grounds similar to those specified in sub-section (2).

(4) Where a certificate of insurance has been issued under sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as purports to restrict the insurance of the persons insured thereby by reference to any condition other than those in clause (b) of sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under clause (b) of sub-section (1) of Section 147, be of no effect:

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this Section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this Section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person.

(6) In this Section the expression "material fact" and "material particular" means, respectively a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions, and the expression "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel or has avoided or cancelled the policy.

(7) No insurer to whom the notice referred to in sub-section (2) or sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in sub-section (1) or in such judgment as is referred to in sub-section (3) otherwise than in the manner provided for in sub-section (2) or in the corresponding law of

the reciprocating country, as the case may be.

Explanation.-For the purposes of this section, "Claims Tribunal" means a Claims Tribunal constituted under Section 165 and "award" means an award made by that Tribunal under Section 168."

17. Reading Sections 170 and 149(2) of the Act together, it is evident that in case the Tribunal grants permission to the insurer under Section 170, the insurer will get right to contest the Claim Petition on all or any of the grounds that are available to the person against whom the claim has been made. However, if such permission is not granted by the Tribunal, then the insurer will be entitled to contest the Claim Petition on the limited grounds mentioned in sub-section (2) of Section 149 of the Act. It follows, therefore, that in case an appeal is filed by the insurer against an Award in a case where its application under Section 170 of the Act was rejected by the Tribunal, it (insurer) will be able to challenge the Award only on the limited grounds mentioned in sub-section (2) of Section 149 of the said Act.

18. The first question to be considered is as to whether the Tribunal was right in passing the order dated 21.11.2009 rejecting the said application under Section 170 of the Act filed on behalf of the Appellant-Insurance Company.

19. Section 170 of the Act contemplates the following two situations where the insurer may be given, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made:

(a) where there is collusion between the person making the claim and the person against whom the claim is made, or

(b) where the person against whom the claim is made has failed to contest the claim.

20. In the present case, no collusion has been shown between the claimant-respondent nos. 1 to 3 and the owner of the vehicle in question namely, Smt. Shitla Devi (respondent no.4 herein). Therefore, situation (a), mentioned above, has not been shown to exist in the present case.

21. As is evident from the impugned Award, Written Statement was filed on behalf of the said Smt. Shitla Devi (respondent no.4 herein) denying the averments made in the Claim Petition. Further, various documents including photostat copies of the Insurance Cover Note, Permit and Driving Licence were filed on behalf of the said Smt. Shitla Devi (respondent no.4 herein). The witnesses examined on behalf of the claimant-respondent nos. 1 to 3 were cross-examined on behalf of the said Smt. Shitla Devi (respondent no.4 herein) as noted by the Tribunal in its said order dated 21.11.2009 passed on the Application under Section 170 of the Act.

22. It is, thus, evident that the owner of the vehicle in question (respondent no.4 herein) against whom the claim was made, was contesting the Claim Petition. Therefore, situation (b), mentioned above, also does not exist in the present case.

23. In view of the above, we are of the opinion that the application under Section 170 of the Act, filed on behalf of the Appellant-Insurance Company, was rightly rejected by the said order dated 21.11.2009.

24. The next question to be considered is as to on what grounds, the Appellant-Insurance Company can challenge the impugned Award, and as to whether such challenge is valid.

25. As noted above, in the present case, the Tribunal rejected the application of the Appellant-Insurance Company for permission under Section 170 of the Act.

26. In view of the rejection of the said application under Section 170 of the Act, it is evident that the Appellant-Insurance Company can challenge the impugned Award only on the grounds mentioned in sub-section (2) of Section 149 of the Act. Such grounds are evidently in respect of Issue Nos. 2 and 3.

27. As noted above, in regard to Issue No.2, the Tribunal has recorded finding of fact that at the time of the accident, the vehicle in question was insured with the Appellant-Insurance Company. In this regard, it is noteworthy that the Insurance Policy brought on record before the Tribunal showed that the vehicle in question was insured with the Appellant-Insurance Company for the period with effect from 6.6.2008 to 5.6.2009, and, thus, the vehicle in question was insured with the Appellant-Insurance Company on the date of the accident, namely, 25.10.2008. It is further noteworthy that the factum of the insurance of the vehicle in question with the Appellant-Insurance Company was got verified by the Appellant-Insurance Company itself.

28. As regards Issue no.3, the Tribunal has recorded finding of fact that at the time of the accident, the Driver of the vehicle in question was having valid and effective Driving Licence, and there was valid Permit in operation in respect of the vehicle in question.

29. Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company has not been able to show any error or infirmity or illegality in the aforesaid findings recorded by the Tribunal on Issue nos. 2 and 3.

30. Having perused the record filed with the Appeal, we are of the opinion that the findings recorded by the Tribunal on the aforesaid Issues were correct, and the same do not suffer from any error or infirmity or illegality.

31. Therefore, we are of the view that the Appellant-Insurance Company has failed to establish any error or infirmity or illegality in the impugned Award on the grounds open to the Appellant-Insurance Company to raise in view of the provisions of sub-section (2) of Section 149 of the Act.

32. Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company submits that the involvement of the vehicle in question in the alleged accident was not established, and the Tribunal erred in deciding Issue No.1.

33. Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company further submits that the quantum of compensation as determined

by the Tribunal in deciding Issue No.4 is not correct.

34. In our opinion, as the application of the Appellant-Insurance Company under Section 170 of the Act was rejected by the Tribunal, it is not open to the Appellant-Insurance Company to raise the question of involvement of the vehicle in question in the accident or the question of quantum of compensation awarded by the Tribunal in the impugned Award. The pleas raised in this regard by Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company, cannot, therefore, be considered.

35. In view of the above, we are of the opinion that the Appeal filed by the Appellant-Insurance Company lacks merits, and the same is liable to be dismissed.

The Appeal is accordingly dismissed.

36. However, on the facts and in the circumstances of the case, there will be no order as to costs.

37. The amount of Rs. 25,000/- deposited by the Appellant-Insurance Company while filing the present Appeal will be remitted to the Tribunal for being adjusted towards the amount payable under the impugned Award.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.05.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

Misc. Bench No. - 3362 of 2011

Vasudev Gupta ...Petitioner
Versus
State of U.P., through Principal Secy., Home and others ...Respondents

Counsel for the Petitioner:
Sri Hari Shanker Jain
Sri Vishnu Shankar Jain

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 25, 26-oral restriction-on procession of " Akhand Jyoti Kalash" by local administration-held-really unfortunate if state feels helpless to facilitate religious procession even after expiry of 63 years of Independence-General Mandamus issued to the Govt. to frame regulation providing the authority to entertain such application and inform in writing within 3 days through registered post by the decision taken.

Held: Para 42 and 43

It is unfortunate that the State feels itself helpless to facilitate the religious procession. Even after 63 years of independence, governmental system has been failed to create communal harmony, love and affection among the various sections of the society. Religious procession or rituals of one community must be welcomed by other and only then, countrymen may enjoy the independence and freedom of life. Freedom and independence cannot be enjoyed in an atmosphere where the State or its authorities find one

community in a "dominant' position to check the others' religious practice.

It is well settled that the State or its instrumentalities have to pass order in writing while considering an application, that too relating to fundamental right protected by the Constitution. Oral communication of a decision is anti-thesis to rule of law. The decision must be speaking one may be precise indicating therein the reason for rejection of an application moved by citizen or a body.

Case law discussed:

AIR (37) 1950 SC 124; AIR (37) 1950 SC 129; 1970 SCC (Cr.) 67; 1970 (3) SCC 746; [1996 Lucknow Law Journel page 102 Anil versus State of U.P. and others; (2004) 7 SCC 467; (1983) 4 SCC 522; AIR 1966 SC 1119; AIR 1996 SC 1765; (1986) 3 SCC 20; (2000) 7 SCC 282; AIR 1970 SC 150; (2010) 3 SCC 732

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

1. Present writ petition under Art. 226 of the Constitution of India has been preferred by a devotee of Goddess Durga asserting his right to carry on religious procession for immersion of 'Akhand Jyoti Kalash' in river 'Kalyani' of district Barabanki of the State of U.P.

2. Question, involved is of public importance as to whether the State or its authorities may stop a religious procession or religious ceremony affecting the citizens' right, protected by Arts. 25 and 26 of the Constitution of India ?

3. In village Rampur Katra within the premises of police station Safdarganj, district Barabanki, there is a temple named Man Durga Mandir where the deity, i.e. Goddess Durga is being worshiped since time immemorial. Nine day worship of nine incarnations of Durga is done in Navaratri, namely Shardiya and Vasantik. After Navaratri, 'Akhand Jyoti Kalash' procession is carried out by the villagers to immerse the Jyoti Kalash in river Kalyani. Earlier in the year 2003, when the Jyoti Kalash procession was stopped by the district administration, the petitioner had filed a writ petition No.5149(M/B) of 2009 whereby a Division Bench of this Court has passed an interim order dated 10.10.2003 permitting to carry out the procession and directing the District Magistrate, barabanki to make proper arrangement for immersion of Jyoti Kalash peacefully.

4. It appears that when the order was not complied with in letter and spirit, an Advocate Commissioner was appointed. In pursuance to the order passed by this Court, the Advocate Commissioner Shri Anupam Mehrotra, a distinguished advocate of this Court had gone to make spot inspection and submitted his report, a copy of which has been filed as Annexure No.3 to the writ petition.

5. Now again, according to the petitioner's counsel, Jyoti Kalash ceremony has been stopped by the administration and the petitioner and his associates have been restrained to immerse Jyoti Kalash in river Kalyani. Hence, the present writ petition has been preferred.

6. It has been submitted by Shri H.S. Jain, learned counsel for the petitioner that the petitioner and other villagers have got right to immerse Akhand Jyoti Kalash in river Kalyani and they have also right to assemble for the purpose and move in procession for immersion of 'Akhand Jyoti' in accordance with Hindu rituals. It has also been submitted that Puja during Navaratri festival is continuing in "Ma Durga Mandir" since ages which cannot be

stopped by the district administration in any manner whatsoever. It has also been submitted that after completion of 'Navaratri', they have right to move in procession to immerse Akhand Jyoti Kalash. Their right has been protected by Arts. 25 and 26 of the Constitution of India.

7. On the other hand, learned Chief Standing Counsel submits that the Akhand Jyoti Kalash procession has been started recently in the year 2003 for the first time. It is incorrect to say that it is age old tradition professed by Hindu villagers. It has also been submitted that the State has right to stop new tradition which lacks old practice. It is further submitted that the district administration has no objection so far as the procession is concerned but that should move on the specified route. It is further submitted by the learned Chief Standing Counsel that the temple is not situated from time immemorial; rather it was a very small temple, known as 'Mathya' in local parlance and for the first time, it was constructed in the year 2003. However, it has been submitted that because of overwhelming Muslim population in the adjoining area and because of their objections, the district administration has tried to regulate the procession from different route which has been objected by the petitioner and his associates. For convenience, para 8 of the counter affidavit filed by Shri Gore Lal Shukla, Sub Divisional Magistrate, Sirauli Gaushpur, district Barabanki is reproduced as under :

"8. That in reply to the contents of paragraph 4 of the writ petition it is submitted that during 'Vasantik Navratra' neither ' Akhand Jyoti Kalash' has earlier ever been installed in the temple nor it has ever been immersed by the devotees in river Kalyani. It is not denied that village Rampur Katra is heavily populated by Muslims.

It is stated that village Rampur Katra has a history of communal flare-ups in past which started in the year 1981 on the day of Basant Panchami and the local police has taken preventive measures. However, in 'Tyohar Register' there is no entry about observance the rituals related to ' Akhand Jyoti Kalash' since 1982 to 2002. Akhand Jyoti used to be installed in Purvi Devi Temple which used to be immersed in Kalyani river but while immersion took place the same was not taken in a procession in the village. In the year 2002 there was some dispute relating to open land in front of Durga Temple and with the efforts made by the District and Police Administration there was some compromise arrived at between two communities.

It is further stated that during Shardiya Navratra in the year 2003, on 4.10.2003 for the first time 'Akhand Jyoti Kalash was planned to be immersed in the year and procession carrying the Kalash was taken and while passing through the Muslim dominated areas the same was objected to by the members of the Muslim community. Since then on such occasions there has always been apprehension of breech of peace and public order. At this juncture, it is further stated that the petitioner and other members of Hindu Community deliberately intend to take out the procession through a route passing through the midst of the thick population of Muslims. For Shardiya Navratra, District and Police Administration suggested another route which processes through the Public Works Department

Road and goes to the bridge at Kalyani River where the Kalash can be immersed. However, devotees of the Kalash never agreed to same. It is further stated that the District Administration has also sorted out another straight route from the temple to Kalyani river which is shorter in distance and does not pass through thick population of the other community but on the said route also the members of Hindu community do not agree. For the purposes of sorting out a solution for taking out the procession and immersing the Kalash in river Kalyani a sketch map was prepared in the year 2003 which is being annexed herewith as Annexure no. CA-1 to this Counter Affidavit."

8. It has been vehemently argued by Mr. D.K. Upadhyay, learned Chief Standing Counsel that the State is not depriving to immerse the Akhand Jyoti Kalash in river Kalyani but only specifying the route to maintain law and order. It is submitted that being Muslim dominated area, a different route has been set up by the district administration. Learned Chief Standing Counsel further submits that it is not an age old practice but a new one started in 2003, hence also, the petitioner has no fundamental right to claim immersion of Akhand Jyoti Kalash in river Kalyani.

9. However, the petitioner has reiterated his submission and invited attention to the application filed with supplementary affidavit stating that they have right to profess religion and carry out the procession for immersion of 'Akhand Jyoti Kalash' in river Kalyani. The petitioner's counsel also raised objection with regard to the word, 'dominant' used by the respondents while filing counter affidavit. It is stated that the temple is age old and only renewal work was done in the year 2003.

10. Articles 25 and 26 of the Constitution of India protect the practice and propagation of religion. Articles 25 and 26 of the Constitution are reproduced as under :

"Article 25 {Freedom of conscience and free profession, practice and propagation of religion}

1. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

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

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

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

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

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

Hindu religious institutions shall be construed accordingly.]

Article 26 **{Freedom to manage religious affairs}**

Subject to public order, morality and health, every religious denomination or any section thereof shall have the right -

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

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

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

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

11. A plain reading of Art. 25 reveals that freedom of conscience and free profession, practice and propagation of religion has been subjected to public order, morality and health and other provisions of Part-III of the Constitution. Every person is entitled to freedom of conscience and the right freely to profess, practise and propagate religion. However, these rights have been subjected to public order, morality and health. Meaning thereby, the citizens' right of practice and propagation of religion is subjected to public order and morality.

12. Article 26 guarantees freedom to manage religious affairs that too subject to public order, morality and health. Art. 26 further guarantees citizens' right to manage its own affairs in the matter of religion but that too subject to public order and morality.

PUBLIC ORDER

13. "Public Order" is what the French call "ordre publique" and is something more than ordinary maintenance of law and order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting 'public order' from that concerning 'law and order'. The question to ask is: "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed"? This question has to be faced in every case

on its facts. The two concepts have well defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life.

14. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State.

15. The disturbance of public order is to distinguish from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. It is the degree of disturbance and its effect upon the life of the community in a locality which determines whether the disturbance amounts only to a breach of law and order. Public order was said to embrace more of the community then law and order. Public order was the even tempo of the life of the community taking the community as a whole or even a specified locality.

It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of public order.

It is not the number of acts that matters - What has to be seen is the effect of the act on the even tempo of life, the extent of its react upon society and its impact.

16. While interpreting the word, 'public order', Hon'ble Supreme Court in a case reported in **AIR (37)1950 SC 124 Ramesh Thappar versus The State of Madras** held that public order is an expression of wide connotation and signifies the state of tranquility prevailing among the members of a political society as a result of the internal regulations enforced by the Government which they have instituted. "Public safety" is used as a part of the wider concept of public order. Public safety ordinarily means security of public or their freedom from danger. Anything which tends to prevent dangers to public health may also be regarded as securing public safety.

17. In **AIR (37) 1950 SC 129 Brij Bhushan and another versus The State of Delhi,** Hon'ble Supreme Court held that the public order and public safety are allied matters, but in order to appreciate how they stand in relation to each other, it seems best to direct our attention to the opposite concepts which we may, for convenience of reference, respectively label as 'public disorder' and 'public unsafety'. 'Maintenance of public order' always occurs in juxtaposition with 'public safety'.

18. In **1970 SCC (Cr.) 67 Arun Ghosh versus State of West Bengal,** Hon'ble Supreme Court distinguished the 'public order' and 'law and order' holding that the 'public order' is to be distinguished from acts directed against individual which do not disturb the society to the extent of causing a general disturbance of public tranquility.

19. In **1970(3) SCC 746 Madhu Limaye versus Sub-Divisional Magistrate, Monghyr and others,** while considering the expression, "in the interest of public order', Hon'ble Supreme Court ruled that it includes those acts which disturb the security of the State or are within "Order- Publique" along with certain acts which disturb public tranquility or are breaches of the peace.

20. In **[1996 Lucknow Law Journel page 102 Anil versus State of U.P. and others,** a Division Bench of Allahabad High Court at Lucknow has distinguished the concept of 'public order' and 'law and order' as the latter is directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility. The Court held that it is a degree of disturbance and its effect upon the life of a community in the locality determines whether disturbance amounts to only breach of law and order or public order.

21. In **(2004)7 SCC 467 Commissioner of Police and others versus C. Anita (Smt),** Hon'ble Supreme Court while considering the validity of detention held that the condition precedent for detention is the act for which a person is charged should be prejudicial to the maintenance of public order. To reproduce relevant portion :

"7.....The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order. 'Public order' has a narrower ambit, and public order could be affected by only such contravention which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of the degree and extent of the reach, of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. It is the length, magnitude and intensity of the terror wave unleashed by a particular eruption of disorder that helps to distinguish it as an act affecting public order' from that concerning 'law and order'. The question to ask is: "Does it lead to disturbance of the current life of the community so as to amount to a disturbance of the public order or does it affect merely an individual leaving the tranquility of the society undisturbed"? This question has to be faced in every case on its facts.

8. "Public order" is what the French call 'ordre publique' and is something more than ordinary maintenance of law and order. The test to be adopted in determining whether an act affects law and order or public order, is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of the public order or does it affect merely

an individual leaving the tranquility of the society undisturbed?

9. "Public order" is synonymous with public safety and tranquility: "it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State". Public order if disturbed, must lead to public disorder. Every breach of the peace does not lead to public disorder. When two drunkards quarrel and fight there is disorder but not public disorder. They can be dealt with under the powers to maintain law and order but cannot be detained on the ground that they were disturbing public order. Disorder is no doubt prevented by the maintenance of law and order also but disorder is a broad spectrum, which includes at one end small disturbances and at the other the most serious and cataclysmic happenings.

10. 'Public Order', 'law and order' and the 'security of the State' fictionally draw three concentric circles, the largest representing law and order, the next representing public order and the smallest representing security of the State. Every infraction of law must necessarily affect order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect public order, but not necessarily the security of the State. The true test is not the kind, but the potentiality of the act in question. One act may affect only individuals while the other, though of a similar kind, may have such an impact that it would disturb the even tempo of the life of the community. This does not mean that there can be no overlapping, in the sense that an act cannot fall under two concepts at the same time. An act, for instance, affecting public order may have an impact that it would affect both public order and the security of the State.

11. The distinction between 'law and order' and 'public order' has been pointed out succinctly in Arun Ghosh's case (supra). According to that decision the true distinction between the areas of 'law and order' and 'public order' is "one of degree and extent of the reach of the act in question upon society". The Court pointed out that "the act by itself is not determinant of its own gravity. In its quality it may not differ but in its potentiality it may be very different".

12. The true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different.

13. The two concepts have well defined contours, it being well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life. Infractions of law are bound in some measure to lead to disorder but every infraction of law does not necessarily result in public disorder. Law and order represents the largest scale within which is the next circle representing

public order and the smallest circle represents the security of State. "Law and order" comprehends disorders of less gravity than those affecting "public order" just as "public order" comprehends disorders of less gravity than those affecting "security of State".

MORALITY

22. Moral codes are ordinarily founded on emotional instincts and intuitions that were selected for in the past because they aided survival and reproduction.

23. Marc Bekoff and Jessica Pierce (2009) have argued that morality is a suite of behavioral capacities likely shared by all mammals living in complex social groups (e.g., wolves, coyotes, elephants, dolphins, rats, chimpanzees). They define morality as "a suite of interrelated other-regarding behaviors that cultivate and regulate complex interactions within social groups." This suite of behaviors includes empathy, reciprocity, altruism, cooperation, and a sense of fairness. In related work, it has been convincingly demonstrated that chimpanzees show empathy for each other in a wide variety of contexts.

24. Christopher Boehm (1982) has hypothesized that the incremental development of moral complexity throughout hominid evolution was due to the increasing need to avoid disputes and injuries in moving to open savanna and developing stone weapons.

25. In talking about human rights today, we are referring primarily to the following demands; protection of the individual against arbitrary infringement by other individuals or by the government; the right to work and to adequate earnings from work; freedom of discussion and teaching; adequate participation of the individual in the formation of his government. These human rights are nowadays recognised theoretically, although, by abundant use of formalistic, legal manoeuvres, they are being violated to a much greater extent than even a generation ago."

26. When we speak for morality or moral values, we become conscious to some unforeseen restriction likely to be imposed in the form of moral policing. Though, under the old Indian concept, the difference between the morality and law was minimum. However, later on, law and morality moved apart. Morality should not be confused with law. Though, it may be based on some religious doctrine because of aged-old recognitions but basically it shall be dependant upon its soundness and perceived soundness providing guidelines with the elements of social recognition to regulate the social order for humanity as a whole. The followers of Positivist theory like, Hart Bentham, Austin and Kelson have deliberately kept justice and morality out of the purview of legal system. They opined that law must never be used as a custom or enforcement of any moral standards. Their formalistic attitude is concerned with law, as it is and not law as it ought to be. Virtually, what appears, the influence of the positivist on European law makers had segregated the morality from law and in due course of time, it affected the moral values of the society. People understand that they have to follow law and morality as optional.

27. There cannot be statutory provisions, rules or regulations to regulate every breath of life. There are gaps,

vacuums in the field of law as well as human behaviour which can be regulated only by enforcing moral values. The difference between constitutional and statutory provisions are part and partial of morality. Every moralist has to follow the law and where there is conflict between the law and moral values and the law is silent, morality should also be enforced to maintain social order and to check the beast embedded in the human being.

28. According to Mahatma Gandhi, civilization does not mean only to achieve something for bodily comfort. Instead of bodily comfort civilization co-relate to generate the sense of duty in the coming generation. It co-relate with the good conduct of a person and sense of duty towards nations and society. In the words of Mahatma Gandhi, to quote:-

"Civilization is that mode of conduct which points out to man the path of duty. Performance of duty and observance of morality are convertible terms. To observe morality is to attain mastery over our mind and out passions. So doing, we know ourselves. The Gujarati equivalent for civilization means "good conduct 1 ".

29. In a democratic polity or country like India, morality may be judged after taking into account the commonality or common features broadly accepted by different religions, sex, communities or believers and non-believers securing the ultimate goal, i.e. the public good and national interest.

CONSTITUTIONAL AMBIT AND DISCUSSION

30. In view of above, Arts. 25 and 26 of the Constitution do not extend unfettered right to carry on religious practice but it has been subjected to public order and morality. However, under the garb of public order or morality, the State and its authorities have no right to interfere with the right protected by Arts. 25 and 26 on flimsy grounds or for extraneous reasons or by abuse of their power. In case, it is done arbitrarily, then being fundamental right, the decision of State is subject to judicial review and the court may pass appropriate direction to protect the rights of citizens.

31. Hon'ble Supreme Court in **(1983)4 SCC 522 Acharya Jagdishwaranand Avadhuta and others versus Commissioner of Police, Calcutta and another** negatived the plea of Ananda Margis for Tandava dance in processions or at public places. Hon'ble Supreme Court held that Ananda Marga is not a separate religion being not an institutionalized religion but a religious denomination. Relying upon its earlier judgment reported in **AIR 1966 SC 1119 Sastri Yagnapurushadji versus Muldas Bhudardas Vaishya,** to satisfy the word, 'religious denomination, three conditions are required to be fulfilled, viz. (1) It must be a collection of individuals who have a system of beliefs or doctrines which they regard as conducive to their spiritual well-being, that is, a common faith; (2) common organisation; and (3) designation by a distinctive name. To reproduce relevant portion; to quote :

"17. Similar view was expressed by this Court in Gulam Abbas and Ors. v. State of U.P. and Ors. where it was said that "the entire basis of action Under Section 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing

disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquility...." Certain observations in Gulam Abbas's decision regarding the nature of the order Under Section 144 of the Code - judicial or executive - to the extent they run counter to the decision of the Constitution Bench in Babulal Parat's case, may require reconsideration but we agree that the nature of the order Under Section 144 of the Code is intended to meet emergent situation. Thus the clear and definite view of this Court is that an order Under Section 144 of the Code is not intended to be either permanent or semi-permanent in character. The concensus of judicial opinion in the High Courts of the country is thus in accord with the view expressed by this Court. It is not necessary on that ground to quash the impugned order of March 1982 as by efflux of time it has already ceased to be effective."

32. In **AIR 1996 SC 1765 A.S. Narayana Deekshitulu versus State of Andhra Pradesh and others,** their Lordships of Hon'ble Supreme Court accepted the importance of rituals in religious life which is relevant for evocation of mystic and symbolic beginnings of the journey but on them the truth of a religious experience cannot stand. The truth of a religious experience is far more direct, perceptible and important to human existence. It is the fullness of religious experience which must be assured by temples, where the images of the Lord in resplendent glory is housed. All must have an equal right to plead and in a manner of such directness and simplicity that every human being can approach the doors of the Eternal with equality and with equal access and thereby exercise greater freedom in his own life. The word 'Dharma' or 'Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of man kind; whatever conduces to the fulfilment of these objects is Dharma, it is Hindu Dharma and ultimately 'Sarva Dharma Sambhava'. It shall be appropriate to reproduce few paragraphs from A.S. Narayana's case(supra); to quote :

"39. Swami Vivekananda in his lecture on "Religion and Science" incorporated in "The Complete Works" (Vol. VI, Sixth Edition) had stated at page 81 thus :

Experience is the only source of knowledge. In the world, religion is the only science where there is no surety, because it is not taught as a science of experience. This should not be. There is always, however, a small group of men who teach religion from experience. They are called mystics, and these mystics in every religion speak the same tongue and teach the same truth. This is the real science of religion. As mathematics in every part of the world does not differ, so the mystics do not differ. They are all similarly constituted and similarly situated. Their experience is the same; and this becomes law.

In Volume II, Ninth Edn. at page 432, Swamiji said that : "There are two worlds : the microcosm and the macrocosm, the internal and the external. We get truth from both these by means of experience. The truth gathered from internal experience is psychology, metaphysics and religion; from external experience, the physical sciences. Now a perfect truth should be in

harmony with experience in both these worlds. The microcosm must bear testimony to the macrocosm and the macrocosm to the microcosm; physical truth must have its counterpart in the internal world, and internal world must have its verification outside;

"80. The importance of rituals in religious life is relevant for evocation of mystic and symbolic beginnings of the journey but on them the truth of a religious experience cannot stand. The truth of a religious experience is far more direct, perceptible and important to human existence. It is the fullness of religious experience which must be assured by temples, where the images of the Lord in resplendent glory is housed. To them all must have an equal right to plead and in a manner of such directness and simplicity that every human being can approach the doors of the Eternal with equality and with equal access and thereby exercise greater freedom in his own life. It is essential that the value of law must be tested by its certainty in reiterating the Core of Religious Experience and if a law seeks to separate the non-essential from the essential so that the essential can have a greater focus of attention in those who believe in such an experience, the object of such a law cannot be described as unlawful but possibly somewhat visionary.

81. The word 'Dharma' or 'Hindu Dharma' denotes upholding, supporting, nourishing that which upholds, nourishes or supports the stability of the society, maintaining social order and general well-being and progress of man kind; whatever conduces to the fulfilment of these objects is Dharma, it is Hindu Dharma and ultimately 'Sarva Dharma Sambhava'.

82. In contradistinction, Dharma is that which approves oneself or good consciousness or springs from due deliberation for one's own happiness and also for welfare of all beings free from fear, desire, disease, cherishing good feelings and sense of brotherhood, unity and friendship for integration of Bharat. This is the core religion which the Constitution accords protection.

89. A religion undoubtedly has its basis in a system of beliefs and doctrine which are regarded by those who profess religion to be conducive to their spiritual well-being. A religion is not merely an opinion, doctrine or belief. It has outward expression in acts as well. It is not every aspect of religion that has been safeguarded by Articles 25 and 26 nor has the Constitution provided that every religious activity cannot be interfered with. Religion, therefore, cannot be construed in the context of Articles 25 and 26 in its strict and etymological sense. Every religion must believe in a conscience and ethical and moral precepts. Therefore, whatever binds a man to his own conscience and whatever moral or ethical principle regulate the lives of men believing in that theistic, conscience or, religious belief that alone can constitute religion as understood in the Constitution which fosters feeling of brotherhood, amenity, fraternity and equality of all persons which find their foot-hold in secular aspect of the Constitution. Secular activities and aspects do not constitute religion which brings under its own cloak every human activity, There is nothing which a man can do, whether in the way of wearing clothes or food or drink, which is not considered a religious activity. Every mundane or human activity was not intended to be protected by the

Constitution under the guise of religion. The approach to construe the protection of religion or matters of religion or religious practices guaranteed by Articles 25 and 26 must be viewed with pragmatism since by the very nature of things, it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practice."

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

34. In **(1986) 3 SCC 20 Municipal Corporation of the City of Ahmedabad and others versus Jan Mohammed Usmanbhai and another,** while interpreting Article 19(6) of the Constitution of India, their Lordships of Hon'ble Supreme Court held that ordinarily, the Legislature is the best Judge of what is good for community but the court should not shirk its duty of determining the validity of law. In determining the reasonableness of the restriction imposed by law under Art. 19(6), the court cannot proceed on a general notion of what is reasonable in the abstract or even on a consideration of what is reasonable from the point of view of the person or persons on whom the restrictions are imposed. The court has to consider whether the restrictions imposed are reasonable in the interest of general public. The expression 'in the interests of general public' in Article 19(6) is of wide import comprehending public order, public health, public security, morals, economic welfare of the community and the objects mentioned in Part IV of the Constitution. The tests of reasonableness has to be viewed in the context of the issues which faced the legislature.

35. In **(2000)7 SCC 282 Church of God (Full Gospel) in India versus K.K.R. Majestic Colony Welfare Association and others** where question cropped up with regard to use of voice amplifiers or beating of drums, their Lordships ruled that the activities which disturb the peace in the name of religion cannot be permitted in a civilised society as rights are closely related to duties. The rights of babies, children, students, the aged or mentally or physically infirm persons should be protected from noise pollution. Their Lordships held that no religion prescribes that the prayers are required to be performed through voice or by beating of drum. Hon'ble Supreme Court held that the provision of Article 25 of the Constitution is subject to provision of Art. 19(1)(a) of the Constitution. Their Lordships affirmed the finding recorded by the Calcutta High Court whereby it is held that true and proper construction of the provision of Article 25(1), read with Article 19(1)(a) of the Constitution, it cannot be said that a citizen should be coerced to hear any thing which he does not like or which he does not require. While reiterating the earlier ratio of its earlier judgment, reported in (1975)1SCC 11 Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj versus State of Gujarat, Hon'ble Supreme Court held that no rights in an organized society can be absolute. Enjoyment of one's rights must

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

36. Subject to aforesaid proposition of law and factual controversy, it appears that the procession to immerse 'Akhand Jyoti Kalash' seems to have started in 2003. The Advocate Commissioner noted in his report that in October, 2003, the procession of Kalash was stopped by the police, hence it was locked in the temple on account of communal tension between Hindu and Muslim communities. The police admitted before the Advocate Commissioner that 'Akhand Jyoti Kalash' could not be immersed in 2003 because of great tension which could have resulted in riots. 'Akhand Jyoti Kalash' could be immersed only in the midnight. Local police informed the Advocate Commissioner that the village Rampur Katra has a population of 17000 and majority of which are minorities and only 5% of them are Hindus. Because of long standing history of communal tension, district administration took precaution stopping the procession from the densely populated village.

37. During the course of argument, learned Chief Standing Counsel on the basis of instruction received stated that the district administration has not prevented with the procession but only specified the route to avoid any conflict. Accordingly, by an interim order, while reserving the judgment, we have directed to communicate the decision specifying the route so that immersion ceremony after Navaratri could be ensured in a peaceful manner. Keeping in view the law on the subject and State intends not to stop the procession in future, there appears to be no hurdle in the way of the petitioner to continue with procession with regard to immersion of 'Akhand Jyoti Kalash' in river Kalyani on the specified route provided by local administration.

38. However, there appears to be one other aspect of the matter. During the course of argument as well as from the report of the Advocate Commissioner submitted in the earlier writ petition, it appears that the procession of 'Akhand Jyoti Kalash' was stopped without communicating the decision in writing. Once right to profess and propagate a religion is a fundamental right subject to morality and public order, then it shall always be incumbent on the State and its authorities to communicate the decision in writing so that in the event of arbitrary exercise of power, a citizen may approach the Court for judicial review of the action. Oral instruction or stopping the religious ceremony without communicating the decision taken by the district administration in writing to the persons concerned that too with regard to rights protected in Part-III of the Constitution seems to be highly arbitrary and hit by Art. 14 of the Constitution. Every action of the State must be just and fair and the citizens must be informed in writing with regard to a decision taken by the State and its authorities affecting their fundamental rights. It shall be appropriate that the State

must provide a time frame and inform the same to the citizens in writing.

39. The government should notify the authority to whom such application for religious procession may be moved and decision should be taken by the authority concerned expeditiously, say within three days with due communication to the person or body concerned by Registered Post as well as personal service by revenue.

40. Before parting with the judgment, we would like to make observation with regard to pleading on record. While filing affidavit and advancing argument on behalf of the State, it has been stated that one community is in dominant position resulting in denial to carry out religious procession.

According to Oxford Advance Learners' Dictionary, dominant means "(1) more important, powerful or noticeable than other things : The firm has achieved a dominant position in world market. The dominant feature of the room was the large fireplace. (2) a dominant GENE causes a person to have a particular physical characteristic, for example brown eyes, even if only one of their parents has passed on this GENE - compare **Recessive dominance** to achieve/assert dominance over sb. Political/economic dominance.

41. In Words and Phrases Permanent Edition Vol. 13 page 569, the word, "domination" has been defined as an edge of one patent over other. To reproduce the definition :

"DOMINATION

C.A. Fed. 1986. "Domination" refers to that phenomenon, which grows out of fact that patents have claims, whereunder one patent has broad or "generic" claim which "reads on" invention defined by narrower or more specific claim in another patent, the former "dominating" the latter because more narrowly claimed invention could not be practiced without infringing the broader claim. - In re Kaplan, 789 F. 2d 1574.-Pat 165(5)

C.C.A. 2 1946. It is for the National Labor Relations Board, not the court, to find whether the degree of independence of employer influence is sufficient to escape condemnation as constituting "domination" within National Labor Relations Act prohibiting domination of union by employer. National Labor Relations Act.

9th Cir. BAP (Cal)1993. Under New Mexico law, "instrumentality" or "domination" as required to pierce corporation veil means proof that subservient corporation functioned under domination and control and for purpose of some dominant party; however, mere control by the entity is not enough to warrant piercing corporate veil, but rather, some form of moral culpability attributable to that party, such as use of the corporation to perpetrate a fraud, is also required. - In re Yarbrow, 150 B.R. 233.-Corp 1.4(1), 1.4(3), 1.4(4)."

Thus, according to dictionary meaning, "domination" with regard to population may be treated as the situation where one section of society has edge over the other and in consequence thereof, the weaker group may suffer with ill consequences even succumbing to the pressure of other group to compromise on the

constitutionally protected rights. Such situation is not only undemocratic but in due course of time, may result into public discontentment and adverse consequence. The government must avoid to use such phrases while filing response and in case there is reality in defence taken by the State, then appropriate remedial measure must be adopted to create uniformity, harmony, affection and good will among the citizens.

42. It is unfortunate that the State feels itself helpless to facilitate the religious procession. Even after 63 years of independence, governmental system has been failed to create communal harmony, love and affection among the various sections of the society. Religious procession or rituals of one community must be welcomed by other and only then, countrymen may enjoy the independence and freedom of life. Freedom and independence cannot be enjoyed in an atmosphere where the State or its authorities find one community in a "dominant' position to check the others' religious practice. As you will sow you will reap. Failure to create communal harmony is because of unequal enforcement of law. Whosoever involves themselves in communal disharmony, corrupt practices, propagate casteism must be dealt with uniformally with firm hand without any appeasement, side track or flexibility. Only then, there shall be respect for law and constitutional spirit. Only because of overwhelming population or head count, one group should not have an edge over others' fundamental right, otherwise, mobocracy shall rule the country. State and its authorities and instrumentality must enforce law with full vigorousness without any discrimination on the basis of caste, creed or religion.

In this cosmopolitan country, at one place, one community may be higher in number but at other place, other community may be in overwhelming number. Unity in diversity may be established and maintained ordinarily only by equal applicability and enforcement of law. Arbitrariness, animosity, affection and appeasement are generally four enemies of good governance. Good governance being part and partial of quality and dignity of life is the fundamental right protected by Art. 21 of the Constitution. Constitutional functionaries and the public servants should be cautious of these four enemies (supra).

43. It is well settled that the State or its instrumentalities have to pass order in writing while considering an application, that too relating to fundamental right protected by the Constitution. Oral communication of a decision is anti-thesis to rule of law. The decision must be speaking one may be precise indicating therein the reason for rejection of an application moved by citizen or a body. Hon'ble Supreme Court has ruled that reason in an order, may be administrative, is necessary ingredient of Art. 14 of the Constitution of India vide JT 2004 (2) SC 172 State of Orissa versus Dhaniram Luhar, JT 2004(5) SC 388 State of Rajasthan versus Sohan Lal and others, JT 2010 (11) SC 273 Sant Lal Gupta & Ors. Vs. Modern Co-operative Group Housing Society Ltd. and Ors., AIR 1971 SC 1447 K.R. Deb versus Collector of Central Excise, Shillong and 2002(10)SCC 471 Union of India versus K.D. Pandey.

Long Back, a Constitution Bench of Hon'ble Supreme Court in a case reported in **A.K.Kraipak and others Vs. Union of India and others, AIR 1970 SC 150** held that difference between judicial, quasi judicial and administrative orders has been obliterated. In a recent case, reported in **(2010)3 SCC 732 Victoria Memorial Hall versus Howrah Ganatantrik Nagrik Samity,** Hon'ble Supreme Court held that reasons ensure clarity, objectivity, transparency and fairness in decision-making process. Reasons also show that there was application of mind. Hence it is implicit in the process of administrative order to assign reason, may be in brief or precise.

44. Before parting, we wish to cite a couplet of Great Urdu Shaer Firaq Gorakhpuri which is self speaking and befitted to present scenario :

"गुजस्ता अहद की यादों क फिर कर ताजा ।

बुझे चिराग जलाओ, बहुत अधेरा है ।।

O rekindle the memories of past ages

Kindle again the blown out lamps, for it is very dark.

45. Subject to aforesaid observation and finding, writ petition is decided finally and we affirm the interim order dated 16.4.2011 and direct the State of U. P. to provide time frame for acceptance and disposal of applications with regard to religious procession with due communication of the decision so taken to the person or body concerned within specified period, preferably within three days by Registered Post as well as personal service. Decision should contain precise reason, in case prayer for the religious procession is rejected.

46. Let the Chief Secretary of the State issue appropriate order /circular keeping in view the observation made in the body of judgment forthwith and submit a compliance report to this Court within a month.

Registry shall send a copy of the present judgment to the Chief Secretary, Government of U.P. forthwith for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.06.2011

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE VEDPAL, J.

Writ Petition No. 3680 of 2011 (M/B)

Asok Pande and another ...Petitioners
Versus
Union of India and others ...Respondents

Constitution of India, Article 13-Joint Drafting Committee for Jan Lokpal Bill-constituted by Govt. of India dated 08.04.2011-proposal of comprising five members of Anna Hazare-whether proper?-Held-No person seek participation as a matter of right-but Bill so Drafted can be assessed by the government before legislation-committee so constituted in no way impinges upon sovereign will of the people-petition dismissed.

Held: Para 40 and 42

Therefore, on the question of the locus of the bill so prepared by the committee; it can safely be inferred that such a bill once introduced in the Parliament by the Government of India would be considered by the Parliament like any

other bill but for the money bill. However, it would be premature for this Court to speculate and assess the mind of the Government as to in what manner the Government would deal with the Bill so prepared by the Drafting Committee.

As a result of the discussion made above and the legal position enunciated, we answer the questions framed by the aforementioned Division Bench as follows:

(1) It is within the executive power of the Government to constitute a committee of members comprising such persons from the society as it thinks fit for drafting of the Lok Pal Bill.

(2) There is no vested right in any citizen to be consulted by the Government of India except as provided by law. Where the law does not vest any such right, as is in the present case, no person can seek as a matter of right his representation in the committee.

(3) The committee has been constituted to assist the Government in finalizing the Lok Pal Bill. The value to be attached to the Bill so prepared by the committee can be assessed only by the Government, for before a legislation is validly transmitted into law, it has to go through the constitutional process. Thus, the committee so constituted in no way impinges upon the sovereign will of the people of India, which lies in the Parliament.

Case law discussed:

AIR 1984 SC 484; AIR 1955 SC 25; 1955 (1) SCR 604; AIR 1959 SC 249, 253; (1964) 5 SCR 294; (2008) 8 SCC 756; AIR 1981 SC 1545; (2003) 4 SCC 399; (1967) 2 SCR 454; (2006) 7 SCC 1; (2009) 1 SCC 633; (2009) 3 SCC 200; W.P. (c) No. 2671/2011; Writ Petition No. 3556 (M/B) of 2011; (1982) 2 SCC 95; (1986) 4 SCC 361; (1986) 4 SCC 566; (1993) 4 SCC 269; 1989 Supp. (2) SCC 364

(Delivered by Hon'ble Pradeep Kant, J.)

1. Heard Sri Asok Pande, who is one of the petitioners, Sri G.E.Vahanvati, learned Attorney General for India, Dr. Ashok Nigam, Additional Solicitor General of India, Sri I.H. Farooqui, Assistant Solicitor General of India for the respondents and Sri C.B. Pandey, as Intervenor.

2. This writ petition in the style of Public Interest Litigation challenges the resolution of the Government of India of April 8, 2011 issued by the Ministry of Law and Justice (for short, MoLJ) by which a Joint Drafting Committee for the purpose of drafting the Lok Pal Bill was constituted comprising five nominees of the Government of India and five nominees of Sri Anna Hazare (including himself). Challenge to the Resolution constituting the Joint Drafting Committee has been principally made on the following grounds:

1. that the impugned resolution is beyond any lawful provision and is completely extra-constitutional;

2. that it is settled that law-making is purely legislative act and, therefore, public inclusion is not valid;

3. that public-private-partnership in law making is not recognized and, therefore, any such attempt is ultra vires the Constitution;

4. that the process through which nominees have been chosen is arbitrary and discriminatory; and

5. that Sri Anna Hazare has been brought at par with the Government which is illegal.

3. Following three questions were framed by the Division Bench comprising Hon'ble F.I. Rebello, C.J. and D.K. Arora, J. which had heard the petition initially:

1. Whether it is open to the Government of India to constitute a Committee of a section of the society for drafting a bill?

2. Whether a section of the society, which has agitated on an issue, only has the right to be represented in the Committee or all those who have been raising such issues without agitation or hunger strikes, should also have the right to represent such Committee?

3. Further, if such Committees are constituted, what would be the locus of the Bill drafted by such Committees, as the sovereign will of the people of India lies in the Parliament through the Members elected by them to represent them in the Lok Sabha as also the State nominees as the representatives in the Rajya Sabha.

4. Law, within the meaning of Article 13 of the Constitution means the law made by the Legislature and includes *intra vires* statutory orders (see *Bidi Supply Co. Ltd. v. Union of India,* **AIR 1956 SC 484;** see also *Edward Mills v. State of Ajmer,* **AIR 1955 SC 25**) and orders made in exercise of power conferred by statutory rules (see *State of M.P. v. Madawar, G.C.,* **1955 (1) SCR 599, 604**) but not executive orders having no statutory sanction (see *Dwarkanath Tewari v. State of Bihar,* **AIR 1959 SC 249, 253**). Resolution ordinarily connotes decision in a meeting (see David M. Walker, *The Oxford Companion to Law* (1980), Claredon Press, 1064). The impugned resolution of the Government of India of April 8, 2011 issued by the MoLJ (Legislative Department), does not find any infirmity in law, as demonstrated, hereinafter.

5. The Apex Court in *Rai Sahab Ram Jawaya Kapur v. State of Punjab,* **AIR 1955 SC 549** opined that executive power ordinarily connotes the residue that remains after legislative and judicial functions are taken away. The executive performs multifarious functions; it can exercise legislative functions when entrusted by the legislature and even judicial functions in a limited way, when empowered to do so. But the executive power can never transgress constitutional provisions or any law as is clear from what is contemplated by Article 53 of the Constitution.

6. The following observation of the Apex Court in Ram Jawaya Kapur (supra) lends authoritative guidance:

"14. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can

exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws.

15. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State."

16. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under article 53(1) of our Constitution, the executive pow3680er of the Union is vested in the President but under article 75 there is to be a Council of Minister with the Prime Minister at the head to aid and advice the President in the exercise of his functions. The president has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part." The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

(emphasis supplied)

Thus, five points which emerge from the decision in Ram Jawaya Kapur (supra), can be summarized as follows:

1. Executive power is a residue of government functions that remain after legislative and judicial functions.

2. To enable the executive to function, it is not necessary that there must be a law already in existence.

3. The executive is deemed to have the primary responsibility of formulation of governmental policy and its transmission into law subject of course to the retaining of confidence of the Legislature.

4. The executive function comprises both the determination of the policy and also carrying it into execution which includes initiation of the process of legislation.

5. Cabinet concentrates in itself the virtual control of both legislative and executive functions and therefore, the most important questions of policy are all formulated by them.

7. Learned Attorney General, in furtherance of his submission that the Government has the power to constitute such a Joint Drafting Committee, has also placed reliance on *Jayantilal Amritlal Shodhan v. F.N. Rana,* **(1964) 5 SCR 294** wherein the Apex Court noted the relevance and importance of executive authority and also *NDMC v. Tanvi Trading and Credit (P) Ltd.,* **(2008) 8 SCC 756** wherein the Apex Court observed that executive instructions may be issued in the absence of legislation.

8. The Apex Court also laid down that the power of the Union Executive when not trammelled by any statute or rule, is wide; and pursuant to its power it can make executive policy or even change it (vide *Col. A.S. Sangwan v. Union of India,* **AIR 1981 SC 1545).**

9. The impugned Resolution of April 8, 2011 only constitutes a Joint Drafting Committee comprising of five nominees of Government of India and five nominees of Sri Anna Hazare (including himself) for the purpose of drafting the Lok Pal Bill and does nothing more.

10. Two points emerge from the impugned Resolution. First, the Government of India has formulated a policy that there will be a Lok Pal and second, that for the implementation of the policy, a bill is to be finalized for transmission of the policy into legislation. A deadline for preparing a draft of the Bill is provided in the impugned Resolution. The impugned Resolution does not go any further. It does not state that the Government would by-pass the constitutional process of law-making. In fact and in law, it is not possible to validly enact a legislation except in accordance with law. The impugned Resolution does not state that the Bill drafted by the Joint Drafting Committee would tantamount to an Act of Parliament. This is not at all the spirit of the Resolution. Therefore, what it implies is only the drafting of a bill for the legislation which will be necessary to give effect to the policy of the Government and the transmission of that policy into law; nothing more, nothing less.

11. Chapter 9 of the **Manual of Parliamentary Procedures in the Government of India,** which is a compilation of Rules of Procedure and Conduct of Business in Lok Sabha/Council of States, Government and Parliament Procedure to be followed by the Ministries in connection with Parliamentary work and Directions by the Speaker under the Rules of Procedure and Conduct of Business in Lok Sabha and various other statutory

rules and orders, prepared by the Ministry of Parliamentary Affairs, reveals the course by which a proposal for legislation in Parliament is initiated and also the various stages, through which such proposed legislation passes through before it is enacted and takes the shape of law. We need not incorporate the entire procedure, but in sum and substance it can be noticed that it provides for various steps right from the initiation of bill in the form of proposal by the concerned department for cabinet approval, to drafting of bill by the Legislative Department of the MoLJ and introduction thereof in the Parliament including elicitation of public opinion and the passing of the bill into an Act of Parliament which is finally published by MoLJ 3680in the Gazette of India Extraordinary as provided in the Manual.

12. Thus, a detailed procedure/process is observed before a bill that initially originated in the concerned department as a proposal, finally originates or is introduced in the Legislature in accordance with Article 107 in the case of the Parliament and Article 196 in the case of State Legislature for its consideration. A bill therefore, is nothing but a proposal made to the Legislature for its consideration to enact a law on the subject it appertains to (see David M. Walker, *The Oxford Companion to Law* (1980), Claredon Press, p.129).

13. The argument, therefore, of the petitioners that the impugned Resolution is beyond any legal principle and is extra-constitutional does not hold good for the simple reason that there is no constitutional process or any procedure established by law that provides as to how and in what manner government resolutions may be made. Consequently, where the Constitution does not require an action to be taken in a particular manner and where there is no legislation or an existing law to regulate the executive power of the Union, the Government would not only be free to take such action by executive order but also to change the policy itself (see *Col. A.S. Sangwan* (supra)).

14. The argument of the petitioners that the Bill so prepared by a committee which consists of five Cabinet rank Ministers, cannot be subjected to various check-ups by the various departments including MoLJ, is itself contradiction in terms and appears to have been raised unmindful of the plea of the learned Attorney General that the five Cabinet rank Ministers have been nominated as members of the committee by their names and not by their designation but as Government nominees, in which Sri Pranab Mukherjee is the Chairman of the committee, Sri Shanti Bhushan is the Co-Chairman and Sri M. Veerappa Moily is the Convenor. They would discharge their functions as members of the Committee like other five nominated members including Sri Anna Hazare and not as Cabinet rank Ministers. Also, the impugned Resolution has been promulgated by the Legislative Department of MoLJ which is the department entrusted under the Government of India (Allocation of Business) Rules, 1961 to drafting of bills.

15. Corollary to the aforesaid argument is that the proposed bill would be subjected to all norms and constitutional procedure before it receives the shape of an enactment and the essential questions, such as, the legislative competence etc. would be examined by the Department of Legal Affairs of MoLJ and other concerned

departments, as clarified in detail by Dr. Ashok Nigam on behalf of the Union of India, who placed reliance on para 8 of the counter affidavit, which has further been clarified by the Union of India in para 3 of its additional counter affidavit, wherein it has been stated that a draft so prepared by the committee would be required to undergo the normal process as per the constitutional provision relating to legislative procedure, the Government of India (Allocation of Business) Rules, 1961, Government of India (Transaction of Business) Rules, 1961 read with Rules of Procedure and Conduct of Business in Lok Sabha/Council of States and the Directions by the Speaker, Lok Sabha/Chairman of the Council of States. The plea, therefore, that such a draft cannot be subjected to procedural safeguards is devoid of any force.

16. Further, the argument of the petitioners that by constituting the committee and accepting the demand of Sri Anna Hazare; Sri Hazare has been brought at par with the Government is based on misconception of facts and law3680 as Sri Anna Hazare is only a member of the committee, like other members, who are to discharge their functions as members of the committee.

17. Sri Asok Pande then contended that public-private-partnership in law making is not recognised and therefore, the impugned resolution is ultra vires the Constitution. This plea must also fall to the ground in view of the law laid down by Apex Court in *Ram Jawaya Kapur* (supra) which says that in order to enable the executive to function it is not necessary that a law must already be in existence.

18. The petitioners' submission that law-making is purely legislative act and therefore public inclusion is not valid, also has no substance. It is well-settled that law-making is purely a legislative act. However, there lies a distinction between drafting of bill and its transmission into law. The preparation of a bill is not equivalent to its origination in legislature. Before Article 107(1) of the Constitution is triggered, one may learn from the stages of legislation enumerated under Chapter 9 of the Manual of Parliamentary Procedures, the intricate stages of executive scrutiny a bill is subjected to. Though, it is within the domain of the executive to initiate a bill which the Parliament is competent to enact under the Seventh Schedule (see *Ram Jawaya Kapur* (supra)). But once a bill originates in the Parliament, the executive power ceases to exist, for then the bill comes within the domain of the Legislature for its consideration. What is of concern, therefore, in the present matter is the preparation of the Bill and not its enactment into law.

19. The learned Attorney General has emphatically stated that it is for the purpose of eliciting the broadest possible views on an important subject, such as, the Lok Pal that the committee has been constituted. Therefore, so far as the contention of the petitioners concerning public inclusion in law-making is concerned; we do not find any illegality in such process. It is conventional that public opinion is elicited before the Legislature enacts a law. Comments from the public are invited and considered by the Legislature as is evident from Chapter 9 of the Manual mentioned above and therefore, it would not be trite to condemn the Joint Drafting Committee merely on the ground that it is unconventional. In

G.B. Mahajan v. Jalgaon Municipal Council, **(1991) 3 SCC 81,** the Municipal Council entered into an agreement with a private builder for the construction of a commercial complex. The project envisaged a self-financing scheme through which the builder was to construct the complex at his own cost but after completion of construction was to hand over the complex to the Council. However, he was allowed to dispose of certain shops by retaining premium received therefrom by way of reimbursement of costs and profits. The action of the Council was challenged as "unconventional' and arbitrary. Negating the contention and describing it as a policy decision, the Supreme Court observed as under:

"The criticism of the project being "unconventional' does not add to or advance the legal contention any further. The question is not whether it is unconventional by the standard of the extant practices, but whether there was something in law rendering it impermissible."

20. In a democratic polity, such as ours, it must be borne in mind that it is the "will of the people' that has been given paramount importance in the Constitution and is the edifice on which our democratic system stands. In paragraph 99 of the judgment in *People's Union for Civil Liberties and Ors. v. Union of India and another,* **(2003) 4 SCC 399,** the Apex Court observed as under:

"99. The trite saying the 'democracy is for the people, of the people and by the people' has to be remembered for ever. In a democratic republic, it is the will of the people that is paramount and becomes the basis of the authority of the Government. The will is expressed in periodic elections based on universal adult suffrage held by means of secret ballot. It is through the ballot that the voter expresses his choice or preference for a candidate. "Voting is formal expression of will or opinion by the person entitled to exercise the right on the subject or issue", as observed by this Court in Lily Thomas v. Speaker, Lok Sabha (1993) 4 SCC 234 quoting from Black's Law Dictionary. The citizens of the country are enabled to take part in the Government through their chosen representatives. In a Parliamentary democracy like ours, the Government of the day is responsible to the people through their elected representatives. The elected representative acts or is supposed to act as a live link between the people and the Government. The peoples' representatives fill the role of law-makes and custodians of Government. People look to them for ventilation and redressal of their grievances. They are the focal point of the will and authority of the people at large."

In State of Madhya Pradesh and Anr. v. Thakur Bharat Singh, **(1967) 2 SCR 454,** the Supreme Court observed as follows:

"Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority i. e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is distribution of powers between the three organs of the State-legislative, executive and judicial-each organ having

some check direct or indirect on the other: and (3) the rule of law which includes judicial review of arbitrary executive actions."

(emphasis supplied)

21. The supremacy of the will of the people including the principle of public interest has been celebrated by the Courts in our country. See for example, *Kuldip Nayar v. Union of India and Ors.,* **(2006) 7 SCC 1**, *Baldev Singh Mann v. Surjit Singh Dhiman,* **(2009) 1 SCC 633,** P*eople's Union for Civil Liberties and Ors. v. Union of India and Anr.*, **(2009) 3 SCC 200.** The position is settled and there is no3680 fallacy in saying that it is the will of the people which is the fulcrum on which our democratic polity stands.

22. The public opinion therefore is solemn and must not be ignored by the executive. The executive must always be considerate of public opinion and work towards redressing the grievances at large. It is only then that democracy would serve fruitful and meaningful purpose. If a public demand is so made for enacting a law on any subject, it is always open to the Government to consider such a demand and if the Government is satisfied that the demand so raised is genuine and in public interest and not against any constitutional or legal provisions, it may, for giving due weight to the will of the people, proceed to enact the law. If such law is enacted on public demand so raised, it cannot be said that the Government has acted in any way unconstitutionally or against the constitutional provisions.

23. It will always be a matter of discretion for the Government to consider objectively and take all factors into consideration while considering the question whether the demand so raised would ventilate the public grievance raised and would be in the interest of public. But if the Government finds that the demand so raised if accepted would be against public interest or national interest or in other words, the repercussions of the same would be more harmful than any public good, it is well within its domain not to accept the demand. To elaborate, one can say that so far as weeding out corruption from the society is concerned, it is a cause which no one can oppose nor can there be slightest hitch in taking effective and prompt steps for eradicating corruption by amending the existing laws, if necessary, for their strict enforcement and also by enacting special laws within the constitutionally permissible limits. Although in situations where the demands for enacting a law, does not appear to be genuine in the opinion of the Government, as discussed above, the Government would always be free to take a decision of its own refusing to accede to such a demand. The Government though cannot be pressurized by any section of the people for conceding to their demand unless it is genuine, but at the same time, it has also to be very vigilant, watchful, sensitive, conscious to the will of the majority of the people and its views, must normally and largely be acceptable to public. Agreeing for making a law for a genuine cause is a part of parliamentary democracy. The Government cannot ignore the ills of the society, for example, corruption, which in its epidemic form, is affecting the life of common man, but equal responsibility lies upon the public also to co-operate in uprooting corruption and not to be guided by individual, self, parochial interests, which necessarily means that that 'Rule of Law' must prevail, which is one of the

essentials of a healthy parliamentary democracy.

24. The people's desire that an institution be established (be it in the name and style of Lok Pal) to check the menace of corruption has been given consideration by the Government. If the executive in its wisdom wants to elicit public opinion in finalizing the draft of the Bill, there is no constitutional or statutory provision, in our opinion, that prohibits the executive from doing so.

25. The petitioners have also challenged the impugned Resolution on the ground that it violates Article 14 of the Constitution, as only certain class of persons who have agitated on the issue by hunger strikes and whom Sri Anna Hazare has nominated are represented in the Committee.

26. The Delhi High Court in *Hemant Baburao Patil v. Union of India and others,* **W.P. (C) No. 2671/2011,** decided on 2.5.2011, after observing that members of the present Drafting Committee do not hold public office and therefore, there cannot be any eligibility criteria, proceeded to hold that the concept of quo warranto is not applicable. The Court further observed that the Drafting Committee which has been constituted, pertains to a pre-enactment stage and therefore, expressed doubt on whether the same could be scrutinized by the Court in exercise of power of judicial review. The Court dismissed the writ petition treating the impugned resolution to be the *"internal matter of the Executive and exclusively in the domain of the Executive".*

27. In *Asok Pande and another versus Union of India and others,* **Writ Petition No. 3556 (M/B) of 2011**, decided on 16.4.2011, the petitioner sought a writ in the nature of mandamus to direct the State to enact a law recognizing the public-private-partnership in law making. Attention of this Court was invited to the impugned Resolution to buttress the petitioner's contentions. The Union of India, repelling the contentions of the petitioner, took the stand therein that the committee constituted by the impugned resolution is advisory in nature to assist the Government. Similar stand by the Union of India, with regard to the nature of the committee, has been taken before us also in the present writ petition. The Union of India has specifically stated in its counter-affidavit that the committee so constituted is advisory in nature. The learned Attorney General has reiterated that the committee constituted would be open to considering all such suggestions. In this connection, the petitioners questioned the stand taken by the Union of India on the ground that the committee has been restricted to only few persons and that every individual has not been invited to present their point of view and to openly participate in law making.

28. To appreciate the contention raised, it must be considered that the Constitution vests the power of making law only in the Legislature. The plea of the petitioners that if Sri Anna Hazare and his nominees can be made part of the committee, then all other persons/citizens of the country should be given an opportunity to be in the committee which he terms as 'open law making', is not known to our constitutional process, nor is practically possible. The plea is fallacious as in no committee all citizens can be accommodated.

29. The Government considering the demand of wiping out corruption appears to have taken a conscious decision to enact a law on the subject and for this purpose has constituted a committee in exercise of its own discretion. In pursuance thereof and in exercise of its discretion it has nominated some persons from the Government itself and invited some persons from amongst those whose demand was acceded to by the Government to assist or advise it in finalizing a Bill on the subject.

30. So now the question that arises for consideration is that if the Government before initiating a legislation wants to seek advise or make consultations in order to finalize a bill can it not do so? Can such an action of the Government be condemned merely on the basis that it failed to invite every person but only those whom the Government wanted to consult or enter into consultation?

31. The expression "consultation' can be distinguished into two parts. The first is where consultation is done by the executive as a matter of constitutional or statutory requirement. In all other cases, the executive can consult or enters into consultation or consults in its own wisdom. Thus, where the executive wants to consult or enters into consultation or consults in its own wisdom, the executive is free to adopt its own procedure in all such cases where there is no procedure established by law; it is within the discretion exercised by the executive to choose whom does it want to consult. Such exercise of discretion by the executive cannot be challenged on the ground that it is discriminatory or arbitrary and thus violative of Article 14 of the Constitution.

32. In *Mithilesh Kumari v. Prem Behari Khare,* **(1982) 2 SCC 95,** the Apex Court opined that *right is a legally protected interest. With the removal of the protection by statute, the right ceases to exist.* Article 14 safeguards equality before law and equal protection before law by the State. It must be borne in mind that there is no law that vests the right in every person to be consulted by the State. The executive may in its discretion choose whom does it want to consult. "Discretion' in the words of Lord Halsbury means *"when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion...according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself..." [Sharp v. Wakefield,* **1981 AC 173, 179**; see also *Kumaon Mandal v. Girja Shankar,* **(2001) 1 SCC 182**; *Union of India v. Kuldeep Singh,* **(2004) 2 SCC 590**; *National Insurance Co. v. Keshar Bahadur,* **AIR 2004 SC 1581.]**

In Secretary of State for Education & Science v. Tameside Metropolitan Borough Council, **(1976) 3 All.E.R. 665, 695,** *Lord Diplock said, "The very concept of administrative discretion involves a right to choose between more than one possible cause of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred." (See also Brind v. Secretary of State,* **(1991) 2 A.C. 696;** *Breen v. Amalgamated Engineering Union,* **(1971) 2 Q.B. 175)**

33. It is thus, the choice of the Government to select people/persons with

a view to take advice or consult or make consultation for the purpose. The persons raising their voice against corruption would not get a right much less any enforceable right or claim to be included in the committee by the Government, though the committee could be said to be constituted in a manner so that it reflects all sections of the society, as stated by the learned Attorney General, but it cannot be overlooked that the committee has been constituted not by vote of public but by the Government in exercise of its executive powers which permits the Government to constitute such a committee and not under any constitutional or statutory force. It is not the requirement of law that only public representative should be placed in the committee. With regard to the argument of the petitioner Sri Asok Pande that other sections of the society are to be represented in such a committee, it must be borne in mind that in parliamentary democracy, public representatives are elected and take their seats in the Parliament or the State Legislature, as the case may be. Members of Parliament and Members of Legislative Assemblies represent the will of the people and are there to make laws which are good and for the benefit of the people.

34. The wisdom of the executive and the exercise of discretion in the present matter cannot be said to transgress or violate Article 14 of the Constitution in any manner and that the argument of the petitioners to that extent fails. The Joint Drafting Committee is a consultative committee of an advisory nature as rightly held by Delhi High Court in *Hemant Baburao Patil (supra).*

35. Since the committee, in our opinion, is consultative and advisory in nature, the nomination of the members to the committee is not under any statutory enactment and hence no eligibility criteria can be traced for the committee of such a kind. Evidently, the impugned Resolution was published under Part I - Section 1 of the Gazette wherein non-statutory resolutions are published also supplements the fact that committee does not have any statutory or constitutional force and is merely constituted in the wisdom of the Government. The Delhi High Court has thus rightly held in *Hemant Baburao Patil (supra)* that the committee constituted is with respect to pre-enactment stage of the Bill and therefore not amenable to judicial review. The wisdom therefore, of the executive constituting such a Joint Drafting Committee for finalisation of the draft of the Lok Pal Bill cannot by tested by this Court under Article 226 of the Constitution, where the exercise of the executive discretion is not referable to any constitutional or statutory provision as regards either compliance or prohibition.

Krishna Iyer, J. *in State of Punjab v. Gurdial Singh,* **AIR 1980 SC 319**, *observed that: "The court is handcuffed in this jurisdiction and cannot raise its hand against what it thinks is a foolish choice. Wisdom in administrative action is the property of the executive and judicial circumspection keeps the court lock-jawed save where the power has been polluted with oblique ends or is otherwise void on well-established grounds. The constitutional balance cannot be upset."*

36. The settled legal position is that it is only the decision-making process and not the decision which is open to challenge in a matter relating to administrative or executive order and action and that the courts would not sit in appeal over the wisdom of the Government in policy

decisions. In *Vidharbha Sikshan Vyawasthapak Mahasangh v. State of Maharashtra,* **(1986) 4 SCC 361**, an order directing D.Ed. Colleges not to admit students in the first year during the year 1985-86 was challenged. Holding it a policy decision of the Government the Supreme Court did not interfere with it on the ground that the policy decision was neither arbitrary nor unreasonable. The Apex Court referring to the decision of the United States Supreme Court in *Metropolis Theatre Company v. State of Chicago,* 57 L. Ed. 730 reiterated the principle in *State of M.P. v. Nandlal,* (**1986) 4 SCC 566** and observed as under:

"The Court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide."

37. The cabinet decision of the outgoing government was to reinstate 800 Railway employees dismissed from service which was subsequently not honoured by the succeeding Government. Propriety of such policy decision was challenged in *Union of India v. R. Reddappa,* **(1993) 4 SCC 269** wherein the Court observed that, *"in a Parliamentary system of Government the democracy grows and matures by healthy conventions and traditions. Should an outgoing Government take a policy decision one day before quitting the office or should the succeeding Government honour it, cannot be regulated by courts."*

So also in *Asif Hameed v. State of J&K,* **1989 Supp. (2) SCC 364** where selection procedure was challenged under Article 226 of the Constitution, the Apex Court while upholding the order of the High Court dismissing the writ petition observed as under:

"While exercising power of judicial review of administrative action, the court is not an appellate authority. The Constitution does not permit the court to direct or advise the executive in matters of policy or to sermonise qua any matter which under the Constitution lies within the sphere of legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers."

38. The matters of policy unless violate constitutional or legal limits on power or are clear abuse of power, it would not be appropriate for the Courts to fetter with executive decision. But once the policy is transmitted into law and its validity is under challenge or an executive action otherwise is questioned of being arbitrary, *mala fide*, illegal or unconstitutional, such an action would be open to judicial review on prescribed legal norms; meaning thereby, that the law which is made, must be within the constitutional framework and it must not contravene, trench or violate any fundamental right of the citizens nor must it infringe, annul, derogate or minish the inviolable basic structure of the constitution. The judiciary though is constitutionally obliged to keep watch upon the functioning of the legislature and the executive and to correct their errors, if any, but such an interference would hardly be required in a matter where the executive exercises its power to constitute the committee, like the present one, entrusted with the job of preparing a draft Bill.

39. As clarified by the learned Attorney General, the status of the committee is thus only consultative, or to say, in other words, advisory in nature and the Bill so prepared would still be subjected to all constitutional procedures. Once the committee completes the task entrusted and prepares a draft of the Bill, it would be within the discretion of the Government to attach value to the draft so prepared by the committee as it thinks fit in finalizing the Bill which is introduced in the Parliament.

40. Therefore, on the question of the locus of the bill so prepared by the committee; it can safely be inferred that such a bill once introduced in the Parliament by the Government of India would be considered by the Parliament like any other bill but for the money bill. However, it would be premature for this Court to speculate and assess the mind of the Government as to in what manner the Government would deal with the Bill so prepared by the Drafting Committee.

41. Thus, the impugned Resolution as it stands, in our opinion, does not suffer from any illegality so as to call for any interference by this Court.

Hence we proceed to conclude as follows:

1. It is within the purview of executive power as contemplated within the meaning of Article 73 of the Constitution to constitute such a committee.

2. It is an exercise of executive power partly for the determination of policy and partly for the implementation of that policy for initiating the process of legislation on the subject.

3. Eliciting public opinion is a conventional practice in the process of legislation and therefore, there is no bar for the executive to elicit public opinion before the draft of a Bill is finalised and then presented to and introduced in the Parliament.

4. It is within the power and discretion of the executive to make consultations before finalising the draft of a bill. The discretion lies in the matter of the persons to be consulted and the value to be attached to their views and opinions. There is no prescribed procedure for consultations, either positive or negative and there is also no provision in law or Constitution restricting the discretion or its exercise in any manner.

5. Where the exercise of the executive discretion is not referable to any constitutional or statutory provision as regards either compliance or prohibition, it cannot be subject to judicial scrutiny under Article 226 of the Constitution unless the executive discretion so exercised is absolutely arbitrary, illegal, unconstitutional or violative of any statutory provision.

6. The settled legal position is that it is only the decision-making process and not the decision which is open to challenge in a matter relating to administrative or executive order and action.

42. As a result of the discussion made above and the legal position enunciated, we answer the questions framed by the aforementioned Division Bench as follows:

(1) It is within the executive power of the Government to constitute a committee

of members comprising such persons from the society as it thinks fit for drafting of the Lok Pal Bill.

(2) There is no vested right in any citizen to be consulted by the Government of India except as provided by law. Where the law does not vest any such right, as is in the present case, no person can seek as a matter of right his representation in the committee.

(3) The committee has been constituted to assist the Government in finalizing the Lok Pal Bill. The value to be attached to the Bill so prepared by the committee can be assessed only by the Government, for before a legislation is validly transmitted into law, it has to go through the constitutional process. Thus, the committee so constituted in no way impinges upon the sovereign will of the people of India, which lies in the Parliament.

43. In view of the conclusions arrived at by us and the answers given to the three questions framed by the Division Bench, no interference is required in the matter under Article 226 of the Constitution of India. The writ petition is accordingly dismissed.

There would be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.06.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE RAJIV SHARMA,J.

Misc. Bench No. - 5483 of 2011

Vinod Shanker Misra, Secretary General and another [P.I.L.]Civil ...Petitioner
Versus
Salman Khan Hero of Hindi Feature Film 'Ready `and others. ...Respondents

Counsel for the Petitioner:
Sri Ashok Pande
Sri V.S. Misra

Counsel for the Respndents:
A.S.G.

Cinematography Act, 1952-Section-5- read with Section 295 and 245 of Indian Penal Code-central Board of Film Certificate-failed to discharge its duty-by outraging religious feeling or religion sentiments-undisputedly the song of film "Ready" which says "Ishq Ke Naam Par Karte Sabhi Ab Rass Lila Hain, Hum Karen to Kahte Hai Character Dhila Hai"-prima faci-can not be used in derogative sense to hurt the feelings of Hindus.

Held: Para 4

While framing the questions, the Division Bench (supra) had taken note of the fact that there is difference in the Indian civilization vis-a-vis Western civilization so far as the life style is concerned. Indian civilization regulates its conduct in such a manner which does not permit the use of derogative words against the religion and religious sentiments of its people. Section 5 (B) of the Cinematography Act, 1952 provides guidelines which prima facie seems to be applicable in the present case. Why the Central Board of Film Certification has

failed to take appropriate decision while clearing the film, is a matter of deep concern before this Court. In Chapter XV, Section 295 and 295-A of Indian Penal Code, provide that no person has got right to act deliberately or maliciously intending to outrage the religious feelings of any class by insulting religion or religious sentiments. Needless to say that under Hindu religion, *Rass Lila* co-relate with Lord Krishna. Prima facie, the word, cannot be used in derogative sense.

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

1. Common question of law and facts both, are involved in these bunch of writ petitions under Article 226 of the Constitution of India, which have been connected by the order dated 6.6.2011, passed by this Court.

2. The petitioner are aggrieved by the film "Ready" whereby, the language and songs of films is vulgar polluting the minds of immature youths and also hurting religious sentiments of the citizens of the country. Writ Petition No.4446 (M/B) of 2011:In Re Suo Moto On The Complaint Of Lady Advo.[P.I.L] Crimin Vs. Union Of India Through Secy., Ministry of Foreign Affairs and Ors., by the order dated 6.5.2011 passed by the Division Bench of which one of us (Hon'ble Mr. Justice Devi Prasad Singh) was a member, following questions have been framed:

1. Keeping the cultural difference between India and Western Civilization, whether such photographs may be published in Indian newspaper, affecting the religious sentiments of citizens.

2. Whether Ministry of Foreign Affairs should interfere with such photographs, where religious sentiments are hurt by any action in foreign country? If yes, then in what manner ?

3. Whether Press Council of India may frame appropriate guide-lines to regulate the Electronic and Press Media.

4. In case, offence is made out in India because of publication of such photographs in newspapers of India or anywhere in the world, whether action may be taken on criminal side, and in what manner ?

5. What remedial measures may be taken by the Government to prevent such offending acts in foreign country as well as to prevent the publication of such photographs in the Indian newspaper or electronic media ?

3. Now, in the present writ petitions, the petitioners are aggrieved by the word, *"Raas Lila"* in the song *"Ishq Ke Naam Par Karte Sabhi Ab Rass Lila Hain, Hum Karen to Kahte Hai Character Dhila Hai"* of a film *"Ready"* by name, which depicts Lord Krishna in derogative manner on the ground that the word, "Raas Lila" indicates and co-relates to the life sketch of Lord Krishna and it cannot be used in a vulgar manner in the promo of the film *"Ready"*. It has been submitted that the film *"Ready"* has already been released.

4. While framing the questions, the Division Bench (supra) had taken note of the fact that there is difference in the Indian civilization vis-a-vis Western civilization so far as the life style is concerned. Indian civilization regulates its conduct in such a manner which does not permit the use of derogative words against the religion and religious sentiments of its

people. Section 5 (B) of the Cinematography Act, 1952 provides guidelines which prima facie seems to be applicable in the present case. Why the Central Board of Film Certification has failed to take appropriate decision while clearing the film, is a matter of deep concern before this Court. In Chapter XV, Section 295 and 295-A of Indian Penal Code, provide that no person has got right to act deliberately or maliciously intending to outrage the religious feelings of any class by insulting religion or religious sentiments. Needless to say that under Hindu religion, *Rass Lila* co-relate with Lord Krishna. Prima facie, the word, cannot be used in derogative sense.

5. In view of the above, we admit the writ petition.

6. Issue notice to respondent No.1, 2 and 3 returnable at an early date.

7. Six weeks time is allowed to file counter affidavit and two weeks time is allowed to file rejoinder affidavit.

8. List thereafter.

9. As an interim measure, the respondent No.3 is directed to reconsider the grant of certificate along with the song having title, *"Ready"* with the song, *"Ishq Ke Naam Par Karte Sabhi Ab Rass Lila Hain, Hum Karen to Kahte Hai Character Dhila Hai",* within a period of one month from the date of receipt of a certified copy of this order. In case no decision is taken, this Court may consider the prayer of the petitioners with regard to interim relief.

10. List immediately after two months along with the bunch of writ petitions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2011

BEFORE
THE HON'BLE PRAKASH KRISHNA,J.

Civil Misc. Writ Petition No. 6626 of 2004

Peer Baksha ...Petitioner
Versus
Regional Manager, Uttar Pradesh Road Transport Corporation, Kanpur Region, Kanpur and others. ...Respondents

Counsel for the Petitioner:
Sri Kaushal Kishore Mishra

Counsel for the Respondents:
Sri C.P. Srivastava
Sri Anubhav Chandra
C.S.C.

U.P. Road Transport Corporation Employees (other than Officer) Service Regulation, 1981-Section 2(i)-Physical disability-petitioner a driver advised for lightwork instead of driver-as suffering from " Asthmatic Bronchitis Lt. shoulder joint injury"-admittedly the petitioner was offered and worked on alternate job till the date of superannuation-can not be treated disable as per definition of Section 2(i)-entitled for every consequential benefits including post retiral benefits.

Held: Para 28, 29 and 34

Keeping in view that the Act, 1995 is piece of welfare legislation for the benefit of such employees who have suffered disability during service, it would appropriate to hold that the word "disability" mentioned in Section 47 should be interpreted broadly and liberally. In other words, it will include any such disability though not included in the

definition of Section 2(i) of the Act, 1995 but because of which the employee is vitiated with discharge or reduction in service, Section 47 will come into play to protect the interest of such an employee by offering alternative job and if it is not possible to adjust the employee against any post, he will be kept on supernumerary post until a suitable post is available or he attains the age of his superannuation whichever is earlier.

The intention of enactment of the Act, 1995 is not to restrict only those categories or persons mentioned in Section 2(i) alone to be entitled to the benefits under the Act on purposive interpretation of Section 2(i), it is reasonable to hold in other words that the definition of "disability" under Section 2(i) of the Act, 1995 is not exhaustive.

The observations that there is no alternative job in the Corporation is linked with the earlier part of its order i.e. the petitioner is not a disabled person within the meaning of "disability" as defined in Section 2(i) of the Act, 1995. There is no denying of the fact that the petitioner was offered alternative job by posting in the depot, which was accepted by him. He continued on the said post till he attained the age of superannuation. There is no suggestion in the counter affidavit that there was no job of greasing the buses in the depot. It follows that there was an alternative job for the petitioner which was offered and accepted by him. He continued on such post till he attained the age of superannuation.

Case law discussed:

JT 1987 (1) SC 246; JT 1989 (4) SC 529; 2001 (9) SC 84; AIR 2003 SC 1623

(Delivered by Hon'ble Prakash Krishna,J.)

1. The petitioner was appointed on 2nd December, 1977 as driver in the Uttar Pradesh Road Transport Corporation, by means of the present writ petition has challenged the order dated 29.11.2003 discharging him from service.

2. The facts are few and not in dispute. From inception of the service till he was finally discharged by the impugned order 29.11.2003 there is absolutely nothing against the work and conduct of the petitioner. The petitioner has been discharged for medical reasons. In the year 1999 he was medically examined. The doctor gave a report to the Assistant Regional Manager, Uttar Pradesh Road Transport Corporation that the petitioner is not medically fit to drive the Bus as he is a patient of asthmatic bronchitis C Lt. shoulder Jt. injury. However, the doctor further suggested that he may be given an alternative job instead of driving vehicles. The said report has been annexed as annexure-1 to the writ petition.

3. In the light of the medical report, the petitioner was shifted to workshop for doing other duties like greasing. He was again medically examined on 21.05.2002 and thereafter the impugned discharge order dated 29.11.2003 was passed. In between a further development took place.

4. It appears that the Corporation decided that the workers who are disabled may not be posted at their original Depot and therefore, the order dated 5.06.2003 proposing transfer of the petitioner to another Depot outside the district was passed and in this regard, option with regard to three places was asked for. The petitioner along with other persons being aggrieved by the said order/action of the Corporation approached this Court by filing a writ petition. The petitioner filed Writ Petition No. 34068 of 2003, which

was disposed of in terms of the judgment delivered in Writ Petition No. 32349 of 2003 by the order dated 08.08.2003. The petitioner represented that he should not be transferred to another Depot. According to the petitioner, the request of the petitioner was not well received by the Corporation and its Officials became annoyed and this led passing of the impugned discharge order by offering retrenchment benefit under Section 6-N of the U.P. Industrial Dispute Act, 1947.

5. In the counter affidavit as well as in the impugned order, the stand taken by the respondents is that the petitioner was discharged from the service after becoming medically unfit for the post of driver. He was initially allotted some lighter work. The disease suffered by the petitioner does not come within the meaning of "disability" under the Person with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (hereinafter referred to as "the Act, 1995") as such he is not entitled to get the benefit of Section 47 of the said Act.

6. Heard the learned counsel for the parties.

7. At the very out set, it may be stated that while entertaining the writ petition, this Court on 19th February, 2004 stayed the operation of the impugned order dated 29.11.2003. The said order remained in operation throughout. In the meantime, the petitioner attained the age of superannuation. In this background, the writ petition was disposed of earlier by the judgment dated 1st February, 2008 by providing that the petitioner be treated as an employee till he retired on 31st January, 2007 and be paid retrial benefit etc. by ignoring the impugned order dated 29.11.2003.

8. The matter was carried in intra court appeal being Special Appeal No. 825 of 2008. A Division Bench of this Court by its judgment dated 16.07.2008 has allowed the appeal and set aside the judgment of the learned Single Judge and restored the matter back for fresh decision on merits.

9. Learned counsel for the petitioner submitted that the impugned order was passed as the petitioner had challenged proposed transfer from one depot to another. The petitioner has discharged the work of greasing till the date of his retirement and therefore, the impugned order dated 29.11.2003 be set aside.

10. Learned counsel for the respondents, on the other hand, submits that the petitioner was medically found unfit for the post of driver. Intially, he was adjusted by providing him some alternative job in the depot. The disability of the petitioner is of such nature which does not come within the definition of "disability" as defined under the under the Act, 1995. The respondent Corporation has taken policy decision to offer an alternative employment by shifting to some other depot with the same pay-scale and service benefits only to such employees whose disability falls within the four corners of disabilities as defined under Section 2(i) of the Act, 1995.

11. Considered the respective submissions of the learned counsel for the parties and perused the record.

12. As noticed herein above, the only ground on which the impugned order is founded is the medical report, finding that the petitioner is unfit for the post of driver. There cannot be any dispute that if a doctor finds that the person is medically unfit for a particular job, his opinion deserved due weight. No attempt was made before this Court to establish that the "disability" of the petitioner is of such nature which falls in section 2(i) of the Act, 1995.

13. The petitioner was found unfit in the medical report dated 03.04.1999 as he was suffering with asthmatic bronchitis C Lt. shoulder Jt. Injury. The doctor advised that he may be given some alternative job. The attention of the Court was invited towards the Uttar Pradesh State Road Transport Corporation Employees (Other than Officers) Service, Regulations, 1981, Regulation-17 in particular. The said Regulation is reproduced below:

***"17. Physical fitness.**--(1) No candidate shall be appointed to a post in the service unless he be in good mental and bodily health and free from any physical defect likely to interfere with the performance of duties. Before a candidate is finally approved for appointment, he shall be required to produce a medical certificate of fitness, in the form prescribed in annexure "D' from the Chief Medical Officer or any other Medical Officer, nominated or approved by the Corporation.*

(2) A person, appointed to the post of driver will be required to undergo medical test, particularly vision test, every year or at such intervals as may be prescribed by the General Manager from time to time.

(3) The service of a person who fails to pass the fitness test, referred to in the sub-regulation (2), may be dispensed with :

Provided that the persons, whose services are so dispensed with may, in the discretion of the Corporation, be offered alternative job."

14. A driver of the Corporation is required to undergo medical test, particularly the vision test, every year or at such intervals as may be prescribed by the General Manager from time to time and if any person who fails to pass the fitness test, the services of any such person may be dispensed with. The proviso enables the Corporation at its discretion to offer alternative job.

15. The question which boils down is whether the stand taken by the respondent Corporation that in view of the fact that the disability of the petitioner does not fall within the definition of "disability" as defined under the Act, 1995, no discretion is left to the Corporation but to dispense with services of such disabled persons.

16. The Act, 1995 was passed in the light of the Proclamation on the Full Participation and Equality of the People with Disabilities in the Asian and Pacific Region. The said Proclamation was accepted on principle by India being a signatory thereto. To discharge the said obligation, the Act, 1995 was passed, as its introduction states. The idea of the said enactment is to provide jobs to the persons suffering with disabilities. A brief survey of the provisions of the said Act would show that in the definition clauses various terms used in the said Act including "disabilities" have been defined.

Section 47 of the Act, 1995, which has been relied in reply, by the learned counsel for the respondents is reproduced below:

***47. Non-discrimination in Government employment.**--(1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service:*

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits:

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

No Promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."

17. The stand taken by the respondents is that services of employee who acquires disability during his service shall not be dispensed with, or reduced in rank. The word "disability" has been defined in Section 2(i) of the Act, 1995. The same is reproduced below:

"2(i) "disability" means--

(i) blindness;
(ii) low vision;
(iii) leprosy-cured;
(iv) hearing impairment;
(v) locomotor disability;
(vi) mental retardation;
(vii) mental illness;"

18. The principal argument of the respondents is that as the disability suffered by the petitioner does not fall in any of the clauses of the word "disability" as defined in Section 2(i) of the Act, 1995, Section 47 thereto cannot be pressed into service. On a careful consideration of the matter, it is difficult to agree with him.

19. The centre theme of Section 47 of the Act is to protect the service of such employees who have acquired disability during service. It does not follow that the service of such employee has to be dispensed with, whose "disability" does not come within the meaning of "disability" as defined in Section 2(i) of the Act, 1995. The aim and object of enactment of Section 47 of the Act is to provide protection to such employees who have suffered disability to the extent of blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation, mental illness.

20. The opening phrase of Section 2 reads "unless the context otherwise requires" purposive construction to definition clause has to be adopted. The court should not only look at the words but also look at the context, the collocation and the object of such words relating to such matter and interpret the

meaning intended to convey by the use of words under such circumstances.

21. When a word has been defined in the interpretation clause, prima facie that definition governs whenever that word is used in the body of the statute. But where the context makes the definition given in the interpretation clause inapplicable, a defined word when used in the body of the statute may have to be given a meaning different from that contained in the interpretation clause; all definitions given in an interpretation clause are therefore normally enacted subject to the qualification— 'unless there is anything repugnant in the subject or context', or 'unless the context otherwise requires'. (See: **Indian City Properties Ltd. v. Municipal Commissioner of Greater Bombay, (2005) 6 SCC 417.)**

22. In **Reserve Bank of India v. Peerless Corp., JT 1987 (1) SC 246,** the Supreme Court has observed as follows:

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. **No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in Srinivasa and we find no reason to depart from the Court's construction."**

23. In **Union of India v. Filip Tiago De Gama, JT 1989 (4) Sc 529,** the Supreme Court has observed as follows:

"16. **The paramount object in statutory interpretation is to discover what the legislature intended. This intention is primarily to be ascertained from the text of enactment in question. That does not mean the text is to be construed merely as a piece of prose, without reference to its nature or purpose.** A statute is neither a literary text nor a divine revelation. "Words are certainly not crystals, transparent and unchanged" as Mr Justice Holmes has wisely and properly warned. (**Towne v. Eisner** [245 US 428,425 (1918)]) Learned Hand, J., was equally emphatic when he said: "Statutes should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." (**Lenigh Valley Coal Co. v. Yensavage** [218 FR 547, 553])."

24. In **Anwar Hasan Khan Vs. Mohd. Shafi and others, 2001 (9) SC 84,** the Supreme Court has observed as follows:

"8. It is settled that for interpreting a particular provision of an Act, the import and effect of the meaning of the words and phrases used in the statute have to be gathered from the text, the nature of the subject-matter and the purpose and intention of the statute. It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved. The well-known principle of harmonious construction is that effect should be given to all the provisions and a construction that reduces one of the provisions to a "dead letter" is not harmonious construction."

25. The Apex Court in case of **Kunal Singh v. Union of India and another, AIR 2003 SC 1623,** has held that the very frame and contents of Section 47 clearly indicate its mandatory nature. It contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. The following observations therefrom is relevant and reproduced below:

"The very frame and contents of Section 47 clearly indicate its mandatory nature. It contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service. The plea that benefit of Section 47 is not available to the appellant as he has suffered permanent invalidity cannot be accepted."

26. As stated above, the Act, 1995 is welfare legislation and also remedial in nature. It is useful to reproduce a passage from the book of Justice G.P. Singh, title Principles of Statutory Interpretation, Tenth Edition:

"Every modern legislation is actuated with some policy and speaking broadly has some beneficial object behind it. But then there are legislations which are directed to cure some immediate mischief and bring into effect some type of social reform by ameliorating the condition of certain class of persons who according to present-day notions may not have been fairly treated in the past."

27. The remedial statute receives liberal construction. In such statutes, the doubt is resolved in favour of the class of persons for whose benefit the stature is enacted. In construing a remedial statute the courts ought to give to it "the widest operation which its language will permit. They have only to see that the particular case is within the mischief to be remedied

and falls within the language of the enactment." The words of such a statute must be so construed as "to give the most complete remedy which the phraseology will permit, so as "to secure that the relief contemplated by the statute shall not be denied to the class intended to be relieved." In the field of labour and welfare legislation which have to be broadly and liberally construed the Court ought to be more concerned with the colour the content and the context of the statute rather than with its literal import and it must have due regard to the Directive Principles of State Policy (Part IV of the Constitution) and any international convention on the subject and a teleological approach and social perspective must play upon the interpretative process.

28. Keeping in view that the Act, 1995 is piece of welfare legislation for the benefit of such employees who have suffered disability during service, it would appropriate to hold that the word "disability" mentioned in Section 47 should be interpreted broadly and liberally. In other words, it will include any such disability though not included in the definition of Section 2(i) of the Act, 1995 but because of which the employee is vitiated with discharge or reduction in service, Section 47 will come into play to protect the interest of such an employee by offering alternative job and if it is not possible to adjust the employee against any post, he will be kept on supernumerary post until a suitable post is available or he attains the age of his superannuation whichever is earlier.

29. The intention of enactment of the Act, 1995 is not to restrict only those categories or persons mentioned in Section 2(i) alone to be entitled to the benefits under the Act on purposive interpretation of Section 2(i), it is reasonable to hold in other words that the definition of "disability" under Section 2(i) of the Act, 1995 is not exhaustive.

30. This is one aspect of the matter. There is another aspect also. If Service Rules or Regulations provide to such person an alternative job which he can perform, his service shall not be dispensed with or he will not be reduced in rank. Importantly, proviso to Regulation-17 (already reproduced) confers discretion on the Corporation to offer alternative job. Proviso to Regulation-17 and Section 47 of the Act go hand in hand. There is no conflict or head on collusion. The aim and object of both the provisions is the same i.e. to provide protective umbrella to such a disabled employee who has suffered disability in the service, by offering alternative job.

31. It is also apt to note Section 72 of the Act, which reads as follows:

"72. Act to be in addition to and not in derogation of any other law.— The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities."

32. This section clearly demonstrates that the Act, 1995 has been enacted in addition to and not in derogation any other law. The Apex Court in the case of Kunal Singh (supra) has held that the fact that the employee is

getting invalidity pension is no ground to deny the protection, mandatorily made available to such employees under Section 47 of the Act, 1995.

33. The impugned order is founded on the premises that the disability suffered by the petitioner does not fall within the purview of disability as defined under the Act, 1995.

34. The observations that there is no alternative job in the Corporation is linked with the earlier part of its order i.e. the petitioner is not a disabled person within the meaning of "disability" as defined in Section 2(i) of the Act, 1995. There is no denying of the fact that the petitioner was offered alternative job by posting in the depot, which was accepted by him. He continued on the said post till he attained the age of superannuation. There is no suggestion in the counter affidavit that there was no job of greasing the buses in the depot. It follows that there was an alternative job for the petitioner which was offered and accepted by him. He continued on such post till he attained the age of superannuation.

35. Viewed as above, there is sufficient force in the writ petition. The writ petition, therefore, succeeds and is allowed. The impugned order dated 29.11.2003 is hereby, quashed. Resultantly, the petitioner is treated in service till the date of age of his superannuation. Learned counsel for the petitioner submitted that the retrenchment benefit and other consequential benefits which were given through the impugned order, subsequently adjusted in the salary of the petitioner. This fact can be verified from the record and no decision is required in the present writ petition. The respondents will pay the post retiral benefit as admissible to the petitioner treating him as a superannuated employee in accordance with the law preferably within a period of two months from the date of production of certified copy of this order.

36. The writ petition succeeds and is allowed with cost of Rs.5000/- payable by the respondents jointly to the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J.

Civil Misc. Writ Petition No. 18681 of 1997

Smt. Asha Saxena ...Petitioner
Versus
U.P. S.E.B. Ex. Engineer, Electricity Kanpur(N) ...Respondent

Counsel for the Petitioner:
Sri A.K. Srivastava
Sri K.N. Yadav

Counsel for the Respondent:
Sri S.P. Mehrotra
Sri Ranjeet Saxena

Constitution of India-Article 226-Penal Rent-petitioners being the legal heirs of deceased employee-challenged recovery of Rs. 118000/-towards penal rent-as their father who was allowed the quarter in question had already retired on 30.01.91 and died on 16.10.96-still petitioner have maintained their illegal possession-held-if accommodation vacated within two weeks-amount of damage be adjusted from amount of unpaid retiral dues-even the balance amount be recovered as arrear of land revenue.

Held: Para 5

Accordingly, petitioners are directed to vacate forthwith the quarter in question. In case within two weeks it is not done, S.S.P. Kanpur Nagar shall immediately get vacated the quarter in question and handover the same to the authorities of the Electricity Board (now Power Corporation) and send compliance report to this court within a month. Respondents are directed to adjust such penal rent as is permissible under the Rules from the unpaid retiral dues of late Sri Rajeshwar Nath and rest of the amount shall be recovered like arrears of land revenue from the substituted petitioners by the Collector, Kanpur on the application of respondents which may be filed in this regard.

(Delivered by Hon'ble S.U. Khan,J.)

1. Heard learned counsel for the petitioner. At the time of argument, no one appeared on behalf of employer respondents U.P. State Electricity Board and its authorities.

2. Late Sri Rajeshwar Nath, the husband of the original petitioner Smt. Asha Saxena, who has also died and substituted by her legal representatives, was an employee of the respondents and by virtue of employment, he was provided a residential quarter by the employer at Kanpur number of which is 7/18, Type-II in Panki Power House Colony, Panki, Kanpur. Husband of the original petitioner did not vacate the allotted quarter even after his retirement on 31.01.1991, hence penal rent was charged and deducted from gratuity, pension etc. (Sri Rajeshwar Nath died on 16.10.1996) In Paras-14 & 20 of the writ petition, it is mentioned that a bill of about Rs.1,18,000/- was raised in respect of penal rent on 23.12.1991. The prayer in this writ petition is that penal rent bill dated 23.12.1991 may be set aside and order of labour court dated 26.11.1996 may be directed to be complied with by the respondents.

3. It appears that the legal representatives of the employee and the original petitioner (husband and wife) are still in the possession of quarter as is evident from their address given in the affidavit and substitution application filed on 10.08.2009. This is horrible state of affairs.

4. If official quarter is not vacated after retirement, penal rent may very well be charged. Retiral dues cannot be claimed unless official quarter is vacated.

5. Accordingly, petitioners are directed to vacate forthwith the quarter in question. In case within two weeks it is not done, S.S.P. Kanpur Nagar shall immediately get vacated the quarter in question and handover the same to the authorities of the Electricity Board (now Power Corporation) and send compliance report to this court within a month. Respondents are directed to adjust such penal rent as is permissible under the Rules from the unpaid retiral dues of late Sri Rajeshwar Nath and rest of the amount shall be recovered like arrears of land revenue from the substituted petitioners by the Collector, Kanpur on the application of respondents which may be filed in this regard.

6. Writ petition is accordingly disposed of.

7. Office is directed to supply a copy of this order free of cost to Sri S.P. Mishra, learned standing counsel for

sending the same immediately to the S.S.P., Kanpur Nagar.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2011

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 26114 of 2011

Mahraj Uddin and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri S.N.Jaiswal

Counsel for the Respondents:
Sri S.P. Kesarwani(Addl. C.S.C.)
Sri J.S. Upadhya (S.C.)
C.S.C.

Motor Vehicle Act, 1988-Section-68 (4) Authority granted permit to play three wheeler on specified root-with condition-to replace new model after expiry of 5 years-in case of default permit deemed to canceled automatically-challenged on basis of earlier judgment of this court as well as of tribunal-held-misconceived period of 20 years relates to Buses CNG and non CNG Vehicle and not for three wheeler-till appropriate decision taken by tribunal regarding three wheeler-condition of permit stand modified from 5 to 7 years-prayer to play the vehicle upto 20 years can not be extended.

Held: Para 27 and 28

In view of the foregoing discussions and conclusions, we dispose of this writ petition with the following directions:

1. The S.T.A. is fully justified to put model condition regarding age of vehicles (including three wheeler).

2. The decision of the STA dated 23/2/2010, which is the basis for putting model condition in the petitioners permit that vehicles are to be changed after 5 years, having been set-aside, the period of 5 years in the model condition in the permits of the petitioners shall stand substituted by the period of 7 years which was prevalent prior to 23/2/2010.

3. The model condition in the petitioners vehicles (which are three wheelers) shall be read to the effect that the petitioners have to change their vehicles after 7 years, failing which their permits shall be treated to be automatically cancelled.

4. That the above directions shall continue till the STA takes any other decision fixing any other age of vehicles (three wheelers) in accordance with law.

The prayer of the petitioners that a direction be issued to the respondent no.2, Regional Transport Officer, Meerut to permit the petitioners to ply their three wheelers up to the age of 20 years, cannot be granted and is refused.

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

1. Heard Shri S.N.Jaiswal, learned counsel for the petitioner and Shri S.P. Kesarwani, learned Additional Chief Standing Counsel for the respondents.

2. By this writ petition, petitioners have prayed for a writ of mandamus directing the respondent no.2, Regional Transport Officer, Meerut to permit the petitioners to ply their vehicles (Three Wheeler) upto the age of 20 years.

Counter and rejoinder affidavit have been exchanged between the parties.

3. Brief facts of the case as emerge from the pleading of the parties are:

4. The petitioners are owners of three wheeler vehicles who are plying their vehicles within the municipal limits of Meerut. The petitioners have been granted permit by the Regional Transport Officer, Meerut in accordance with the provisions of the Motor Vehicles Act, 1988 (hereinafter called the "Act 1988"). Petitioners' vehicles are almost 5 years old. The Regional Transport Officer, Meerut has put a remark on the permit issued to the petitioners that if the vehicles are more than 5 years old, the vehicles should be replaced by new model, which is within 5 years, otherwise the permit granted to them could be treated as cancelled automatically. The model condition of the three wheeler vehicles has been fixed as 5 years by the order of the State Transport Authority, Lucknow (hereinafter called the "S.T.A."). Prior to the order of the S.T.A. dated 23/2/2010, the maximum age of vehicles of auto rickshaw (Three Wheeler) in the city area was fixed as 7 years. The STA in its meeting dated 23/2/2010, took a decision in exercise of power under Section 68(4) of the Act, 1988 prescribing different age of the vehicles. The present writ petition has been filed by the owners of Auto Rickshaw (Three Wheelers). According to the decision of the STA dated 23/2/2010, tempo-taxi and auto rickshaw with regard to Meerut and certain other metropolitan cities the age of the vehicles has been fixed as 5 years, looking to the air pollution created by them.

5. The petitioners' case in the writ petition is that the decision of the STA dated 23/2/2010, was challenged before the State Transport Appellate Tribunal, (hereinafter called the "Tribunal") by certain vehicle owners by way of revision where the Tribunal passed a final order on 08/12/2010, in Revision no. 40/2010, Rajesh Yadav Vs. The State Transport Authority, U.P. Lucknow Through its Chairman/Secretary & Anr. and other connected revisions. The revisions were allowed and the orders impugned were set-aside and the age limitation for stage carriage buses plying on various routes, single storied vehicles were fixed as 20 years, for non-C.N.G. city buses 15 years, and for C.N.G. city buses 12 years. Relying on the said judgment of the Tribunal dated 08/12/2010, the petitioners claim that the age of their three wheelers be fixed as 20 years. Following prayers have been made in the writ petition by the petitioners:

"(i) to issue a writ, order or direction, in the nature of mandamus directing the respondent no.2, Regional Transport Officer, Meerut to permit the petitioners to ply their vehicles (Three Wheeler) upto the age of 20 years.

(ii) or to issue any other and further order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the case.

(iii) to award cost of the writ petition to the petitioners."

6. Short Counter Affidavit has been filed by the respondents in which reliance has been placed on the directions issued by the STA dated 05/3/2010, issued on the basis of the resolution dated 23/2/2010.

7. Rejoinder affidavit has been filed by the petitioners, where the copy of the judgement of the Tribunal dated 08/12/2010 in Revision No.40/2010, as

well as the order of this Court dated 27/1/2011 passed in Writ Petition No.62045/2010, Smt. Usha Sharma Vs. State of U.P. & Ors, has been brought on the record as Annexures 2 and 3 to the Rejoinder Affidavit.

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

9. Shri S.N.Jaiswal, learned counsel for the petitioners in support of the writ petition submits that the decision of the STA dated 23/2/2010, having been set-aside by the Tribunal, the petitioners are entitled to ply their vehicles up to 20 years and the model condition put in the petitioners permit by which it was endorsed that the vehicles shall be changed after 5 years, failing which it shall be treated to be cancelled be set-aside is unjustified. Reliance has been placed on the orders of this Court passed in Writ Petition No.22378/2010 decided on 10/5/2007 and Writ Petition No.14050/2010 decided on 18/3/2010 wherein both the Division Benches of this Court disposed of the writ petitions with certain directions.

10. Shri S.P. Kesarwani, learned Additional Chief Standing Counsel appearing for the respondents has relied on the circular dated 05/3/2010, issued by the STA prescribing various age for all categories of vehicles including three wheelers. He submits that for non-C.N.G. vehicles i.e. tempo and auto rickshaw, maximum age has been fixed as 5 years with regard to the metropolitan cities, and for other cities for non-C.N.G. vehicles age has been fixed as 8 years and for C.N.G. vehicles i.e. tempo and auto rickshaw in rural area the age has been fixed as 10 years.

11. Shri S.P. Kesarwani, learned Additional Chief Standing Counsel appearing for the respondents has however, not disputed that the order of the STA has been set-aside by the Tribunal vide judgment and order dated 08/12/2010, in revision.

12. The first issue which is to be considered is as to whether the Regional Transport Authority, (hereinafter called the "R.T.A") while granting permits can impose model condition for grant of permit i.e. fixing of age of the vehicles. Section 68(4) of the Act, 1988 is relevant in this context. Section 68 (3) and (4) of the Act, 1988 which are relevant in the present case are quoted below:

"68.Transport Authorities-

(1) .....

(2).....

(3) The State Transport Authority and every Regional Transport Authority shall give effect to any directions issued under section 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the following powers and functions, namely :-

(a) to co-ordinate and regulate the activities and policies of the Regional

Transport Authorities, if any, of the State ;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport

Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities;

[(ca) Government to formulate routes for plying stage carriages; and]

(d) to discharge such other functions as may be prescribed.

(4) For the purpose of exercising and discharging the powers and functions specified in sub-section (3), a State Transport Authority may, subject to such conditions as may be prescribed, issue directions to any Regional Transport Authority, and the Regional Transport Authority shall, in the discharge of its functions under this Act, give effect to and be guided by such directions."

13. Under Section 68 (3) of the Act, 1988, the STA subject to the directions issued by the State Government under Section 67 shall exercise and discharge throughout the State the functions and powers as enumerated in sub-section 3. One of the functions provided in sub-section 3 is to co-oordinate and regulate the activities and policies of the R.T. A.

14. The question as to whether model condition for grant of permit can be laid down by the STA came up for consideration before the Division Bench of this Court in **1995 AWC 890, Smt. Munni Devi Vs. Regional Transport Authority, Meerut & Ors.** In the aforesaid case, the R.T.A., Meerut while granting permit has put a condition that not more than 10 years old vehicles be provided. The said condition was challenged by means of writ petition by stage carriage permit holders. It was held by the Division Bench that the STA can issue direction regarding fixation of age of vehicles. Even grant of permit by the R.T.A of the vehicle owners having 10 years old vehicles was upheld. Following was laid down in para 6 which is quoted below:

"6. State Transport Authority, Lucknow (hereinafter referred to as S.T.A.) has fixed the model condition of twenty years for vehicles to be placed under stage carriage permits with the result that an operator is entitled to ply a vehicle which is not more than twenty years old. S.T.A. has also, in this connection, issued direction on 9.3.1993 under sub-section (4) of Section 68, to all the R.T.A.s. in this State requiring them to impose only twenty years model condition for plain routes and ten years model condition for hill routes. These directions have been issued by the S.T.A. in view of the difference of opinion on the question of model condition between the R.T.As. in this State. There is no dispute that S.T.A. can issue such a direction. Direction issued by S.T.A. under the above provisions is binding on the R.T.A. which is to "give effect to and be guided by such directions". R.T.A. while granting permits by the impugned resolution has referred to the aforesaid directions of S.T.A. and was conscious of the fact of fixation twenty years model condition by it and, therefore, it has not fixed any model condition contrary to that fixed by S.T.A. What it has done is that it has granted permits to persons holding vehicles of not more than ten years old. Fixing the model condition and granting permits to better models are two different things. By model condition, the maximum

period upto which a vehicle can be used as a stage carriage under a permit is fixed. Without transgressing the model condition, it is always open to the transport authorities to grant permits to those applicants who have vehicles of better model. Such a condition is in the interest of travelling public. The order of the R.T.A. thus is not contrary to the direction issued by the S.T.A."

15. The judgment of the Apex Court in **AIR 1980 SC 800, Subhash Chandra & Ors. Vs. State of U.P. & Ors,** had occasion to consider a condition in Section 51(2) (x) of the Motor Vehicles Act, 1939 to the effect that vehicle should not be more than seven years of age from the date of registration during the validity of permit. The above provision was challenged. The Apex Court upheld the said condition. Following was laid down in paragraph 4 which is quoted below:

"4. Section 51(2) (x) authorises the impost of any condition, of course, having a nexus with the statutory purpose. It is undeniable that human safety is one such purpose. The State's neglect in this area of policing public transport is deplorable but when it does act by prescribing a condition the court cannot be persuaded into little legalism and harmful negativism. The short question is whether the prescription that the bus shall be at a seven-year old model one is relevant to the condition of the vehicle and its passengers' comparative safety and comfort on our chaotic highways. Obviously, it is. The older the model, the less the chances of the latest safety measures being built into the vehicle. Every new model incorporates new devices to reduce danger and promote comfort. Every new model assures its age to be young, fresh and strong, less likely to suffer sudden failures and breakages, less susceptible to wear and tear and mental fatigue leading to unexpected collapse. When we buy a car or any other machine why do we look for the latest model? Vintage vehicles are good for centenarian display of curios and cannot but be mobile menaces on our notoriously neglected highways. We have no hesitation to hold, from the point of view of the human rights of road users, that the condition regarding the model of the permitted bus is within jurisdiction, and not to prescribe such safety clauses is abdication of statutory duty."

16. Another Division Bench judgment of this Court in **AIR 1991 Alld 158, Radhey Shyam Sharma Vs. Regional Transport Authority, Kathgodam, Nainital,** had occasion to consider Rule 88 of Central Motor Vehicles Rules, 1989 which provided that motor vehicle covered under permit should not be more than 9 years old with regard to national permit. The model condition on the basis of the aforesaid rule was challenged and came up for consideration before the Division Bench of this Court in a writ petition. The Division Bench upheld the vires of the rules and also the condition. Following was laid down in paragraph 22 which is quoted below:

"22. In view of the reports mentioned above and for the reasons given in the counter-affidavit, Government was fully justified in fixing the age/model condition of nine years of vehicles for use under national permit and it cannot be said that there was no reasons or material with the Government for framing the impugned rules. In fact from the perusal of the aforesaid reports and the reasons given in the counter-affidavit of the Government,

we are satisfied that the Government was fully justified in fixing the age limit of nine years of a vehicle for operation under national permit."

17. The copy of the circular dated 05/3/2010, issued by the STA on the basis of the resolution dated 23/2/2010, issued in exercise of power under Section 68(4) of the Act, 1988 has been brought on record as Annexure SCA-1.

18. A perusal of the aforesaid circular dated 05/3/2010 clearly indicates that the STA noticed the earlier period fixed with regard to various categories of vehicles including the mini bus, school bus, city bus and auto rickshaw in different districts including District Meerut. It was noticed that non-C.N.G. vehicles are creating serious air pollution and keeping in view the traffic problem, it is necessary to fix the age of the vehicles for safety and benefit of the general public.

19. In the present case, we are concerned with the three wheelers only. It is useful to notice that in Meerut and in other metropolitan cities for non-C.N.G.vehicles (three wheelers) 5 years period had been fixed and for C.N.G. vehicles 7 years period has been fixed, and in districts other than metropolitan cities, C.N.G. vehicles ten years has been fixed and for non-C.N.G. vehicles 8 years has been fixed.

20. From the judgements as noticed above, it is clear that the STA had full jurisdiction to fix the age of vehicles to be plied under the permits. Learned counsel for the petitioners have placed reliance on the Division Bench judgements of this Court in Writ Petition Nos.22378/2007 decided on 10/5/2007, and 14050/2010 decided on 18/3/2010. It is useful to quote the judgment dated 10/5/2007 passed in Writ Petition No.22378/2007 which is to the following effect:

"After hearing learned counsel for the petitioner Shri S.N. Jaiswal and Shri C.K. Rai, learned Standing Counsel we dispose of this writ petition in terms of the judgement and order of this Court dated 15.10.2003 passed in Civil Misc. Writ Petition No.46190 of 2003 (Ram Prakash & Anr Vs. State of U.P. & Ors) wherein this Court had issued the following directions:

"The Secretary, Regional Transport Authority respondent no.2 shall issue permit to the petitioners after verifying the fact that the petitioners have vehicles which are roadworthy and fit in condition. He will also ensure that the vehicles which are owned by the petitioners are of the model which is within the period of 20 years."

21. A perusal of the aforesaid judgment clearly indicates that the said judgment was given on the basis of earlier judgment and order of this Court dated 15/10/2003, passed in Writ Petition No.46190/2003, Ram Prakash & Anr Vs. State of U.P. & Ors.

22. Obviously, the decision under challenge in Ram Prakash's case (supra) was a decision of STA prior to 15/10/2003, and the judgements relied by the petitioners counsel were on the basis of the judgment of the Division Bench in Writ Petition 46190/2003 which has no relevance with regard to the subsequent decision of STA taken on 23/2/2010.If the age of the vehicle can be prescribed by the STA under the provisions of the Act, 1988,

which has been answered as Yes by the Division Benches of this Court as noticed above, there is no lack of jurisdiction in the STA in fixing the age of vehicle by its resolution dated 23/2/2010. Thus, the Division Bench judgement of this Court dated 10/5/2007 passed in Writ Petition No.22378/2007 relying on the earlier Division Bench judgment of this Court in the case of Ram Prakash (supra) is no longer applicable in view of the subsequent decision and resolution of the STA taken 23/2/2010.

23. Now comes the judgement of the Tribunal which has been heavily relied by the learned counsel for the petitioners in Revision No.40/2010 Rajesh Yadav (supra) decided on 08/12/2010, copy of which has been filed as Annexure- 2 to the Rejoinder Affidavit. It is useful to note para 3 of the judgement which noticed that the challenge made in the revision was by the vehicle owners having stage carriage permit plying buses. From the perusal of para 3 of the aforesaid judgment, it is clear that types of vehicles whose owners had come up in the revision were city bus stage carriage both C.N.G and non-C.N.G. The Tribunal also relied on the judgment of Prakash Sharma (supra) in Writ Petition No.46190/2003. It is useful to quote paragraphs 3 and 4 as well as the operative portion of the judgment dated 08/12/2010 passed by the Tribunal.

"3. Before me the types of vehicles whose owners come up in revisions for city bus stage carriage, the age limit for single storied vehicles before 23.2.2010 was 20 years and for Non C.N.G. city bus was 15 years and for C.N.G. city bus was 12 year. The Hon'ble High Court's order dated 09.4.2010 passed in writ petition-A No.19461 of 2010 Sri Guru Ram Public School through Principal Vs. State of U.P. and others has been cited wherein relying on the order dated 5.10.2003 passed in Civil Misc. Writ Petition No.46190 of 2003 Ram Prakash and another Vs. State of U.P. and others, the Hon'ble High Court has laid down as follows:

"The respondent no.3 shall issue permit to the petitioner after verifying the fact that the petitioner has a vehicle which is roadworthy and fit in condition. He will also ensure that the vehicle which is owned by the petitioner is of the model which is within the period of 20 years".

4. Above mentioned order of the Hon'ble High Court is applicable to the revisions before me. Therefore, it is hereby directed that the age limit for the stage carriages; single stored vehicles shall be 20 years and for non-C.N.G. city bus shall be 15 years and for C.N.G. city bus shall be 12 years as existed before 23.2.2010 with this observation all the revisions are disposed of.

.....

ORDER

Revisions are allowed. Impugned orders are set aside. It is hereby directed that the age limit for the stage carriage plying on various routes:single storied vehicles shall be 20 years and for non-C.N.G. city bus shall be 15 years and for C.N.G. city bus shall be 12 years as existed before 23.2.2010. However, the age limit for C.N.G. vehicles in Ghaziabad shall be 15 years.

Record received from the lower authorities be sent back to their offices.

A copy of this judgment be kept on the record of each of Revisions Nos.21/2010 to 41/2010, 43/2010 to 64/2010, 69/2010, 99/2010, 100/2010, 104/2010,107/2010 to 158/2010,175/2010 to 177/2010 & 199/2010 and the original judgment be retained on the record of Revision No.20/2010.

Sd/-illegible
8.12.10
(Suresh Kumar Srivastava)
Chairman"

24. Thus, before the Tribunal, the city bus owners both CNG and non-CNG had challenged the decision of the STA and from the operative portion of the judgment, it is clear that the direction was issued fixing age limit for single storied vehicle and for non-C.N.G. vehicles city bus 15 years and for CNG city bus 12 years as existed before 23/2/2010. The judgment of the Tribunal confines to single storied vehicles, non-CNG and CNG city buses and there is no consideration of cases of auto rickshaw/tempo nor any direction in the operative portion has been given by the Tribunal with regard to auto rickshaw/tempo. Thus, in the judgement of the Tribunal dated 08/12/2010, there is no direction with regard to the fixing of age of auto rickshaw/Tempo and the said judgement can be relevant only to the extent of directions issued. However, there is one aspect of the matter which has been emphasised by the learned counsel for the petitioners which cannot be lost sight of that the Tribunal has set-aside the order of the STA and the consequence of which shall be that the entire order is to be treated as set-aside.

25. We are also of the view that treating the order of the STA to be set-aside for buses/mini buses and implementing the said decision with regard to auto rickshaw/tempo shall not be appropriate. We, however are constrained to observe that the Tribunal has passed the order heavily relying on the Division Bench judgment of this Court in Writ Petition No.46190/2003 decided on 05/10/2003, in Ram Prakash (supra) which directions were relevant at the time when there was no other decision of STA. When the STA has taken a subsequent decision giving appropriate reason, the judgment of the Division Bench of this Court in Writ Petition No.46190/2003 decided on 05/10/2003, in Ram Prakash (supra) cannot be read too far, nor the said judgment in anyway fetters the power of the STA to fix the age of the vehicles or put any model condition in the permit. It is to be noted that in this writ petition there is no challenge to the decision of S.T.A. dated 23/2/2010, thus the reliance on the said order by the counsel for the petitioners cannot be said to be misplaced. However, as observed above, the judgment of the STA dated 23/2/2010, as circulated by circular dated 05/3/2010, having been set-aside, it shall not be appropriate to rely on the same. In the circular dated 05/3/2010, the age of the vehicles as existed prior to 23/2/2010, has been mentioned in the tabular form which is part of the rejoinder affidavit as Annexure-1.

26. With regard to city Meerut, for urban areas the age of auto rickshaw was 7 years and the age of tempo/taxi for rural areas was 10 to 15 years prior to 23/2/2010. Thus, the age of auto rickshaw in the city of Meerut as was existing before 23/2/2010, has to be followed and applied treating the judgement passed by the S.T.A. dated 23/2/2010 to be set-aside by the Tribunal. We make it clear that age of

vehicles existing prior to 23/2/2010 shall hold field till any other decision is taken by S.T.A. or order dated 08/10/2010 of the Tribunal is set-aside.

27. In view of the foregoing discussions and conclusions, we dispose of this writ petition with the following directions:

1. The S.T.A. is fully justified to put model condition regarding age of vehicles (including three wheeler).

2. The decision of the STA dated 23/2/2010, which is the basis for putting model condition in the petitioners permit that vehicles are to be changed after 5 years, having been set-aside, the period of 5 years in the model condition in the permits of the petitioners shall stand substituted by the period of 7 years which was prevalent prior to 23/2/2010.

3. The model condition in the petitioners vehicles (which are three wheelers) shall be read to the effect that the petitioners have to change their vehicles after 7 years, failing which their permits shall be treated to be automatically cancelled.

4. That the above directions shall continue till the STA takes any other decision fixing any other age of vehicles (three wheelers) in accordance with law.

28. The prayer of the petitioners that a direction be issued to the respondent no.2, Regional Transport Officer, Meerut to permit the petitioners to ply their three wheelers up to the age of 20 years, cannot be granted and is refused.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J.

Civil Misc. Writ Petition No. 28924 o 1994

Sudarshan ...Petitioner
Versus
Tapesar and others ...Respondents

Counsel for the Petitioner:
Sri S.K.Varma
Sri Siddharth Varma

Counsel for the Respondent:
Sri R.N.Rai
Sri B.L.Srivastava
Sri Purushottam Upadhyay
S.C.

U.P. Consolidation of Holding Act, Section 49-bar of subsequent proceedings-Respondents filed Suit for declaration of Bhumidhar of plot in question-as the plot in question has been developed as grove with permission of Land Lord-have became absolute owner-dismissed by Trail Court as barred by Section 49 of the Act-1st Appellate Court set-a-side the order remanded the matter for fresh decision-as consolidation authorities have no jurisdiction to allot the same to any other person-Second Appeal also dismissed-hence consolidation authorities have every jurisdiction to decide the title of the grove land also-hence the order passed by the Appellate Court illegal-High Court affirm the view of Trail Court.

Held: Para 5

Consolidation in respect of grove land cannot take place in the sense that a plot having grove cannot be given to any other person in rearrangement of chak. However, as far as question of title is

concerned, consolidation courts have got full jurisdiction to decide the matter and bar of Section 49 squarely applies. In this regard reference may be made to Dalel Vs. Baroo, 1963 RD 67 (H.C. F.B.), Ram Dulare Vs. Ram Charan, 1977 RD 108 (H.C.), Shambhu Vs. D.D.C., 1975 AWC 469, Baijnath Rai Vs. D.D.C., 1986 RD 306 (D.B.) and Anwar Ali Vs. Munir Ali, 1981 RD 300 (H.C.).

Case law discussed:

1963 RD 67(H.C. F.B.; 1977 RD 108 (H.C.); 1986 RD 306 (D.B.); 1981 RD 300 (H.C.)

(Delivered by Hon'ble S. U. Khan,J.)

1. Heard learned counsel for the parties.

2. The only question involved in this writ petition is as to whether bar of Section 49 of U.P. Consolidation of Holdings Act applies to grove land or not? Para-1 of the writ petition is quoted below:

"That the opposite parties 1 and 2 filed a Suit under section 229-B of the U.P. Zamindari Abolition and L.R. Act on 30.10.70 on the ground that even though initially the plot in dispute belonged to Purnvasi, Shiv Nath and Vira yet when the Zamindar had given permission to the plaintiffs Tapeshwar and Munni Lal for the plantation of a grove then the plaintiffs alone became the grove holders and after the abolition of Zamindari the plaintiffs alone became Bhumidhars."

3. The number of the plot in dispute is 40, area 13 biswas 16 biswansis. S.D.O., Ghazipur dismissed the Suit No.359 on 15.03.1986 holding the same to be barred by Section 49 of U.P.C.H. Act as consolidation in the area in question had taken place and the plea raised in the suit by the plaintiff could be raised by him before consolidation courts but it was not done. Against the said order, Appeal No.33 of 1986 was filed. Additional Commissioner First, Varanasi Division, Varanasi allowed the appeal on 26.06.1989 (Annexure-III to the writ petition). The lower appellate court in Para-10 of its judgment held that plaintiffs appeared to be the only grove holders/ bhumidhars in use and occupation of the land in dispute. Ultimately lower appellate court set aside the judgment and decree passed by the trial court and remanded the matter to it. Against the appellate court judgment and decree, Second Appeal No.39 of 1988-89 was filed. Board of Revenue, Allahabad dismissed the second appeal on 30.05.1994, hence this writ petition.

4. Section 49 of U.P.C.H. Act is quoted below:

***""49. Bar to Civil Jurisdiction**.-- Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of right of tenure-holder in respect of land lying in an area, for which a [notification] has been issued [under sub-section (2) of Section 4] or ad-judication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act." (proviso not relevant)*

5. Consolidation in respect of grove land cannot take place in the sense that a plot having grove cannot be given to any other person in rearrangement of chak. However, as far as question of title is concerned, consolidation courts have got full jurisdiction to decide the matter and bar of Section 49 squarely applies. In this regard reference may be made to **Dalel Vs. Baroo, 1963 RD 67 (H.C. F.B.), Ram Dulare Vs. Ram Charan, 1977 RD 108 (H.C.), Shambhu Vs. D.D.C., 1975 AWC 469, Baijnath Rai Vs. D.D.C., 1986 RD 306 (D.B.) and Anwar Ali Vs. Munir Ali, 1981 RD 300 (H.C.).**

6. Accordingly, writ petition is allowed. Judgment and decrees passed by the lower appellate court and Board of Revenue are set aside. Judgment and decree passed by the trial court is affirmed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2011

BEFORE
THE HON'BLE PANKAJ MITHAL,J.

Civil Misc. Writ Petition No. 32221 of 2011

Shashi Kumar Tripathi ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Sandeep Chaturvedi

Counsel for the Respondent:
C.S.C.

U.P. Stamp (Valuation of Property) Rules 1997-Rule 4(2)-circle rate notified on 01.08.2010-objection against circle rate pending-such circle rate can be revised by D.M. On its own or on representation-direction to consider and decide the same within period of two months

Held: Para 5

Rule 4(2) of the aforesaid Rules empowers the Collector, on being satisfied about the incorrectness of the circle rates, to revise the same within a period of two years from the date of fixation of the minimum rates. The said revision may be done by the Collector either at his own motion or on an application made to him in this behalf.

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

1. The Collector, Kanpur Nagar under the U.P. Stamp (Valuation of Property) Rules, 1997 has prescribed the minimum rates for different categories of land which are commonly known as circle rates on 1.8.2010.

2. The petitioner has filed objection/representation against the fixation of the aforesaid rates vide application dated 26.2.2011, Annexure - 5 to the writ petition.

3. I have heard learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

4. The submission of learned counsel for the petitioner is that his aforesaid application/representation is not being considered and decided by the Collector, Kanpur Nagar, respondent No.2.

5. Rule 4(2) of the aforesaid Rules empowers the Collector, on being satisfied about the incorrectness of the circle rates, to revise the same within a period of two years from the date of fixation of the minimum rates. The said

revision may be done by the Collector either at his own motion or on an application made to him in this behalf.

6. The petitioner having made an application complaining about the incorrectness of the circle rate, the Collector is bound to consider and decide the same.

7. In view of aforesaid facts and circumstances, the writ petition is disposed of with the direction to the respondent No.2 to consider and decide the above representation/application of the petitioner within a period of two months from the date of presentation of a certified copy of this order/

8. With aforesaid direction, the petition stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.06.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 34797 of 2011

Sunil Kumar Pandey and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.S. Baghel
Sri Gautam Baghel

Counsel for the Respondents:
C.S.C.

U.P. Police Sub-Inspector (Civil Police) Service Rules 2008-Rule 10-readwith U.P. Public Service (Relaxation of Age Limit) Rule 1992-Age relaxation for direct recruitment on Post of S.I.-age limit provided minimum 21 years-upper limit 28 years-argument that for last 7 years no vacancy advertised-hence entitled for relaxation-selection in every year can not be claimed as a matter of right-the provision of Rules 1992 not applicable for Police Personnel where specific Rules framed-Petitions misconceived dismissed.

Held: Para 17

In view of the law laid down by the apex Court as well as this Court in Sanjay Agarwal (supra) and Dr. Rajeev Ranjan Mishra (supra) making clear distinction between the Rules regulating "Recruitment" and those regulating "conditions of service", the Rules regulating age applicable before appointment is, therefore not a rule regulating conditions of service, hence is beyond the purview and ambit of Rule 28 of 2008 Rules and cannot be relaxed at all. Besides, as I already said, it is applicable to a person who has already been appointed and not one who has yet to be recruited.

Case law discussed:
2007(6) ADJ 272(DB)=2007(5) ALJ 328(DB); 2000(3) AWC 2367; AIR 2002 SC 2322; 2005(2) AWC 1191=(2004) 3 UPLBEC 2778; (2005) 3 SCC 618; Sanjay Kumar Pathak Vs. State of U.P. and others WP No. 65189 of 2006, decided on 25.5.2007; 2008(1) ESC 595(DB); 1992 (3) SCALE 287=(1993) 3 SCC 575

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

1. Heard Sri P.S. Baghel, Senior Advocate assisted by Sri Gautam Baghel, for the petitioners and perused the record.

2. The petitioners have sought a writ of certiorari for quashing the advertisement dated 19.5.2011 in so far as it provides upper age limit as 28 years and have also sought a writ of mandamus directing the respondents to provide relaxation in age to

the candidates born between 1.1.1980 to 1.7.1983 so as to make them eligible to appear in the selection in question.

3. Admittedly the recruitment in question is governed by the U.P. Police Sub-Inspector and Inspector (Civil Police) Services Rules 2008 (hereinafter referred to as the "2008 Rules") as amended from time to time. The aforesaid Rules do not contain any provision conferring power to the competent authority to relax the Rule regarding age. Rule 10 of 2008 Rules reads as under :-

" A candidate for direct recruitment must have attained the age of 21 years and must not have attained the age of more than 28 years on the first day of July of calendar year in which vacancies for direct recruitment are advertised:

Provided that the upper age limit in the case of candidate belonging to the Scheduled Castes, Scheduled Tribes and such other categories as may be specified."

4. The learned counsel for the petitioners contended that for the last 10 years no recruitment on the post of Sub-Inspector has been made , therefore, the petitioners who were earlier eligible and entitled to be considered against the vacancies arising in 2007-08, have become overage and are entitled for relaxation of age. He placed reliance upon a decision in **Special Appeal No. 325 of 2008 Smt. Abha Pandey Vs. State of U.P. and others decided on 2.4.2008** in which it was observed that selection process shall be initiated by the respondents within 3 months.

5. On the other hand, it is contended by the learned counsel for the respondents that selection process has been initiated in accordance with law. Since under the advertisement the petitioners were not eligible, hence can not appear in the selection process.

6. In my view, the submission advanced on behalf of the petitioners lacks substance.

7. It proceeds on the assumption that petitioners have a right to claim initiation of selection process as soon as the vacancies occurred in 2007 or 2008, and when they were otherwise eligible and qualified for the post on which the vacancies had occurred.

8. The question whether a person is entitled for such right as also the relaxation in age came up for consideration before a Division Bench in the case of **Sanjay Agrawal Vs. State of U.P. and others 2007(6) ADJ 272 (DB)=2007(5) ALJ 328(DB).** In paragraphs 30, 32, 41 and 42 of the said judgment this Court held as under:

"(30) ..... The right of consideration commences from the advertisement as admitted and thus it would also adhere to various conditions of the advertisement. It cannot be said that the right of consideration flowing from advertisement is distinct from and severable from the various conditions of eligibility prescribed in the advertisement. A candidate would have a right of consideration in accordance with the advertisement if he fulfils various qualifications and eligibility prescribed thereunder and not otherwise. It is not open to a candidate to suggest that he is entitled for benefit of the advertisement partly and the other part which is against

him is to be ignored. An advertisement which is a public offer to all persons concerned will have to be taken as a whole and not in part. If a candidate fulfils all the qualifications prescribed in the advertisement only then he can be said to have a right of consideration and not otherwise. Since the basic premise of the argument in our view does not stand, the entire building raised thereon also cannot stand.

(32) .....The submission is that the Rule makes it obligatory to the Court to make recruitment at least once in every three years and in case it fails to do so, it is bound to compensate those candidates who have become overage or otherwise become ineligible due to non-holding of recruitment during a particular period. Elaborating the submission, it is also contended that the petitioners are entitled for relaxation in the matter of age to the extent the recruitment could not be held for a period of more than three years and to that extent relaxation needs to be given to such candidates.

(41) Further a person if fulfils requisite educational and other qualifications does not possess a fundamental or legal right to be considered for appointment against any post or vacancy as soon as it is available irrespective of whether the employer has decided to fill in the vacancy or not. The right of consideration does not emanate or flow from existence of the vacancy but commences only when the employer decides to fill in the vacancy and the process of recruitment commences when the notification or advertisement of the vacancy is issued. So long as the vacancy is not made available for recruitment, no person can claim that he has a right of consideration since the vacancy exists and therefore, he must be considered..... We are of considered view that the right of consideration would come in picture only when the vacancy is put for recruitment, i.e., when the advertisement is published. That being so, the right of consideration commences when the recruitment process starts. The incumbent would obviously have right of consideration in accordance with the provisions as they are applicable when the advertisement is made and in accordance with conditions provided in the advertisement read with relevant rules. It is also obvious that if there is any inconsistency between the advertisement and Rules, the statutory rules shall prevail. In Malik Mazhar Sultan (supra), the Apex Court has clearly held that recruitment to the service could only be made in accordance with the Rules and not otherwise.

(42) Recently a similar claim for relaxation in respect to the period when no recruitment was held, pertaining to recruitment of U.P. Judicial Services came up for consideration before a Full Bench of this Court in Sanjay Kumar Pathak Vs. State of U.P. and others (writ petition no. 65189 of 2006) decided on 25.5.2007, and it held that unless permitted by the Rules no relaxation can be claimed. The Court also observed as under:

"Nobody can claim as a matter of right that recruitment on any post should be made every year."

9. Furthermore, in absence of any provision empowering the respondents to grant relaxation in age in the selection governed by the statutory Rules, no such mandamus can be issued. The learned

counsel for the petitioners also has not been able to place any decision or provision before this Court which provides such relaxation. He however, refers to U.P. Public Service (Relaxation of Age Limit) Rules, 1992 framed under Article 309 (Proviso) of the Constitution of India, authorizing the State Government to relax any provision with regard to maximum age limit. In my view, the aforesaid Rules would not apply to recruitment in U.P. Police Force which is governed by the Police Act, 1861 and the Rules framed thereunder i.e. under Section 46 (2).

10. A Division Bench of this Court in **Subhash Chandra Sharma vs State of U.P. and others 2000(3) AWC 2367** while considering applicability of U.P. Recruitment to Service (Age Limit) Rules, 1972 to U.P. Police Force, in paragraphs no. 16, 17 and 18 held as under:

"16. Thus, there can be no doubt that if the appropriate Legislature has enacted a law regulating the recruitment and conditions of service, the power of the Governor is totally displaced, and he cannot make any Rule under proviso to Article 309 of the Constitution. In State of U. P. v. Babu Ram Upadhyaya. AIR 1961 SC 751. a decision rendered by a Constitution Bench, the Police Act and the U. P. Police Regulations came up for consideration and it was held as follows in paragraph 12 of the Reports :

The result is that the Police Act and the Police Regulations made in exercise of power conferred on the Government under that Act. which were preserved under Section 243 of the Government of India Act. 1935, continue to be in force after the Constitution so far as they are consistent with the provisions of the Constitution."

In paragraph 23. it was observed that the Police Act and the Rules made thereunder constitute a self-contained Code providing for appointment of the police officers and prescribing the procedure for their removal. In Nanak Chand v. State of U. P., 1971 ALJ 724, a Full Bench of our Court held as follows :

"It is not correct to say that no temporary posts can be created in the Police Force, Section 2 of the Police Act is certainly wide enough to permit such posts to be created, and it appears that it is now the general Rule in U. P. for all new recruits to be employed at first in a temporary capacity."

17. In Nurul Hasan v. Senior Superintendent of Police. 1985 UPLBEC 1329. a Division Bench of this Court, speaking through Hon'ble S. Saghir Ahmad, J. (as his lordship then was), held as follows :

"It has already been specified above that in the exercise of the powers conferred by the Police Act the State Government has made Police Regulations by which the service conditions of the subordinate police officers have been regulated. There are, therefore, special statutory provisions which regulate the service conditions of police personnel. They would, therefore, be not governed by the C.C.A. Rules as they clearly fall within Explanation (a) of Rule 3 of the said Rules."

18. Similar view has been taken by two other Division Benches of our Court in State of U. P. v. Mohd. Ibrahim. AIR 1959. All 223. and Mukhtar Singh v. State of U. P., AIR 1959 All 569. Section 2 of the Police Act empowers the State Government

to issue orders providing for the manner in which the police force may be constituted. The constitution of a force necessarily implies the act of making appointment to various categories of posts in the police force. Provision in this regard have been made in the U. P. Police Regulations or in the Government orders issued from time to time on the subject relating to recruitment. Therefore, the field relating to recruitment of subordinate ranks of the police force is already covered by the provisions of the Police Act. Consequently, a Rule made by the Governor in exercise of power conferred by proviso to Article 309, like the 1972 Rules, which is very general in terms and does not make any reference to the police force, can have no application to the matter governing the upper age-limit of the candidates seeking recruitment to the posts of constables or sub-Inspectors of police."

11. Similarly the Apex Court in **Chandra Prakash Tiwari and others Vs. Shakuntala Shukla and others AIR 2002 SC 2322** held that U.P. Government Service (Criteria for Recruitment by Promotion) Rules 1994 framed under Article 309 (Proviso) of the Constitution is inapplicable to the members of U.P. Police Force and held that Police Act 1861 and the provisions made thereunder shall hold the field. The view expressed by the Division Bench in **Subhash Chandra (supra)** has been affirmed by a Full Bench of this Court in **Vijay Singh And others Versus State Of Uttar Pradesh and others 2005 (2) AWC 1191= (2004) 3 UPLBEC 2778** following the dictum laid down in **Chandra Prakash Tiwari Vs. Shakuntala Shukla (Supra).**

12. The next submission is that the recruitment ought to have been made every year and if the recruitment is not made in a particular year, the recruiting body is bound to give relaxation to the candidates who have become overage due non-recruitment against the vacancies available in the year when no recruitment was made. In support of this submission, Sri Baghel however, could not show any provision under 2008 Rules whereunder the present recruitment in question is being made which may require holding of recruitment every year. In the absence of any such provision, the recruitment made otherwise in accordance with rules cannot be interfered.

13. In **Food Corporation of India Vs. Bhanu Lodh (2005) 3 SCC 618** the Apex Court has held that rigor of statutory provisions cannot be relaxed by giving a total go-bye to the statutes. In **Malik Mazhar Sultan Vs. U.P.P.S.C. JT 2006 (4) SC 531** the Apex Court has said that the recruitment to the service can only be made in accordance with rules and not otherwise.

14. This aspect has also been considered by a Full Bench judgment of this Court in **Sanjay Kumar Pathak Vs. State of U.P. and others** WP No. 65189 of 2006, decided on 25.5.2007, by a Division Bench of this Court (of which I was also a member) in **Dr. Rajeev Ranjan Mishra and others Vs. State of U.P. and others 2008(1) ESC 595 (DB)** and by a Single Judge (myself) in **Vijay Kumar Pandey Vs. State of U.P. and others 2008(1) ADJ 345.**

15. A faint attempt was made to contend that power of relaxation is contained in Rule 28 of 2008 Rules. However, the submission is worth rejection outright. A Bare perusal of Rule 28 shows

that it confers power upon the State Government to relax the requirement of any rule regulating the "conditions of service" of person appointed to the service if it is satisfied that such provision causes undue hardship in any particular case. Without looking into anything further suffice it to say that Rule 28 refers to rules regulating "conditions of service" and not the rules relating to 'recruitment'. Further it is also made clear that it is applicable to a person who is appointed to service meaning thereby after appointment if such provision causes undue hardship, only then Rule 28 would be attracted. The distinction between Rules pertaining to 'Recruitment' and "conditions of service" is well established.

16. In **Syed Khalid Rizvi And Ors.Union Of India and 1992 (3) SCALE 287=(1993) 3 SCC 575,** considering the distinction between Rules pertaining to Recruitment and conditions of service the Apex Court in paragraphs 30, 31 and 33 held as under:

"30. The next question is whether the seniority is a condition of service or a part of rules of recruitment? In State of M.P. and Ors. v. Shardul Singh, this Court held that conditions of service means all those conditions which regulate the holding of a post by a person right from the time of his appointment (emphasis Supplied) to his retirement and even beyond, in matters like pensions etc. In I.N. Subba Reddy v. Andhra University and Ors. , the same view was reiterated. In Mohd. Shujat Ali and Ors. etc. v. Union of India and Ors. etc. , Constitution Bench held that the rule which confers a right to actual promotion or a right to be considered for promotion is a rule prescribing a condition of the service. In Mohd. Bhakar v. Krishna Reddy 1970 S.L.R. 768, another Constitution Bench held that any rule which affects the promotion of a person relates to his condition of service. In State of Mysore v. G.B. Purohit C.A. No. 2281 of 1965 dt. 25.1.1967, this Court held that a rule which merely effects chances of promotion cannot be regarded as varying a condition of service. Chances of promotion are not conditions of service. The same view was reiterated in another Constitution Bench judgment in Ramchandra Shankar Deodhar and Ors. v. The State of Maharashtra W.P. No. 299 of 1969 dt. Nov. 12, 1973. ***No doubt conditions of service may be classified as salary, confirmation, promotion, seniority, tenure or termination of service etc.*** *as held in State of Punjab v. Kailash Nath , by a bench of two Judges. But it must be noted the context in which the law therein was laid. The question therein was whether non-prosecution for a grave offence after expiry of four years is a condition of service? While negativing the contention that non-prosecution after expiry of 4 years is not a condition of service, this Court elaborated the subject and the above view was taken. The ratio therein does not have any bearing on the point in issue. Perhaps the question may bear relevance, if an employee was initially recruited into the service according to the Rules and Promotion was regulated in the same rules to higher echelons of service. In that arena promotion may be considered to be a condition of service. In A.K. Bhatnagar v. Union of India , this Court held that seniority in an incidence of service and where the service rules prescribe the method of its computation it is squarely governed by such rules. In their absence ordinarily the length of service is taken into account. In that case the direct recruits were made senior to the recruits*

by regularisation although the appellants were appointed earlier in point of time and uninterruptedly remained in service as temporary appointees alongwith the appellant but later on when recruited by direct recruitment they were held senior to the promotees." (emphasis supplied)

*"31. .....**The eligibility for recruitment to the Indian Police Service, thus, is a condition of the recruitment and not a condition of service. Accordingly we hold that seniority, though, normally an incidence to service,** Seniority Rules, Recruitment Rules and Promotion Regulations form part of the conditions of recruitment to the Indian Police Service by promotion, which should be strictly complied with before becoming eligible for consideration for promotion and are not relaxable." (emphasis supplied)*

"33. Rule 3 of the Residuary Rules provides the power to relax rules and regulations in certain cases - Where the Central Govt. is satisfied that the operation of - (i) any rule made or deemed to have been made under the Act, or (ii) any regulation made under any such rule, regulating the conditions of service of persons appointed to an All India Service "causes undue hardship in any particular case", it may, by order, dispense with or relax the requirements of that rule or regulation, as the case may be, to such an extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a "just and equitable manner". Rule 3 empowers the Central Govt. to relieve undue hardship occurred due to unforeseen or unmerited circumstances. The Central Govt. must be satisfied that the operation of the rule or regulation brought about undue hardship to an officer. The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, that too in an individual case, the Central Govt. on its satisfaction of those conditions, have been empowered to relieve such undue hardship by exercising the power to relax the condition. It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. The latter too must be in writing that too with the consultation of U.P.S.C. In Mahapatra and Khanna cases this Court held that approval by the Central Govt. and U.P.S.C. are mandatory. In A.K. Cnaudhary's case it was held that requirement of Rule 3(3)(b) of Seniority Rules is mandatory. In Amrik Singh's case an express order in writing under Rule 3 of Residuary rule is mandatory. In this case neither any representation to relax the rules was made nor any order in writing in this behalf was expressly passed by the Central Govt. The fiction of deeming relaxation would emasculate the operation of the Rules and Regulations and be fraught with grave imbalances and chain reaction. It is, therefore, difficult to accept the contention that there would be deemed relaxation of the Rules and Regulations."

17. In view of the law laid down by the apex Court as well as this Court in **Sanjay Agarwal (supra) and Dr. Rajeev Ranjan Mishra (supra)** making clear distinction between the Rules regulating "Recruitment" and those regulating "conditions of service", the Rules regulating age applicable before appointment is, therefore not a rule regulating conditions of service, hence is beyond the purview and ambit of Rule 28

of 2008 Rules and cannot be relaxed at all. Besides, as I already said, it is applicable to a person who has already been appointed and not one who has yet to be recruited.

18. In view of above discussions, the writ petition lacks merit.

19. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2011

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 39406 of 2007

Hari Ram Gupta ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.B. Yadav

Counsel for the Respondents:
C.S.C.

U.P. Recruitment of Service Determination of Date of Birth Rules 1974-Rule-2-Date of Birth-Petitioner already passed High School examination-before joining of Service-in Service Book date of birth recorded-neither on basis of High School Certificate nor on basis of Medical Certificate-after getting retirement notice-application of correction rejected on ground of delay-Held-authorities himself committed great illegality by ignoring the date of birth mentioned in Service Record-order quashed but towards payment of salary lump sum amount of Rs. 5000/-given

Held: Para 25 and 30

Therefore I am of the opinion that the respondents were duty bound to correct the date of birth as mentioned in the High School certificate, which has not been disputed by the respondents, only on intimation of the petitioner.

However the respondents are directed to pay Rs. 50,000/- lump sum and grant the post retiral benefits treating him in service on the basis of date of birth recorded in High School certificate i.e. 1.1.1949. The respondents are also directed to release the post retiral dues and other benefits within a period of three months from the date of receipt of certified copy of the order of this Court.

Case law discussed:
2006 (1) ESC 80 (All); 1993 (2) SCC 162; 2006 (6) SCC 537; AIR 2010 SC 2295; 2008 ESC (4) 2251

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

1. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the order dated 16.8.2007 passed by Executive Engineer, Construction Revision, Public Works Department, District Maharajganj (respondent no. 3) by which the petitioner's application for correction of date of birth in the service book has been rejected on the ground that the date of birth recorded in the service book at the time of entry in the service shall be deemed to be correct. This was done on the basis of legal advice taking note of the provisions contained in ***(U.P. Recruitment of Services Determination of Date of Birth Rules) 1974*** (herein after referred to as Rules 1974).

2. The facts giving rise to this case are that the petitioner was appointed as a roller driver on 1.3.1980 and was confirmed on the said post on 30.8.1982. While entering into the service his date of birth in the service book was recorded as 20.8.1947. Taking note of that the

petitioner was served with the notice of retirement dated 20.3.2007 treating the petitioner's date of birth as 20.8.1947. After coming to know about the notice dated 20.3.2007 issued by Executive Engineer Construction Division, Public Works Department, District Maharajganj, the petitioner has given an application mentioning therein that the petitioner has passed High School Examination in the year 1967 and in the High School Certificate, his date of birth is mentioned as 1.1.1949. Along with application, the petitioner has also filed photo stat copy of the High School certificate but no decision was taken thereon and petitioner thereafter filed Civil Misc. Writ Petition No.2232 of 2007. This writ petition was disposed of on 11.5.2007 with the observation that for redressal of his grievance the petitioner may file application before the authority concerned. The direction was also issued to the respondents to decide the petitioner's representation before he reaches the age of superannuation. Copy of the order passed by this Court is brought on record as Annexure 4 to the writ petition. It is thereafter the petitioner has filed the certified copy of the order of this Court along with fresh representation and the same was rejected by the impugned order dated 16.8.2007 on two grounds :-

(1) the application has been filed at the fag end of service.

(2) In view of ***Rules of 1974*** the date of birth recorded in the service book at the time of entry into service shall be deemed to be correct.

3. Sri R.B.Yadav, learned counsel appearing for the petitioner, referring to Rule 2 of Rules 1974, has submitted that in the case of an employee who entered into the service after passing of the High School Examination, his date of birth recorded in the High School Certificate shall be treated to be correct date of birth and in case while entering into the service the employee has not passed High School Examination, the date of birth recorded in the service book shall be treated to be correct date of birth. In his submissions, the respondent has erred in rejecting the petitioner's application and retiring him treating his date of birth as 20.8.1947.

4. In support of his submissions, he has placed reliance upon the judgment of this Court in the case of ***Hari Shankar Pandey Vs. U.P. Power Corporation, Lucknow and others 2006 (1) ESC 80 (All).***

5. Refuting the submission of learned counsel for the petitioner, learned standing counsel has submitted that the petitioner has not filed High School certificate while entering into the service therefore at the fag end of the service he cannot be permitted to take benefit of the date of birth recorded in the High School Certificate.

6. In his submissions, in view of the rules of 1974, no application for correction of date of birth can be entertained. He has placed reliance upon the government order dated 7.6.1980 annexed as annexure 1 to the supplementary counter affidavit dated 4.1.2011 mentioning therein that the date of birth recorded in the service book shall be final for all purposes. In the submissions of learned standing counsel, there is neither any infirmity nor illegality in the order impugned and the writ petition deserves to be dismissed.

7. In response to the writ petition as well as supplementary affidavit, the respondents have filed counter affidavit, supplementary counter affidavit and second supplementary counter affidavit stating therein that the petitioner's date of birth was recorded on the basis of medical certificate of Senior Medical Superintendent S.S.P Gupta Hospital Varanasi. According to which, the petitioner has stated that he is of about 27 years but the Doctor has recorded that he appears to be 35 years. First page of the service book has also been brought on record mentioning the date of birth 20.8.1947. In the supplementary counter affidavit sworn on 30th March, 2009, it has been stated that the petitioner kept mum for about 25 years after entering into service and at the fag end of the service he has filed an application for correction of date of birth in the service book which is impermissible. Whereas through second supplementary counter affidavit the respondents have brought on record the relevant ***Rule 2 of Rules of 1974*** as amended in the year 1980. The letter dated 22.12.2010 issued by Deputy Secretary Madhyamic Shiksha Parishad verifying the petitioner's passing High School Examination in the year 1967 recording date of birth dated 1.1.1949. In reply thereto the petitioner has filed rejoinder affidavit as well as supplementary rejoinder affidavit. These affidavits may be referred as and when it is required.

8. I have heard Sri R.B.Yadav, learned counsel for the petitioner and learned standing counsel and gone through the record of writ petition and various affidavits filed by the parties.

9. It is not in dispute that the petitioner has entered into service for the first time on 1.3.1980 and was made confirmed on 30.8.1982. The petitioner has filed an application for correction of date of birth only after receipt of the notice dated 20.3.2007 intimating him to retire with effect from 31.8.2007. The petitioner's application was considered only after the order of this Court dated 11.5.2007 passed in Writ Petition No. 22321 of 2007 and respondent no.3 has rejected the same on the ground of legal advice which was given on the basis of Rules of 1974.

10. For better appreciation the running language of Rule 2 of the Rules of 1974 as amended by first amendment in the year 1980 is reproduced below by splitting it into three parts.

(a) The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service.

(b) Where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benetis and.

(c) No application or represention shall be entertained for correction of such date or age in any circumstances whatsoever.

11. From the perusal of impugned order dated 16.8.2007 which reads as under :-

" माननीय उच्च न्यायालय द्वारा पारित आदेश पर विधि अधिकारी से विधिक राय ली गयी, जिस पर उनके द्वारा यह राय दी गयी कि " उत्तर प्रदेश सेवा में भर्ती (जन्म् तिथि अवधारण नियमावली 1974) के प्राविधानों के अनुसार सेवा में नियुक्ति के समय अंकित जन्म् तिथि सभी प्रयोजनों के लिए सही मानी जायेगी"।

12. It transpires that the legal adviser of the department has only considered the second conditions of the Rule 2 i.e. date of birth recorded in the service book at the time of entry into service be deemed to be correct and ignored the first part of amended Rule 2 which talks about the correctness of date of birth which is recorded in the High School certificate and has given opinion that it cannot be corrected. The Deputy Secretary of the U.P. High School and Intermediate Board has in fact admitted the factum of petitioner's passing High School in the year 1967and issuing of High School certificate containing date of birth dated 1.1.1949 (annexure 2 to the supplementary counter affidavit). Now in this context the last proviso of Rule 2 which contains the words *"no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever."* is required to be considered. For understanding the object of the relevant rule, the last portion of the Rule cann't be read in isolation and it has to be read as a whole i.e. along with part (a) (b) and (c) as spilitted above. The words used *"No application or represention shall be entertained for correction of such date or age in any circumstances whatsoever."* is referable to the date of birth recorded in the High School certificate as well as date of birth recorded in service book.

13. If the language used in the second part (Part b) of Rule 2 of first amendment 1980 is looked into, it will transpire that this part will only come into play when the first part is missing i.e.if a government servant has not passed High School Examination while entering into the service then the date of birth recorded in the service book shall be deemed to be correct and if the government servant has passed High School Examination prior to entry into service then the date of birth recorded in the High School certificate shall be deemed to be correct.

14. The word used in the bottom of Rule i.e., no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever, is to be read *such date* means the date of birth either recorded in the High School certificate or service book and for such correction of date of birth no application shall be entertained. Here the situation is very anomalous as admittedly the petitioner has passed High School Examination prior to the joining of service in the year 1980 and in the High School certificate his date of birth is recorded on 1.1.1949 and in the service book it is recorded as 20.8.1947 and if the rule is literally interpreted then no application can be entertained and that will defeat the very purpose/object of the Rule 2. Therefore, it is to be interpreted in a manner to achieve the object of the rule which can be done taking notice of the contents as contained in part (a) and (b), (beginning and middle part of the rule) the language used in Part (b) is very apparent and unambiguous saying that where a government servant has not passed such examination as aforesaid or has passed examination after joining the service the date of birth or age recorded in

the service book at the time of his entry into government service shall be deemed to be correct but here the petitioner has already passed High School Examination therefore the Part (b) will not play any role and the date of birth recorded in the High School certificate shall prevail and only by giving this interpretation the object of the rule can be achieved. Therefore, I am of the considered opinion that the order passed by respondent no. 3 is unsustainable for the following reasons.

(a) The competent authority has not passed this order after applying his own mind and based his decision on the basis of legal advice. It is well settled that legal advice can be made a basis for passing the order but the competent authority authorised under statute to do a particular thing cannot wash off his hand from applying his own mind and basing the decision only on the basis of legal advice. The authority concerned ought to have applied his own mind before passing the impugned order taking note of the relevant provisions of the Rules as whole.

(b) The Part (a) of Rule 2 as referred above has not been taken into consideration either by the legal adviser of the department or by the authority concerned who has passed the impugned order which clearly states that if the person has entered into service after passing High School Examination the date of birth recorded in the High School certificate shall be deemed to be correct. The part (b) which talks about the date of birth recorded in service book, if the employee has not passed High School Examination before entering into service or has passed after entering into service will be eclipsed by the shadow of part (a).

15. In this case, there appears to be one interesting feature that even the medical certificate on the basis of which date of birth as has been recorded in service book is not based on any medical examination. From the perusal of the medical certificate annexed with the counter affidavit sworn on 21st May, 2008 by Doctor D.P.Rai, it transpires that it is a certificate mentioning therein that according to the candidate/petitioner's statement, his age is 27 years whereas by appearance he appears to be 35 years. In the service book, the petitoner's date of birth is recorded 20.8.1947 it has neither been recorded on the basis of petitioner's statement nor on the basis of Doctor's report, according to the doctor, the petitioner appeared to him to be 35 years. If the petitioner's statment was taken to be true that he is of 27 years, the date of birth in the year 1980 should have been recorded as 1953 and if it was recorded according to doctor's assessment it was to be 1943 as the doctoer has assessed him as 35 of years.

16. I am of the view that doctor's certificate could only be taken into consideration if the petitioner had not passed High School Examination.

17. It appears that the respondent had not required the petitioner to file High School certificate which is born out from the perusal of paragraph no. 5 of the writ petition, which is reproduced below :-

That in brief the facts of the case are huge posts of Class IV employees in P.W.D. National Highway Division Varanasi arose and the petitioner along with other persons appeared and selected and they were sent for medical examination before the Chief Medical

Officer and at that time the respondents did not accept the High School Certificate.

18. There is no specific denial of paragraph no. 5 but the vague reply of paragraphs no. 2 to 18 have been filed in paragraph no. 9 of the counter affidavit which is reproduced below.

That the contents of paragraphs no. 2 to 18 of the writ petition are not admitted hence denied. In reply it is submitted that the petitioner, Hari Ram Gupta was appointed as Roller Driver in the office of the answering respondent and at the time of confirmation the petitioner was medically examined by the Senior Medical Superintendent, Varanasi and on 20.8.1982 and at that time the age of the petitioner was recorded as 35 years in the service book and the petitioner also accepted and made signature on his service-book. Thereafter the service-book of the petitioner was prepared and the date of birth mentioned as 20.8.1947 as per Medical Examination Certificate. It is further submitted that the petiioner has not submitted any objection at the time regarding his date of birth. After a long gap first time the petitioner submitted a representation with objection on 30.3.2007 that the date of birth, which is registered in the service-book is not correct and the petitioner has also filed a writ petition no. 22321 of 2007 before this Hon'ble Court. It is further submitted that in compliance of the Hon'ble Court by order dated 11.5.2007 passed by this Hon'ble Court the answering respondent decided the representation of the case and on 17.8.2007 the same shall be communicated to the petitioner.

It is further submitted that in the aforesaid order, the answering respondent stated that the date of birth, which is recorded in your service book would be treated as correct in all respect and the petitioner has not objected from last 24 years regarding his date of birth therefore after expiry of 24 years the such type of objection is rightly rejected by the answering respondent. It is also settled by the Hon'ble Apex Court as well as Hon'ble High Court that fake end of the services of the employee the correction in the date of birth is not permissible therfore on this sole ground the writ petition is liable to be dismissed.

19. From the perusal of reply of paragraphs no. 2 to 18 it transpires that the respondents have understood the doctor's certification as correct proof of age which is apparently illegal as there was no real assessment of the age after medical examination of the petitioner but it appears that it was a mere suggestion of a doctor and date of birth recorded in the service book on the basis of mere suggestion of a doctor to my mind cannot prevail over the date of birth recorded in High School certificate that too in the circumstances when the petititioner has entered into service before passing the High School Examination.

20. Had the respondents required the petitioner to produce the High School Certificate, there was no occasion for the petitioner to conceal the same. Prima facie it appears to be an outcome the ignorance of the petitioner and non application of mind of the respondents as well who have treated the certificate of the doctor as correct which was merely an advice and not the certificate based on any medical examination of the person

concerned, on this ground also the concerned respondent ought to have applied his mind before rejecting the petitioner's application.

21. So far as the change of date of birth at the fag end of service is concerned, the Hon'ble Apex court as well as this Court has never prohibited the same but has observed that the court should move on slow pace in interfering with these kind of matters.

22. The Apex Court in ***Union of India Vs. Harnam Singh 1993 (2) SCC 162*** has observed as under.

" A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay."

An application for correction of the date of birth should not be dealt with by the courts, the Tribunal or the High Court keeping in view only the public servant concerned. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process.Some are likely to suffer irreparable injury, inasmuch as because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose the promotion for ever. Cases are not unknown when a person accepts appointment keeping in view the date of retirement of his immediate senior. This is certainly an important and relevant aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, ismade out by the respondent and that too within a reasonable time as provided in the rules governing the service, the court or the tribunal should not issue a direction or make a declaration on the basis of materials which make such claim only plausible. Before any such direction is issued or declaration made, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for corrrection of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be within at least a reasonable time. The applicant has to produce the evidence in support of such claim,which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant to prove about the wrong recording of his date of birth in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of

the entries in respect of their dates of birth in the service books. By this process, it has come to the notice of this Court that in many cases, even if untimately their applications are dismissed, by virtue of interim orders, they continue for months, after the date of superannuation. The court or the tribunal must, therefore, be slow in granting an interim relief or continuation in service, unless prima facie evidence of unimpeachable character is produced beause if the public servant succeeds, he can always be compensated, but if he fails, he would have enjoyed undeserved benefit of extended service and thereby caused injustice to his immediate junior.

23. The same view has been taken by the Apex Court in the case of ***State of Gujarat Vs. Vali Mohd. Dosabhai Sindhi 2006 (6) SCC 537.***

The Apex Court again in the case of ***Punjab and Haryana High Court at Cnandigarh Vs. Megh Raj Garg and another AIR 2010 SC 2295*** has observed as under.

" A government servant who has declared his age at the initial stage of the employment is, of course, not precluded from making a request later on for correcting his age. It is open to a civil servant to claim correction of his date of birth, if he is in possession of irrefutable proof relating to his date of birth as different from the one earlier recorded and even if there is no period of limitation prescribed for seeking correction of date of birth, the government servant must do so without any unreasonable delay." In the absence of any provision in the rules for correction of date of birth, the general principle of refusing relief on grounds of laches or stale claims, is generally applied by the courts and tribunals. It is nonetheless competent for the Government to fix a time limit, in the service rules, after which no application for correction of date of birth of a Government servant can be entertained. A Government servant who makes an application for correction of date of birth beyond the time, so fixed, therefore, cannot claim, as a matter of right, the correction of his date of birth even if he has good evidence to establish that the recorded date of birth is clearly erroneous. The law of limitation may operate harshly but it has to be applied with all its rigour and the courts or tribunals cannot come to the aid of those who sleepover their rights and allow the period of limitation to expire.

If no rule or order has been framed or made, prescribing the period within which such application has to be filed, then such application must be filed within the time, which can be held to be reasonable. The applicant has to produce the evidence in support of such claim, which may amount to irrefutable proof relating to his date of birth. Whenever any such question arises, the onus is on the applicant, to prove the wrong recording of his date of birth, in his service book. In many cases it is a part of the strategy on the part of such public servants to approach the court or the tribunal on the eve of their retirement, questioning the correctness of the entries in respect of their dates of birth in the service books.

24. Form the perusal of dictum laid down by the Apex Court it is clear that the Apex court has not totally closed the door for correction of date of birth but whatsoever has been observed by the

Apex Court is that no application shall be entertained after period of limitation prescribed under the relevant rules coupled with the fact that if there is no rule it has to be filed within reasonable time. Further the correction must be sought on the basis of concreate material which is unrefutable. These are three parameters which have to be weighed while dealing with the matter of correction of date of birth in the service book. Here in the Rule of 1974 no limitation is prescribed for applying for correction of date of birth in the service book and in fact it prohibits the correction. As I have observed if the Rule 2 is read as whole then it will transpire that the date of birth recorded in the High School Certificate or equivalent examination or in absence of High School certificate before entering into service the date of birth recorded in the service book shall be deemed to be correct and the last portion of the rule provides that no application for correction of date of birth shall be entertained. Here in fact, literally the petitioner has filed an application for correction of date of birth but if one goes by the rule 2 which is relevant rule, the correction is automatic as the petitioner has brought in the notice of the employer that he has entered in the service after passing High School Examination in the year 1967 and there his date of birth is recorded 1.1.1949 and the date of birth in the service book will only prevail when the petitioner has not passed High School Examination prior to entry into service and it will come into play in absence of the employees non passing of High School Examination before entering into service. So far as the petitioner's coming for correction at the later stage is concerned, it is known fact that service records are always kept in the custody of employer and the petitioner being Class IV employee cannot be judged on high parameter of legal mechanism.

25. Therefore I am of the opinion that the respondents were duty bound to correct the date of birth as mentioned in the High School certificate, which has not been disputed by the respondents, only on intimation of the petitioner.

26. The view taken by me also find support from the decision of this Court reported in the case of ***Hari Shankar Pandey Vs. U.P. Power Corporation, Lucknow and others 2006 (1) ESC 80 (All).*** where this Court has held that the date of birth recorded in the High School certificate if the employee has entered into service after passing High School Examination shall be deemed to be correct. On the same line, a Division Bench of this Court in the case of ***State of U.P. Vs. Krishna Murari Lal reported in 2008 ESC (4) 2251*** has observed as under :-

(6) .....It is also not disputed that the petitioner had appeared in the High School examination prior to joining the service where his date of birth is also entered as 31.5.1945, therefore, the contention of the learned Standing Counsel that the petitioner is estopped from challenging his date of birth entered in the service record on the eve of his retirement, cannot be maintained. Once an incumbent had a High School certificate before joining the service, the said date of birth shall be taken to be final. The petitioner had no opportunity to challenge the entry because in all his papers including seniority list etc., the same date of birth as entered in his High School certificate was reflected and it is

evident that the aforesaid anomaly has come to his notice only at the time of his retirement.

(13) From the perusal of the said Rule 3, it is clear that date of birth of a government servant as recorded in the certificate of his having passed the high School or equivalent examination or where a Government servant has not passed any such examinations aforesaid, the date of birth recorded in his service at the time of his entry into Government service shall be deemed to be his correct date of birth.

(14) The aforesaid rule clearly indicates that date of birth of a Governemnt servant as recorded in the certificate of his having passed the High School or equivalent examination or where a Government servant has not passed such examination, the date of birth recorded in his service at the time of his enry into government service has to be treated as correct date of birth of the Government servant.

27. Here in this case, the Division Bench has allwed the appeal and quashed the order passed by Hon'ble Single Judge for correcting date of birth on the basis of High School certificate only on the ground that in the year 1959 the petitioner in that case had only appeared in the High School Examination and failed whereas Rule 2 requires that the person must have passed High School Examination before entering into service. In the present case, it is not in dispute that the petitioner has entered into service after passing High School Examination in the year 1980.

28. In view of the foregoing discussions, the writ petition succeeds and is allowed. The impugned order 16.8.2007 passed by respondent no. 3 is hereby quashed as the petitioner has retired in the year 2007 therefore no direction can be issued for reinstatement in service.

29. It is also observed that as the petitioner has not worked due to pendency of writ petition after the retirement treating the date of birth as 1947, therefore on the principle of 'no work no pay' no direction is being issued for paying the salary on the basis of date of birth recorded in the High School certificate dated 1.1.1949.

30. However the respondents are directed to pay Rs. 50,000/- lump sum and grant the post retiral benefits treating him in service on the basis of date of birth recorded in High School certificate i.e. 1.1.1949. The respondents are also directed to release the post retiral dues and other benefits within a period of three months from the date of receipt of certified copy of the order of this Court.

31. It is also provided that no application shall be entertained for payment of arrears of salary etc. except the post retiral dues on the basis of petitioner's continuance in service on the basis of date of birth recorded in the High School certificate in view of the judgment of the Apex Court in the case of ***Punjab and Haryana High Court*** (supra) which provides that correction of date of birth at fag end of service not only related to the petitioner but it also affects others.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2011

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 55538 of 2008

Ram Chandra Yadav and another
...Petitioner
Versus
District Judge, Allahabad and others
...Respondent

Counsel for the Petitioner:
Sri Shamim Ahmad
Sri Ravi Kiran Jain
SriV.K.Agarwal

Counsel for the Respondent:
Sri Vishnu Gupta
S.C.

Constitution of India, Article 226-words and phrases-word-'First Floor-Ground Floor numbered a first floor-called-below the ground floor called as "basement" as counted by all most common wealth countries-if as per agreement the petitioner not satisfied-may file civil suit for specific performance or damage-courts are not expert body-the number of marks given by Development Authority-perfectly justified-court below committed great illegality by taking different view.

Held: Para 32 and 43

In the said system the floor just above the ground floor is assigned the number one and is known as first floor and so on. All floors below the ground level are either called lower ground or basement. In almost All Common Wealth Countries storeys in a building are counted in the aforesaid manner. Thus, in a seven storey building the top most floor would generally be the 6th floor.

In the above view of the matter, I am of the firm opinion that as per the agreement dated 8.6.01 respondent No.3 is entitled to a shop of the specified size on the first floor of the building as described in the sanctioned building plan by the Allahabad Development Authority and the courts below were not justified in directing to treat any other floor as the first floor and in directing for delivering possession of a shop on such a floor.

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

1. Petitioners are owners and landlords of the property No.1029/880 Old Katra, Allahabad. It is said that the aforesaid property consisted of an old dilapidated house over 100 years old. Petitioners decided to develop the property and reconstruct a multi-storied building thereon.

2. Petitioners entered into a registered agreement with respondent No.3 on 8.6.01 agreeing for letting out a portion having an area of 17' X 35' with a minimum height of 12 ' on the first floor of the proposed building facing Chintamani Road and having access through the front portion of the building. The agreement also provided that the petitioners would construct a multi-storied building consisting of shops on the ground floor and the first floor with residential block on the second floor and that the landlords would complete the construction of the first floor within a period of one year on obtaining sanction of the map from the Allahabad Development Authority and shall deliver possession of the same whereupon tenant would start paying rent @ Rs.3,000/- per month. The agreement further provided that if the landlords fail to complete the constructions within time stipulated and

deliver its possession to the respondent No.3 they shall be liable to pay damages @ Rs.6,000/- per month to respondent No.3. The tenancy would be for a period of 21 years with the option of renewal on such terms as may be agreed between the parties.

3. The petitioners got the map of the proposed building prepared and sanctioned from the Allahabad Development Authority on 21.9.01. The sanctioned map is Annexure-9 to the writ petition and it shows that the building would consist of a basement, a ground floor, a first floor and a second floor.

4. Respondent No.3 immediately thereafter instituted original Suit No.736 of 2001 against the petitioners for permanent injunction restraining the petitioners from entering into any agreement to sell or let out and deliver possession of a shop measuring 17' X 35' on the ground floor of the above property to any other person except respondent No.3; mandatory injunction directing the petitioners to deliver him actual physical possession of the ground floor shop (as per sanctioned plan)/first floor shop as per agreement dated 8.6.01 on the same terms and conditions as contained in the above agreement and damages for delay/non-performance of the agreement dated 8.6.01. In substance the suit envisaged for a decree of specific performance agreement dated 8.6.01 with damages and for permanent and mandatory injunction.

5. In the aforesaid suit respondent No.3 also applied for temporary injunction which was granted vide order dated 1.3.02 and the petitioners were restrained from letting out or otherwise to give a shop 17' X 35' being constructed just above the basement as per the approved map of the Allahabad Development Authority. The appeal against the aforesaid interim injunction order was dismissed by the Additional District Judge vide judgment and order dated 6.5.02. However, both the above orders were set aside by the High Court vide judgment and order dated 24.5.02 passed in Writ Petition No.22620 of 2002 filed by the petitioners on the ground that specific performance of the agreement was not legally permissible when the agreement provided for adequate compensation for its breach.

6. The aforesaid judgment and order of the High Court was taken to the Supreme Court by respondent No.3 by means of Civil Appeal No.6677 of 2002. The Supreme Court by a short judgment dated 30.4.2008 allowed the appeal, set aside the order of the High Court and directed the parties to strictly adhere to the conditions in the agreement dated 8.6.01. The Trial Court was directed to appoint a local Advocate as Commissioner to deliver possession to the tenant in terms of the aforesaid agreement. The suit was ordered to be closed with the above directions. The relevant extract of the order of the Supreme Court dated 30.4.08 is reproduced herein below:-

"Since there is an agreement entered into between the landlord and tenant we are of the view that the terms of agreement should be strictly adhered to by both the parties. We accordingly dispose of this appeal with the direction that the parties should strictly adhere to the conditions contained in the agreement dated 8.6.01. We, therefore, direct the Trial Court to appoint a local

Advocate (Commissioner) to go to the disputed building and deliver possession to the tenant in terms of the aforesaid agreement. The remuneration of the Commissioner shall be fixed by the Trial Court.

The order impugned passed by the High Court is accordingly set aside. In view of our aforesaid direction the suit shall stand closed.

The appeal is accordingly disposed of."

7. It appears that the Trial Court vide order dated 24.5.08 appointed an Advocate (Commissioner) for affecting delivery of possession as directed by the Supreme Court.

8. The Advocate (Commissioner) submitted a report on 29.5.08 to the effect that delivery of possession could not be affected. According, to the Advocate (Commissioner) there is a dispute between the parties as to which of the portion would be considered as the first floor portion as at the time of agreement no basement was contemplated.

9. Subsequently, another Advocate (Commissioner) was appointed by the Trial Court vide order dated 30.5.08.

10. Thereafter, vide order dated 23.7.08 the Trial Court proceeded to decide the controversy with regard to the location of the first floor and the portion which was to be let out to respondent No.3. The Trial Court vide order dated 23.7.08 held that the floor above the so called basement which is being claimed as the ground floor by the petitioners is to be treated as the first floor and respondent No.3 is entitled to possession of a shop area 17' X 15' on the same. Necessary, directions for delivery of possession within three days through Advocate (Commissioner) was also issued.

11. The said order was challenged by the petitioners in Civil Revision No.196 of 2008 but the same was dismissed by the District Judge vide order dated 18.10.08.

12. Aggrieved by the judgment and order dated 18.10.08 of the revisional court and that of the the Trial Court dated 23.7.08 determining the floor above the basement as the first floor and directing for delivery of possession of a shop on the said floor to respondent No.3, petitioners have invoked the writ jurisdiction of this Court contending that the floor above the basement cannot be the first floor and the courts below have materially erred in treating the basement as the ground floor.

13. In short, the parties are at variance with regard to the first floor on which a shop in the building is to be given to respondent No.3 as per agreement dated 8.6.01.

14. In order to resolve the above controversy I would first like take into consideration the relevant terms and conditions of the agreement itself. The salient features of the agreement are as under:-

(i) the owners and landlords would let out a portion of the first floor area approximately 17' X 35' with minimum height 12' for the purposes of carrying business to the proposed tenant respondent No.3 on rent;

(ii) the shop would be in the front portion of the building facing Chintamani Road, Allahabad having access through front portion of the building;

(iii) the owners and landlords were obliged to complete the construction and to deliver possession within one year of the date of obtaining sanction from the Allahabad Development Authority;

(iv) the tenant shall pay rent @ Rs.3,000/- per month inclusive of house tax, water tax, water charges, sewer tax etc. and it would be the responsibility of the tenant to obtain electricity connection and to pay electricity dues;

(v) the tenancy shall be for a period of 21 years from the date of possession which may be renewed at the option of the tenant;

(vi) during subsistence of the tenancy rent shall be increased every five years by 10% of Rs.3,000/-;

(vii) tenant shall pay a sum of Rs.2,00,000/- as security deposit which has already been paid vide Cheque Nos.8807494l and 8807495 of Rs.50,000/- each both dated 21.5.01 drawn on Dena Bank, Johnstonganj, Allahabad and Rs.1,00,000/- in cash;

(viii) the said security would be refunded with 12% interest on the shop being vacated by the tenant;

(ix) in the event landlords fail to complete construction and deliver possession within time stipulated in the agreement they will be liable to damages @ Rs.6,000/- per month.

15. It may be noted that in the aforesaid agreement there is no stipulation as to the maximum height and the numbers of storeys of the proposed building. The agreement does not provide that the building would only be of three storeys or that there would be no basement.

16. According to the aforesaid agreement the tenant is entitle for a shop having an approximate area of 17' X 35' with minimum height of 12' on the first floor of the proposed building in premises No.1029/880, Old Katra, Allahabad in the front portion facing Chintamani Road and having access through the front portion of the building.

17. Petitioners in order to carry out the aforesaid agreement subsequently got the map of the building sanctioned by Allahabad Development Authority dated 21.9.01. The map of the building so sanctioned provides for a basement, a ground floor, a first floor and the second floor with a terrace. In other words, the approved map is of four storey building including the basement.

18. The Amin report paper No.29-A dated 9.7.08 establish that the building so constructed consist of four storeys. The lowest storey is about 5 ½' below and 3 ½' above the road level. It has several shops with a five wide lane in the middle. The second storey above it also has four shops and 5' 1" lane in the middle. These two stories have their frontage towards Chintamani Road. The third storey consists of a hall 51' X 15 and 12' in height. The top storey has a permanent construction in half portion but the same was not available for inspection.

Respondent No.3 in the original suit instituted had claimed the following reliefs:-

(i) That by means of permanent injunction restrain the defendants from catering into any agreement to sell/or any agreement to let or otherwise creating any change in respect of suit property or deliver possession of one shop measuring approximately 17' X 35' situated on ground floor of House No.1029/880, Old Katra, Allahabad to any other person except the plaintiff.

(ii) That by means of Mandatory injunction this Hon'ble Court may be pleased to order the defendants to deliver to the plaintiff actual and physical possession of the ground floor shop (as per sanctioned plan)/First Floor Shop (as per registered agreement dated 8.6.2011), as lease on the terms and conditions given in the aforesaid registered contract dated 8.6.01 by evicting the defendants or any other person or persons who may found in possession of the said shop having been let in by the defendants.

(iii) That a decree of a sum of Rs.6,000/- per month be passed in favour of plaintiff against defendants by way of compensation or damages for non-performance of the agreement from 8.6.01 till the date of delivery of actual and physical possession by the defendants to the plaintiff as per clause II of the aforesaid registered contract dated 8.6.01.

(iv) That any other relief which this Hon'ble Court may deem fit and proper in the circumstances of the case be awarded to the plaintiff against defendants.

(v) That cost of this suit be awarded to the plaintiff against the defendants.

19. In sum and substance the reliefs claimed in the suit were with regard to the specific performance of the agreement dated 8.6.01 and for damages for default or delay and as per the agreement and it was specifically claimed that respondent No.3 be given possession of the first floor shop as per the agreement which in effect is the ground floor as per the sanctioned plan. To put it differently respondent No.3 claimed shop on the ground floor as per the sanctioned may though under the agreement a shop on the first floor was agreed to be let out.

20. In the aforesaid suit no issues were framed and the parties had not adduced any evidence. The suit was not decided by the courts below on merits. In the said suit only an application for temporary injunction was decided whereupon the matter traveled up to the Supreme Court. The Supreme Court vide order dated 30.4.08 directed the suit to stand closed and in view of the agreement entered into between the parties directed that the parties should strictly adhere to the conditions contain in the agreement and the Trial Court would appoint a local Advocate (Commissioner) to ensure delivery of possession to the tenant in terms of the agreement.

21. In the judgment and order of the Supreme Court there is no adjudication of the respective claims of the parties. The Supreme Court has also refrained itself from specifying the shop liable to be given to the respondent No.3 or the storey which was to be treated as the first floor according to the agreement. Thus, as the parties were in variance with regard to the

storey on which the shop has to be given to the tenant, the Advocate (Commissioner) was unable to execute the writ of delivery of possession. Thereafter, the Trial Court took upon the task of executing the order of the Supreme Court and went on to adjudicate the claim with regard to the location of the shop or the storey on which it is to be given to respondent No.3.

22. I have heard Sri Ravi Kiran Jain, Senior Advocate, assisted by Sri Shamim Ahmad, learned counsel for the petitioners and Sri Vishnu Gupta, learned counsel appearing for respondent No.3.

The pleadings exchanged between the parties have also been examined by me.

23. The main thrust of the argument of Sri Jain, is that under the agreement respondent No.3 is entitle to a shop on the first floor of the building. The courts below are not justified in treating the floor above the basement as the first floor as the same is the ground floor and the first floor is the one above the ground floor.

24. The above submission has been countered by Sri Vishnu Gupta and it has been contended that at the time of the agreement there was no proposal for constructing a basement. The basement being the lowest floor, the floor above it would naturally be a first floor and as such the courts below have not erred in accepting the claim of respondent No.3. He has also submitted that the agreement further provided for letting out a shop to respondent No.3 not only on the first floor but in the front portion facing Chintamani Road and having access through the front portion of the building. The so called first floor as per the sanctioned map does not have access from the Chintamani Road and as such it is not suitable for commercial purposes.

25. I have considered the respective submissions of the parties in the light of the pleadings and the documents on record.

26. There is no material on record to establish that at the time of entering into an agreement there was any specific agreement between the parties with regard to the plan/ map according to which the proposed building was to be constructed. The map of the building was got prepared and approved subsequently.

27. In the agreement the basic requirement was that the petitioners would be offered a shop of the area specified on the first floor of the building on rent in the front portion facing Chintamani Road and having its access through the front portion of the building for commercial use.

28. The petitioners have not denied to offer a shop of the size specified but the difficulty has arisen due to rival claims as to the storey on which the shop would be located.

29. In the circumstances, the main question which falls for consideration is as to which of the storeys of the building would constitute the first floor of the building.

30. A storey is any level part of the building having a permanent roof. Ground floor is the floor closest to the level of street and is considered to be a principal

floor of the building whereas basement is storey below the ground floor.

31. There are two major schemes in use across the world for the numbering of the floors of a building. The most commonly used scheme is the British convention which is also being followed in India.

32. In the said system the floor just above the ground floor is assigned the number one and is known as first floor and so on. All floors below the ground level are either called lower ground or basement. In almost All Common Wealth Countries storeys in a building are counted in the aforesaid manner. Thus, in a seven storey building the top most floor would generally be the 6th floor.

33. It appears that the Allahabad Development Authority has also adopted the Birtish system of numbering the floors of buildings and has accordingly approved the map of the petitioners by describing the floor which is practically at the ground level i.e. 5 ½' below 3 ½ ' above it to be the ground floor and the storeys above it by giving them numbers 1 and 2 i.e. first floor and second floor. The floor below the ground floor has been described as the basement. The aforesaid sanctioned map is a sacred and a most sacrosanct document having the approval of a specialized body consisting of experts in the field of architecture and a planning.

34. It is well settled that the decisions of experts or specialized bodies having technical knowledge in the subject are rarely interfered with by law courts unless found to be suffering from the vice of arbitrariness or are against settled principles. No such ground for inference in the decision of the Allahabad Development Authority is shown to exist.

35. It is also a common experience that elevators used in a multi-storied building are also on the same pattern. The ground floor is generally assigned a symbol G or Zero and all storeys above ground floor are given numbers in sequence 1, 2, 3 and 4 and so on whereas all storeys below ground level are assigned numbers by pre-fixing the sign of Minus (-) such as -1, -2, and -3.

36. In some buildings there are mezzanine floor or either intermediate or subterranean floors which are differently illustrated.

37. The basic principle which is culled out is that the floor which is closest/nearest to the ground level is normally described as the ground floor. In the present case, the ground floor described the sanctioned map is closest to the ground level being only 3 ½ ' above it. The basement is 5 ½ ' below the ground level and as such is not closest to ground level. Therefore, it can not be treated as the ground floor.

38. The agreement actually has no reference of a basement. The lower most storey of the building is admittedly 5 ½' below the road level and 3 ½' above the road level. It is virtually a basement being more than half below the road level. Generally, in India any storey or portion of a building which goes below the ground level in common parlance is described as a basement. Technically it may be half way and may be called a mezzanine floor which is generally referred to a structure half way between the first floor and the second floor. The

concept of half way floor has now universal application and is referred to any storey which is in between the two stories such as in the present case regarding basement.

39. In any view, when the lowest storey which is 5 ½' below and 3 ½' above the ground the floor which is closest to the road level has rightly been described by the Development Authority as the ground floor in the sanctioned map and as such there is no alternative but to treat the same as the ground floor and any deviation from the same would only lead to confusion and chaos.

40. In this view of the matter, I am of the opinion that the courts below have certainly exceeded their jurisdiction in directing for treating the ground floor shown in the map sanctioned to be the first floor and in directing for providing shop to respondent No.3 on the said floor. There was no justification for the courts below to deviate from the sanctioned map to take a different view and to give the ground floor the nomenclature of the first floor.

41. The next submission which falls for consideration is that the first floor as per the sanctioned map does not have a shop but only a hall as is evident from the report of the Amin. It has no access from the front of the building and is therefore, not suitable for commercial purpose may be a valid point in favour of respondent No.3. However, it would not be of much help to respondent No.3 as admittedly the building had been constructed in accordance with the map sanctioned by the Allahabad Development Authority which is deemed to be in accordance with by laws and the regulations of the Development Authority. Therefore, any change in the building plan may not be possible at this stage except for some internal arrangement wherein the hall may be partitioned and converted into a shop of the size specified to accommodate respondent No.3. but it may not be possible to alter the entrance and to provide access to respondent No.3 from the front of the building . This however would not compel the petitioners to let out a shop to respondent No.3 on any other floor other than the first floor which is the most fundamental condition.

42. Therefore, in the event respondent No.3 is not satisfied and considers that the agreement has been violated the only remedy available to him is to sue the petitioners for the breach of the agreement and to claim damages which relief actually claimed but was not granted.

43. In the above view of the matter, I am of the firm opinion that as per the agreement dated 8.6.01 respondent No.3 is entitled to a shop of the specified size on the first floor of the building as described in the sanctioned building plan by the Allahabad Development Authority and the courts below were not justified in directing to treat any other floor as the first floor and in directing for delivering possession of a shop on such a floor.

44. Accordingly, the orders impugned dated 23.7.2008 and 18.10.2008 are set aside/ quashed and the court of first instance is directed to ensure that the respondent No.3 is delivered possession of a shop having an area of 17' X 35' with minimum height of 12' on the first floor as has been described in the sanctioned map of the building in

premises No.1029/880 Old Katra, Allahabad preferably on the front portion facing Chintamani Road Allahabad.

45. Writ Petition allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.05.2011

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 69274 of 2009

Vinod Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
P. N. Tripathi

Counsel for the Respondent:
C. S. C.
Sri M.C. Chaturvedi

Constitution of India, Article 226- Dismissal from Service-on allegation of filing forged Cast Certificate-petitioner declared himself as 'Ahir' by cast-from very beginning stated that being unaware with procedure of Cast Certificate had given Rs. 500/-to the Munshi-and an FIR against guilty Munshi lodged under direction of Court-disciplinary authority inflated punishment of dismissal-in meantime Cast Certificate issued by competent authority produced before revisional authority-who confirmed the order of dismissal on mechanical manner-held-order entails civil consequences can not be passed without affording opportunity of hearing-when Counsel as well as Standing Counsel unable to produce any rule regulation or procedure regarding issue of Cast Certificate-a villager little man can not be held guilty for the misdeed of Munshi working in Tehsil-order of dismissal set-a-side with direction to decide as fresh in light of observation made by court.

Held: Para 21 and 22

Otherwise also to get an employment now a days is a hard task and when a person is in a service, so many things depend on him. Therefore, before imposing a penalty of cancellation of selection termination/dismissal/removal from service, the authorities empowered for imposing such penalties must take due care and caution.

In the present case as obviously pending statutory proceedings when the petitioner has brought on record the caste certificate and prayed with all humility that this aspect of the matter be considered as he has been cheated and has been made victim of the circumstances. It was the duty of the authority concerned to look into the same instead discarding the same with closed eye. Otherwise also as the petitioner's selection has been cancelled on the ground of fraud played by the petitioner, therefore, the petitioner was entitled for notice and before issuing show cause notice to the petitioner the impugned order could not have been passed.

Case law discussed:
2011 (1) ADJ 635; 2005 (6) SCC 149; 1993 SCC 259; 2000(1) SCC Page 152; 2008 Vol. (10) ADJ 283;Sanjay Kumar Singh Vs. State of U.P. and others, passed in Writ Petition No. 51282 of 2007 decided on 27.01.2010,

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

1. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 10.11.2009, 29.1.2008 and 21.8.2007. Vide order dated 21.8.2007, the Superintendent of Police, Ghazipur has cancelled the petitioner's selection on the ground that while entering in the service,

petitioner has filed forged caste certificate whereas vide order dated 29.1.2008 and 10.11.2009 the petitioner's appeal as well as revision filed against the order of cancellation of the selection have been dismissed by the respondents no. 3 and 2 respectively .

2. The facts giving rise to this case are that the petitioner was selected for appointment on the post of Constable in U.P. Civil Police in the year 2006 and was sent for training. While entering in the service, the petitioner has claimed the benefit of reservation of other backward classes on the basis of caste certificate issued by Tehsildar Tehsil Shahganj,District Jaunpur. Later, on verification from the Tehsil Authority it was found that the caste certificate was not issued by the office of Tehsildar and on that ground the petitioner's selection was cancelled by the impugned order dated 21.8.2007 by Superintendent of Police holding that the petitioner has obtained his selection by playing fraud upon the authorities as he has produced forged caste certificate at the time of entering into the service.

3. The appeal filed by the petitioner has been dismissed by the respondent no. 3. However before revision could be filed when it came to the notice of the petitioner that his selection has been cancelled on the ground of forged caste certificate. He applied before the tehsil authority for obtaining the caste certificate as the petitioner belongs to Ahir by caste and falls under the O.B.C. category and is entitled for reservation under U.P. Scheduled Caste Scheduled Tribes and Other Backward Classes Reservation, Act 1994. Thereafter he obtained the caste certificate and produced the same before the revisional authority. But the revisional authority without veryfying it from the tehsil authority has dismissed the revision by affirming the order passed by appointing authority as well as appellate authority.

4. Sri P.N.Tripathi, learned counsel for the petitioner submitted that the petitioner is of a rural background and he has given Rs. 500/- to one Sri Akhilesh Srivastava for obtaining caste certificate who happens to be deed writer and munshi in Tehsil Shahganj. Who provided him the caste certificate issued by the office of Tehsildar containing the seal and signature of Tehsildar and there was no occasion for the petitioner to disbelieve the same. On the basis of said certificate, the petitioner applied for selection. It is also submitted that when the petitioner came to know that this is forged certificate, the petitioner filed an application under Section 156 (3) Cr.P.C. before the court of competent jurisdiction for lodging an F.I.R. against Sri Akhilesh Srivastava that is pending before that court. He has further submitted that as the impugned order has been passed on the ground of allegation of fraud therefore before passing any order on that count an opportunity of hearing ought to have been offered to the petitioner. In support of his submissions, he has placed reliance upon the judgment of this Court reported in ***2011 (1) ADJ 635 Kishan Kumar Vs State of U.P. and others.***

5. Refuting the submissions of learned counsel for the petitioner, learned standing counsel has submitted that the caste certificate of the petitioner, which was submitted by him at the time of recruitment, was not issued by the office of Tehsildar, therefore no infirmity can be

attached with the impugned order as on date of selection the petitioner had produced forged certificate.

6. Learned standing counsel further submitted that even if the opportunity would have been offered, the petitioner could not have improved his case as on the date of production of certificate, it was not issued by competent authority. In his further submissions, the petitioner has no leg to stand before the court and the writ petition deserves to be dismissed.

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

After hearing learned counsel for the parties, it transpires that undisputedly the caste certificate filed by the petitioner showing him Ahir by caste was not issued by the office of Tehsildar. It appears that this fact came into the notice of the respondents at the time of verification of the caste certificate and on that basis the appointing authority has cancelled the selection of the petitioner on the ground that the petitioner has obtained his selection by playing fraud annexing the forged certificate.

8. From the perusal of impunged order it transpires that before passing the impugned order the opportunity of hearing was not afforded to the petitioner. It is settled law that where any order is passed on the ground of playing fraud then an opportunity of hearing is necessary. The mere allegation of fraud is not sufficient for taking action against a person unless it is pleaded and proved.

9. It is also settled that fraud is always intentional and is being played with a view to obtain certain benefit knowing it well that in case true facts are stated that benefit would not be extended to the person concerned.

10. The Apex Court in the case of ***State of A.P. & Anr. Vs. T. Suryachandra Rao, reported in 2005 (6) SCC 149,*** has observed as under:-

"8. By "fraud" is meant an intention to deceive; whether it is from any expectation of advantage to the party himself or from ill-will towards the other is immaterial. The expression "fraud" involves two elements, deceit and injury to the person deceived. Injury is something other than economic loss, that is, deprivation of property, whether movable or immovable, or of money, and it will include any harm whatever caused to any person in body, mind, reputation or such others. In short, it is a non-economic or non-pecuniary loss. A benefit or advantage to the deceiver, will almost always cause loss or detriment to the deceived. Even in those rare cases where there is a benefit or advantage to the deceiver, but no corresponding loss to the deceived, the second condition is satisfied. (See Vimla (Dr.) Vs. Delhi Admn., AIR 1963 SC 1572; and Indian Bank Vs. Satyam Fibres (India) (P) Ltd., (1996) 5 SCC 550).

9. A "fraud" is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. (See S.P.Chengalvaraya Naidu Vs. Jagannath, (1994) 1 SCC 1).

11. ----------In Webster's Third New International Dictionary "fraud" in

equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Law Dictionary, "fraud" is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act, 1872 defines "fraud" as an act committed by a party to a contract with the intent to deceive another. From dictionary meaning or even otherwise fraud arises out of a deliberate active role of the representator about a fact, which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with the knowledge that it was false. In a leading English case i.e. Derry Vs. Peek (1886-90) All ER Rep 1 what constitutes "fraud" was described thus; (All ER p.22 B-C).--------.

15. "Fraud" is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. Although negligence is not fraud but it can be evidence on fraud; as observed in Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education, (2003) 8 SCC 311."

11. From the perusal of the Apex Court's judgment, it is clear that the fraud is always intentional and it is played by a person knowing it well that he does not belong to a particular category and files certificate on the basis of falsehood with a view to obtain the benefit of falsehood whereas in the present case, it is not so, as the petitioner himself has gone before the authorities as well as came before this Court with clean hands in unambiguous words that he had paid money to one Sri Akhilesh Srivastava for obtaining the caste certificate and thereafter, the caste certificate was given to him by Sri Srivastava. In fact, this is a case where the fraud has been played on the petitioner. The petitioner really belongs to other backward class (Ahir by caste) and has been made victim of circumstances.

12. After dismissal of the appeal and before filing of the revision the petitioner has obtained the caste certificate issued by the Tehsildar and submitted the same before the revisional authority along with the memo of revision but the revisional authority did not take notice of the aforesaid fact and dismissed the revision.

13. It is to be noticed that belonging of a person to a particular caste is a question of fact and which cannot be negatived in any circumstances. Here ***doctrine of factum valet*** will come into play i.e. hundred text cannot alter a fact.

The facts always remain the same. The issuance of a certificate only means that a competent authority is certifying a person that he belongs to a particular caste and for that purpose the certificate issued is taken to be true. It is not so that if the certificate is not issued to a particular person the factum of belonging of a person to a particular caste is anyhow diluted. The mere declaration of a person belonging to a particular caste is sufficient. The certification given by an authority is only putting a seal on the declaration of person after verification. Here in the present case, the filing of earlier certificate which was in fact not issued by the office of Tehsildar will not dilute the petitioner 's status of his being Ahir by caste.

14. In fact, the status of the petitioner has further been certified by the Tehsildar and the certificate was brought into the notice of the revisional authority. In these circumstances, I am of the view that the revisional authority is not meant to put a seal on the orders passed by the competent authority and appellate authority. He is under statutory obligation to apply his own mind to the facts of the case. Here I find that the revisional authority has not applied his mind to the full swing and based his decision only on the basis of the decision of competent authority and appellate authority. It was the duty of the revisional authority to take notice of the fact that the defect which crept earlier has now been cured. He would have examined the matter sympathetically looking into the background of the petitioner. The petitioner in his complaint which has been brought on record as Annexure 7 to the writ petition has stated that he is the villager and is totally unaware of the fact that how the caste certificate is issued. He, believing on a person who was working in the Tehsil campus, has given money required by him for obtaining caste certificate. In fact he has been duped. Learned counsel appearing for the State respondents has also not brought any rule in the notice of the court meant for obtaining caste certificate containing the procedure for making an application disclosing the requirement for filing an application for obtaining caste certificate. In absence of any rule which is not known to the parties' counsel how can it be expected from a person living in the remote rural area will know about the same. The petitioner has been made victim of the circumstances which has resulted into the cancellation of his selection.

15. I am of the considered opinion that the authorities below have erred in holding that the petitioner has played fraud in his selection. Had the petitioner, was not Ahir by caste and would have annexed certificate to that extent his role would have certainly been brought in the zone/ambit of fraud, therefore very basis of impugned orders are unsustainable. I also find that the impugned order of cancellation of selection suffers from breach of principle of natural justice.

16. The Apex Court in the case of ***D.K.Yadav Vs. J.M.A.Industries Ltd. Reported in 1993,SCC 259*** has made the following observations.

The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is

not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily effecting the rights of the concerned person.

It is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. ***In Mohinder Singh Gill Vs. Chief Election Commissioner, (1978) 1 SCC 405 :(1978) 2 SCR 272;*** *the Constitution Bench held that 'Civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivation and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Distionary, 4th edn., page 1487 defined civil rights are such as belong to every citizen of the State or country.... they include..... rights capable of being enforced or redressed in civil action..... In State of Orissa Vs. (Misss) Birapani Dei this Court held that* ***even an administrative order which involves civil consequences must be made consistently with the rules of natural justice.*** *The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.*

In ***State of W.B. Vs. Anwar Ali Sarkar, 1952 SCR 284: AIR 1952 SC 75: 1952 Cri LJ 510; per majority,*** *a seven judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In* ***Maneka Gandhi Vs. Union of India (1978) 1 SCC 248: (1978) 2 SCR 621*** *another Bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under article 14. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable.* ***The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.*** *Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness,unreasonableness or unfairness. They have to act in a manner which is patently impartial and meets the requirement of natural justice.*

The law must therefore be now taken to be well settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil right or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between quasi judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi judicial inquiry is to arrive at a just decision and if a rule or natural justice is calculated to secure justice or to put in negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

17. This decision has been followed in numerous cases decided thereafter which need not be detailed as this is the established principle of law that even an administrative order which leads to civil consequences must be passed in consonance with the rules of natural justice.

18. Here in the present case it is apparent on the face of record that no opportunity was given to the petitioner before passing the impugned order.

19. The Apex Court in ***Chandra Prakash Shahi Vs. State of U.P. and others reported in 2000 (1) SCC Page 152*** has held that such an order amounts to dismissal, therefore, a notice and opportunity was necessary. It has gone to hold that notice is also required under Para 541 of the Police Regulations. Recently a Division Bench of this Court has dealt the issue in ***Paras Nath Pandey Vs. Director, North Central Zone, Cultural Centre, Allahabad reported in 2008 Vol. (10) ADJ 283*** that such order passed by the authority concerned cannot survive.

20. It is well settled that if order of termination is based on concealment of fact or suppression of material then termination order cannot be passed without affording an opportunity of hearing. The Apex Court as well as this Court in numerous decisions has laid

down this proposition. In the cases of ***Kamal Nayan Mishra Vs. State of Madhya Pradesh and others reported in (2010) 2 SCC 169 and Sanjay Kumar Singh Vs. State of U.P. and others, passed in Writ Petition No. 51282 of 2007 decided on 27.01.2010,*** it has been held that order leading Civil Consequences, passed without opportunity of hearing is unsustainable in eye of law.

21. Otherwise also to get an employment now a days is a hard task and when a person is in a service, so many things depend on him. Therefore, before imposing a penalty of cancellation of selection termination/ dismissal/removal from service, the authorities empowered for imposing such penalties must take due care and caution.

22. In the present case as obviously pending statutory proceedings when the petitioner has brought on record the caste certificate and prayed with all humility that this aspect of the matter be considered as he has been cheated and has been made victim of the circumstances. It was the duty of the authority concerned to look into the same instead discarding the same with closed eye. Otherwise also as the petitioner's selection has been cancelled on the ground of fraud played by the petitioner, therefore, the petitioner was entitled for notice and before issuing show cause notice to the petitioner the impugned order could not have been passed.

23. In the result, the writ petition succeeds and is allowed. The impugned orders dated 10.11.2009, 29.1.2008 and 21.8.2007 passed by respondent nos 2, 3 and 4 being unsustainable are hereby quashed.

24. The matter is sent back before the respondent no. 4 with a direction to pass a fresh order after verifying the newly issued caste certificate dated 23.8.2007 by the Tehsildar concerned. In case, it is certified that the caste certificate has been issued by the officer competent and the petitioner belongs to Ahir by caste the petitioner shall be immediately reinstated in service with all consequential benefits. There shall be no order as to costs.
