APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2013

BEFORE
THE HON'BLE SHIVA KIRTI SINGH CHIEF JUSTICE.
THE HON'BLE DILIP GUPTA, J.

Special Appeal No. 20 of 2009

Chandrabhan Awasthi and others
Appellants/Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare, Sri Irshad Ali
Sri Rajendra Kumar Pandey
Sri Rajiv Kumar Singh
Sri Veer Singh

Counsel for the Respondents:
C.S.C., Sri H.K. Shukla
Sri K. Shahi, Sri P.N. Tripathi

U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other employees) Act 1971- Primary Schools attached with junior high school or High School-by G.O. 21.06.1973-393 Primary Sections attached Higher Secondary School-brought under payment of salaries Act-institution upgraded to High School on 10.03.1980-admittedly not covered by the G.O. dated 21.06.1973.-held-can not claim grant in aid to those attached primary Sections.

Held: Para-5
So far as the claim of the petitioners is concerned even if the order of attachment is accepted to be genuine and by a competent authority, the primary section was attached to a Junior High School only till 10th March, 1980 when the School was upgraded to High School. Clearly the primary section to which petitioners belonged cannot be covered by the policy decision of the State Government because on 21st June, 1973 the primary section was not attached with the Higher Secondary School. There is no dispute that for primary sections of Junior High Schools there was a different scheme and such Institutions were covered by the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978.

Case Law discussed:
Special Leave Petition (Civil) No. 649 of 1995

(Delivered by Hon'ble Shiva Kirti Singh, Chief Justice)

1. Heard learned counsel for the petitioners, learned counsel for the State and Sri K.Shahi, learned counsel appears for the Basic Education Officer, district Gorakhpur.

2. This appeal is directed against the judgment and order of a learned Single Judge dated 27th November, 2008 whereby writ petition preferred by the fifteen appellants bearing Civil Misc. Writ Petition No.38988 of 1999 was dismissed with costs of Rs.1,50,000/- with each of the petitioners held liable for payment of Rs.10,000/-.

3. Although challenge made in the writ petition was to an order passed by the Secretary (Basic Education) on 28th July, 1999 contained in Annexure-17 to the writ petition, the issue calling for determination was basically a question of law as to whether the petitioners were also entitled for payment of salary in accordance with the provisions of the Uttar Pradesh High Schools & Intermediate Colleges (Payment of Salaries of

Teachers & Other Employees) Act, 1971 (hereinafter referred to as the 'Act of 1971') in view of policy decision of the State Government dated 6th September, 1989 contained in Annexure-1.

4. There is no dispute on facts that the petitioners claim to be teachers of a primary section of a Junior High School till the said Junior High School became a High School in the year 1980. The Secretary as well as the learned Single Judge have doubted the genuineness of order whereby District Basic Education Officer granted recognition to the Primary Section in question as attached to the Junior High School on 12th February, 1973. The power of the District Basic Education Officer to grant recognition to such attachment and the genuineness of the very order of attachment may be issues of facts and may require going into evidence but the issue of law does not require going into such details. A perusal of the Government decision dated 6th September, 1989 clearly shows that by way of policy, in the light of various Government Orders including the one dated 21st June, 1973, the Government decided that only in respect of 393 primary sections attached to Higher Secondary Schools payment of salary to the teachers of primary sections shall be made under the provisions of the Act of 1971 although that Act applies strictly only to payment of salary of teachers of Intermediate and High Schools. A reading of the order dated 6th September, 1989 and Government Order dated 21st June, 1973 leaves no manner of doubt that the cut-off-date was 21st June, 1973 and only such primary schools which were attached with Higher Secondary Schools till that date were held eligible and included in the list of 393 Schools for grant of benefit in the matter of payment of salary under the Act of 1971.

5. So far as the claim of the petitioners is concerned even if the order of attachment is accepted to be genuine and by a competent authority, the primary section was attached to a Junior High School only till 10th March, 1980 when the School was upgraded to High School. Clearly the primary section to which petitioners belonged cannot be covered by the policy decision of the State Government because on 21st June, 1973 the primary section was not attached with the Higher Secondary School. There is no dispute that for primary sections of Junior High Schools there was a different scheme and such Institutions were covered by the Uttar Pradesh Junior High Schools (Payment of Salaries of Teachers and other Employees) Act, 1978.

6. So far as the legal issue discussed above is concerned, a judgment of learned Single Judge, on which petitioners have placed reliance, is available on record as Annexure No.18. That judgment of the learned Single Judge dated 7th January, 1993 passed in Civil Misc. Writ Petition No.6841 of 1993 only made certain observations and remanded the matter for consideration by the authorities. According to submissions of learned counsel for the Basic Education Officer, that judgment is under challenge through a Review Petition which is still pending and direction of that judgment still remains unimplemented. On the other hand, on behalf of the respondents, reliance has been placed upon a judgment of the Supreme Court dated August 1, 1997 passed in Special Leave Petition (Civil) No.649 of 1995 (State of U.P. &

Others Vs. Committee of Management of Hansraj Lal Intermediate College). The approved as a High School after June, 1973 can claim that the primary sections should be recognized within the grant-in-aid scheme of the State Government of Uttar Pradesh. The Supreme Court held that the scheme was applicable only to the High Schools which had primary sections attached to it prior to June, 1973. The respondent-Intermediate College of that case was recognized as a High School only in August, 1973 and since that date was after June, 1973, the Supreme Court held that the said School cannot claim benefit of the scheme for grant-in-aid for its primary sections.

7. In view of such clear judgment of the Supreme Court, we have no option but to dismiss this Special Appeal. It is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.04.2013.

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

Service Bench No. 75 of 2011

State of U.P. ...Petitioner
Versus
Kanhaiya Lal ...Respondent

Counsel for the Petitioner:
C.S.C.

Counsel for the Respondent:
Sri Kunchan Kumar Pandey
Sri R.K. Upadhayaya

Constitution Of India, Art.-226- Service Law-arrears of Salary-entitlement-Notional promotion with retrospective effect given- Supreme Court decided whether a Junior High School having primary sections if **whether entitled for salary for the period without discharge of duty on promotional post-held-'No'**

Held: Para-12

In any case, the Constitution Bench judgment of Hon'ble Supreme Court in the case of Paluru Ramkrishnaiah(supra) and other judgments (supra) of Hon'ble Supreme Court is a binding precedent where Hon'ble Supreme Court held that where promotion is granted from retrospective date, then the salary for the period the petitioner actually had not worked in the promotional post shall not be paid. Accordingly, the tribunal seems to have failed to exercise jurisdiction vested in it. Thus, the impugned order seems to suffer from substantial illegality.

Case Law discussed:
1996 SCC(L&S)633; (2006) 10 SCC 145; (1989)2 SCC 541; AIR 1993 SC 1740; [2005(23) LCD 173

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

1. Heard learned Standing Counsel for the petitioner and Mr. R.K. Upadhyay, learned counsel for the respondents.

2. Present writ petition has been preferred against the judgment and order dated 10.9.2009, passed by State Public Service Tribunal, Lucknow in Claim Petition No.952 of 2003.

3. While adjudicating the promotional controversy, a decision was taken to grant promotion to the claimant respondent from 31.1.2000 on the post of Senior Finance and Accounts Officer. However, it is provided by the order dated 25.10.2012 that the claimant respondent shall not be entitled for arrears of salary in the promotional avenue. The order was impugned before the tribunal and the

tribunal by the impugned judgment and order directed the petitioner State to pay salary of the period between 31.12.2000 to 25.10.2002 on the ground that the delay caused in providing promotional avenue is not because of the fault of the claimant respondent.

4. While assailing the impugned order, passed by the tribunal, the petitioner's counsel submits that the grant of promotional avenue notionally from anterior date does not confer any right to the employee to claim arrears of salary.He relied upon the cases reported in **1996 SCC (L&S) 633 State of Haryana and others versus O.P. Gupta and others, (2006)10 SCC 145 Union of India and another versus Tarsem Lal and others** and a Constitution Bench judgment of Hon'ble Supreme Court reported in **(1989)2 SCC 541 Paluru Ramkrishnaiah and others versus Union of India and another.**

5. On the other hand, learned counsel for the claimant respondent submits that the claimant was deprived of promotional avenue for no fault on his part, hence he is entitled arrears of salary. He relied upon a judgment reported in **AIR 1993 SC 1740 State of U.P. and others versus G.P. Swami** and another judgment of this Court reported in **[2005(23) LCD 173] Dhanpal Singh versus State of U.P. and another.**

6. However, the fact remains that during the period in question, i.e. almost for two years, the petitioner had not discharged duty on the higher post of Senior Finance and Accounts Officer.

7. In the case of **Paluru Ramkrishnaiah(supra)**, their Lordships of Hon'ble Supreme Court held that where promotion is granted from retrospective date, then the back wages for the period the petitioner actually did not work in the promotional post shall not be paid. For convenience, para 19 of the aforesaid judgment is reproduced as under:

"As regards back wages the Madhya Pradesh High Court held :

. It is the settled service rule that there has to be no pay for no work i.e. a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of a higher post although after due consideration he was given a proper place in the gradation list having deemed to be promoted to the higher post with effect from the date his junior was promoted. So the petitioners are not entitled to claim any financial benefit retrospectively. At the most they would be entitled to refixation of their present salary on the basis of the notional seniority granted to them in different grades so that their present salary is not less than those who are immediately below them."

8. In the case of O.P. Gupta(supra), controversy before the Apex Court was with regard to payment of arrears of salary in lieu of notional promotion made in the higher cadre. Notional promotion was granted in pursuance to Apex Court's judgment in view of fresh seniority list prepared of the cadre. Their Lordships of Hon'ble Supreme Court held that in such situation, the employee shall be entitled for the pay-scale retrospectively but without payment of arrears of salary. To quote relevant portion, to quote :

"7. This Court in Paluru Ramkrishnaiah v. Union of India (SCR at

p. 109 : SCC p. 556, para 19) considered the direction issued by the High Court and any pay and allowance during the period for which he did not perform the duties of higher post, although after due consideration, he was given a proper place in the gradation list having been deemed to be promoted to the higher post with effect from the date his junior was promoted. He will be entitled only to step up the scale of pay retrospectively from the deemed date but is not entitled to the payment of arrears of the salary. The same ratio was reiterated in Virender Kumar, G.M., N. Rlys. v. Avinash Chandra Chandha (SCC p. 482, para 16). "

9. The aforesaid proposition of law has been followed in the case of **Tarsem Lal(supra)** where in identical situation, Hon'ble Supreme Court has declined to grant arrears of salary.

10. The cases relied upon by the learned counsel for the claimant respondents seems to be based on different facts and circumstances. In the case of G.P. Swami (supra), an employee was dismissed from service but later on restored in service. Because of pendency of litigation, he could not be restored in service at earlier date. Their Lordships of Hon'ble Supreme Court held that since during the course of litigation, the employee retired, salary for the period when the employee was out of job may be paid to him.

11. The case of Dhanpal Singh(supra) was decided by one of us (Hon. Devi Prasad Singh, J) whereby while allowing for notional promotion, consequential benefit was granted with retrospective effect and from the upheld that there has to be "no pay for no work", i.e., a person will not be entitled to judgment, it appears that the notional promotion was granted only for the purpose of pensionary benefits. This Court has not passed any order to pay arrears of salary in the case of Dhanpal Singh (supra).

12. In any case, the Constitution Bench judgment of Hon'ble Supreme Court in the case of **Paluru Ramkrishnaiah**(supra) and other judgments (supra) of Hon'ble Supreme Court is a binding precedent where Hon'ble Supreme Court held that where promotion is granted from retrospective date, then the salary for the period the petitioner actually had not worked in the promotional post shall not be paid. Accordingly, the tribunal seems to have failed to exercise jurisdiction vested in it. Thus, the impugned order seems to suffer from substantial illegality.

13. The writ petition deserves to be and is hereby allowed. A writ in the nature of certiorari is issued quashing the impugned judgment and order dated 10.9.2009, passed by State Public Service Tribunal, Lucknow in Claim Petition No.952 of 2003. The claim petition is also dismissed to the extent it relates to payment of arrears of salary in lieu of notional promotion.

14. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.04.2013

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

First Appeal No. 174 of 2012

Pratima Yadav ...Petitioner
Versus
Vinod Kumar Yadav ..Respondent

Counsel for the Petitioner:
Sri D.P. Dwivedi, Sri Sharad Dwivedi

Counsel for the Respondent:
Sri Akhilesh Kr. Srivastava

Hindu Marriage Act, 1956- Section 24-Interim maintenance-During Pendency of Divorce proceeding-Trail Court rejected application-revisional Court-set-a-side the order and directed for interim maintenance-suit dismissed as withdrawn without considering interim maintenance-maintaining the order of dismissal-direction to Trail Court to decide interim maintenance application on merit-issued.

Held: Para-10
In view of the discussions made above, appeal is allowed. The impugned order is set aside in as much as it does not discuss anything about maintenance under Section 24 of the Act. The withdrawal of the suit as desired by the plaintiff (respondent before me) is not disturbed by this order but the learned Trial Court is directed to decide application of the appellant/wife under Section 24 of Hindu Marriage Act, without delay, on merits.

Case Law discussed:
AIR 1984 Punjab and Haryana 332; AIR 1988 Calcutta 98; AIR 1993 Bombay 160

(Delivered by Hon'ble Saeed-uz-Zaman Siddiqi, J)

1. The instant appeal has been preferred under Section 28 of Hindu Marriage Act, read with Section 19 of Family Court Act, against the order dated 10.10.2012, passed by learned Civil Judge (S.D.), Ambedkar Nagar in Case No.259 of 2004 by which the suit for divorce was dismissed as withdrawn.

2. Brief facts of the case are that the respondent filed suit for divorce which was registered by the learned Trial Court as Suit No.259 of 2004. In the said suit the appellant moved an application for interim maintenance under Section 24 of Hindu Marriage Act (hereinafter referred to as the "Act"), which was rejected by the learned Trial Court against which she preferred Civil Revision No.69 of 2008 which was allowed by learned Additional District Judge, Ambedkar Nagar and the impugned order was quashed and the learned Trial Court was directed to decide the application for ad-interim maintenance under Section 24 of the Act on merits. This order was passed on 12.01.2012. The mischievous husband immediately moved an application for withdrawal of the suit which was numbered as 54-A1, against which the appellant filed objection 55-C. Learned Trial Court allowed the application subject to payment of Rs.4,00/- as cost and the suit was dismissed as withdrawn. The wife/defendant has preferred this appeal against the impugned order.

3. Heard learned counsel for both the parties and perused the records.

4. The only point which is involved in this appeal is that the suit was filed in the year 2004. The application under Section 24 of the Act was moved which was dismissed vide order dated 1.10.2008. Now the suit has been dismissed as withdrawn vide order dated 10.10.2012. It was argued by the learned counsel for appellant that during the period of institution of suit till its dismissal the defendant who is appellant before this Court is entitled for ad-interim

maintenance as provided under Section 24 of the Act.

5. For ready reference Section 24 of Act is reproduced below:-

"24. Maintenance Pendente lite and expenses proceedings. Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner' s own income and the income of the respondent, it may seem to the court to be reasonable."

6. A plain reading of the Act shows that intention of the legislature is that where in any proceedings it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, order the respondent to pay the the expenses of the proceedings and monthly during the proceeding. These words make the intention of the legislature quite clear that expenses have to be allowed by the Court if the requirement as provided under Section 24 of Act are fulfilled for a period during the pendency of the suit or proceeding. Termination of proceedings cannot be treated to be a bar of providing interim maintenance under Section 24 of the Act. In this regard the order of rejection of ad-interim maintencne has already been quashed by the Revisional Court vide order dated 12.1.2012, passed in Civil Revision No.69 of 2008. It was incumbent upon the learned Trial Court to have implemented the order of the Revisional Court at the time of withdrawing of the suit which the learned Trial Court has failed to do. The object of enacting Section 24 of the Act is that an indigent spouse should not suffer during pendency of the proceedings because of his/her poverty. The whole purpose of Section would frustrate in case it is dismissed on the ground that after the decision of the main petition it does not survive.

7. A Division Bench of Punjab and Haryana High Court in the case of **Sohan Lal v. Smt. Kamlesh, AIR 1984 Punjab and Haryana 332**, has held as under:-

"From a reading of the section, it is evident that the Court, during the pendency of the proceedings under the Act, viz., for restitution of conjugal rights, judicial separation, divorce or nullity of marriage, can grant to a spouse having no sufficient come to maintain himself/herself and to meet the necessary expenses of the proceeding, maintenance pendente lite and litigation expenses. The object of enacting the section is that an indigent spouse should not suffer during the pendency of the proceedings because of his/her poverty. It is the duty of the Court to decide such an application expeditiously so that the indigent spouse is not handicapped because of want of funds. However, if the application under S. 24 is not decided during the pendency of the main petition on account of dilatory tactics of the other spouse or for some unforeseen circumstances, the whole purpose of the section stands frustrated in case it is dismissed on the ground that after the decision of main petition it does not survive. Therefore, we are of the view that even if the main petition is decided finally, the application under Section 24 which is pending decision can continue. Similarly, a

revision petition filed against an order under Section 24 can continue in spite of disposal of the main petition. In the above view, we are fortified by the following observations of D. S. Tewatia, J. in Amrik Singh v. Smt. Narinder Kaur, AIR 1979 Punj & Hary 211:-
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"If the view is that the provisions of Section 24 of the Act were intended by the legislature to enable the indigent spouse to secure wherewithal to defend the proceedings against oneself and to maintain oneself during the pendency of the proceedings, then it is incumbent upon the Courts to take an immediate decision upon the petition under Section 24 of the Act, otherwise the delay would defeat the very purpose. Otherwise in a case where the Court delays the decision on the application till the fag-end of the trial of the main case, right to maintenance and litigation expenses would be denied to the applicant on the specious argument that she had been able to prosecute the litigation for all that long period and had survived and so she was not entitled to favourable order on her application, for the litigation expenses and the interim maintenance under Section 24 of the Act was intended merely to meet the contingency of an indigent spouse not being able to prosecute the case and survive during the pendency of the proceedings which contingency would no longer exist when the proceedings had reached the stage of conclusion though not finally concluded."

It was further held:-

"Generally, the petitions under these sections are decided first and should as a matter of fact be decided before conclusion of main petition. It is further observed that a reading of Sections 24 and 26 does not show that if the main petition under Sections 9, 10, 12 or 13 is disposed of, the jurisdiction of the Court to award maintenance pendente lite by an order to be passed thereafter is taken away. This view was affirmed in Bhanwar Lal's case (supra). The same view was taken by a Division Bench of Mysore High Court in N. Subramanyam v. Mrs. M. G. Saraswathi, AIR 1964 Mys 38. It was held therein that it cannot be said that since the proceedings had themselves terminated, there was no occasion to grant interim maintenance or expense. The right to those items, if established, could not be defeated by allowing time to elapse and the pendency of the proceedings to end. We are in respectful agreement with the observations made in the aforesaid cases."

It has been further observed:-

"The word "proceeding" in the section appears at three places and it connotes the main proceedings, that is, proceedings other than proceedings under Section 24. The words "monthly during the proceedings such sum" are very important. These words show the intention of the legislature that it intended to give maintenance to the indigent spouse till disposal of the main petition. If the application under Section 24 is taken to be included in the word "proceeding"', anomalous results would follow. Therefore, we are of the opinion that if the application under Section 24 continues after dismissal of the main petition, the applicant is entitled to the maintenance till the date of the decision of the main petition."

8. Similar view has been taken by the Calcutta High Court in the case of **Chitra Sengupta v. Dhruba Jyoti Sengupta, AIR 1988 Calcutta 98**,

wherein it has been held that the wife-appellant, who appealed against a decree of divorce passed against he, filed an would be maintainable. In this case it was also held that "we are, however, of opinion that if she is otherwise entitled to maintenance under S.24, Hindu Marriage Act, the fact that she made no such application in the trial Court would be of no consequence."

9. In **Vinod Kumar Kejriwal v. Usha Vinod Kejriwal, AIR 1993 Bombay 160**, the Bombay High Court has also taken the same view as discussed above.

10. In view of the discussions made above, appeal is allowed. The impugned order is set aside in as much as it does not discuss anything about maintenance under Section 24 of the Act. The withdrawal of the suit as desired by the plaintiff (respondent before me) is not disturbed by this order but the learned Trial Court is directed to decide application of the appellant/wife under Section 24 of Hindu Marriage Act, without delay, on merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 203 Of 1990

Ram Awadh and another ...Petitioners
Versus
The Board of Revenue U.P. Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri R.S. Chauhan, Sri Alik Singh
Sri Ambrish Prasad, Sri M.K. Dhrubvanshi
Sri R.N. Singh, Sri R.S. Maurya
Sri Surendra Nath Singh

application for maintenance pendente lite and cost of litigation under Section 24, it

Counsel for the Respondents:
C.S.C., Sri S.K. Tyagi

U.P.Z.A. & L R Act, Section-198- readwith amended U.P. Act No. IVf 1969- Cancellation of lease granted prior to 28.06.68-Power vested with Astt. Collector of the Division-but lease after 28.06.68-only the collection empowered to cancel-Board of Revenue rightly set-a-side the order by Asst. Collector-being without jurisdiction but instead of directing the Collector or to place the complaint before collector-kept mum-order passed by Board modified to the extant-consequential direction issued.

Held: Para-14
Reverting back to the facts of this case, as I have noticed and found that there can be no illegality in the order passed by the learned Member, Board of Revenue, so far as it is held that the order cancelling the lease by the Sub Divisional Officer was without jurisdiction, but simultaneously, looking into the grievance of the petitioners on merit, which is still unredressed, this Court provides an opportunity to the petitioners to approach the Collector for cancellation of the lease granted in favour of the father of respondent nos. 5/1 and 5/2.

Case Law discussed:
2004(9) SCC 619; 2011(11) SCC 198; Special Appeal No. 164 of 2012; 2012(11) ADJ 70

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

1. Learned counsel for the petitioners states that he may be permitted to amend the prayer by deleting the quashing of the order dated 23.8.1973. He is permitted to so during the course of the day.

2. Through this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 8.5.1989 passed by the Board of Revenue, Allahabad in reference no. 127 of 1983-84 (Shobh Nath Vs. Gaon Sabha) and order dated 18.10.1989 passed by the learned Member, Board of Revenue, Allahabad in review application in reference no. 127 of 1988-89 (Ram Dular Vs. Shobh Nath).

3. Heard Sri M.K. Dhrubvanshi, learned counsel for the petitioners, learned Standing Counsel appearing for the State-respondents and Sri S.K. Tyagi, learned counsel for respondent nos. 5/1 and 5/2.

4. The facts giving rise to this case are that, it appears that a lease was executed by the gaon sabha in the name of father of respondent nos. 5/1 and 5/2 on 21.7.1971 for plot nos. 325, 362, 489, 885 and 480. The petitioners herein filed an application for cancellation of the aforesaid lease on the ground that respondent no. 5 is the son of sitting Gram Pradhan and had more than 3.126 acres of land, therefore, allotment could not be made in his favour. In addition to that, it was also stated that before granting the lease, no Munadi was conducted and the Sub Divisional Officer has also not approved the proposal of the gaon sabha for grant of lease. The aforesaid application was allowed by the Sub Divisional Officer vide order dated 23.8.1973. Aggrieved by the order dated 23.8.1973, respondent no. 5 had preferred revision no. 186 of 2005 before the Additional Commissioner, Faizabad Division, Faizabad. The aforesaid revision was heard by learned Additional Commissioner, Faizabad and he found that the order passed by the Sub Divisional Officer was without jurisdiction as for cancellation of agricultural lease, the Assistant Collector in-charge is not competent authority and the lease could only be cancelled by the Collector of the concerned district.

5. Taking note of this, learned Additional Commissioner made a reference before the Board of Revenue for setting aside the order passed by the Sub Divisional Officer, holding it without jurisdiction. The aforesaid reference was numbered as reference no. 127 of 1983-84 (Shobh Nath Vs. Gaon Sabha). The learned Board of Revenue, after hearing the counsel for the parties, accepted the reference and set aside the order passed by the Sub Divisional Officer dated 23.8.1973, holding it without jurisdiction. The petitioners filed a review application, reviewing the order dated 8.5.1989. The said review application was also rejected by the learned Member, Board of Revenue by the detailed order on 18.10.1989.

6. Sri Dhrubvanshi contends that the orders impugned are patently illegal orders for the simple reason that if the learned Member, Board of Revenue was of the opinion that the order passed by the Assistant Collector in-charge was without jurisdiction, he should have, after allowing the reference, directed the competent authority concerned to consider the petitioners' application only and pass an appropriate order on the same as the petitioner's grievance is still unredressed.

7. Refuting the submissions of learned counsel for the petitioners, learned Standing Counsel as well as Sri Tyagi submitted that there is no illegality in the orders impugned as before the

Board of Revenue, the question was as to whether the order passed by the Assistant Collector in-charge is within his competence or it is without jurisdiction. Learned counsel for the respondents have also placed reliance upon the amendment made from time to time in the U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short, 'the Act'). Particular attention has been drawn towards the amendment made vide U.P. Act No. IV of 1969. For appreciation, the relevant amendment as made in sections 14 and 23 of the Act are reproduced hereinunder:

"14. Amendment of Section 198 - In section 198 of the principal Act, -

(a) in sub-section (2) for the words, figures and brackets "The Assistant Collector-in-charge of the sub-division may on his own motion and shall on the application of any person aggrieved by an order of the Land Management Committee passed under sub-section (1) enquire in the manner prescribed into an allotment made under sub-section (1)", the words, figures and brackets "The Collector may of his own motion and shall on the application of any person aggrieved by an allotment referred to in sub-section (1) inquire in the manner prescribed into such allotment" shall be substituted; and

(b) in sub-section 93), for the words "an Assistant Collector-in-charge of the sub-division", the words "the Collector" shall be substituted.

23. **Transitory provisions**- Notwithstanding the amendments made in Section 198 of, and in Schedule II to, the principal Act, by this Act -

(a) the jurisdiction to make inquiries and pass orders under sub-section (2) of the said Section 198; and

(b) the jurisdiction to entertain and decide suits under sub-section (4) of the said section, in relation to allotments referred to in sub-section (1) of the said section, made prior to the 28th day of June, 1968, shall continue to vest in the Assistant Collector-in-charge of the sub-division as if this Act had not been passed."

8. As has been noticed, before filing of the application for cancellation of the lease, another amendment was made in the Act, known as "U.P. Act No. 35 of 1970". In view of section 3 of this Act, the entire provisions contained in section 198 earlier have been substituted by inserting the following provisions:

"3. Amendment of Section 198 - For Section 198 of the principal Act, the following shall be substituted, namely:

'198. Order of Preference in admitting persons to land under Sections 195 and 197 - (1) In the admission of persons to land as sirdars or asami under Section 195 or Section 197 (hereinafter in this section referred to as 'allotment of law'), the Land Management Committee shall, subject to any order made by a court under Section 178, observe the following order of preference:

(a) any educational institution recognized by the Director of Education, Uttar Pradesh or by the Board of High School and Intermediate Education, Uttar Pradesh or by a University and imparting instructions in or providing for research in

agriculture, horticulture or animal husbandry;

(b) landless widow, sons, unmarried daughters and parents residing in the circle, of a person who has lost his life by enemy action while in active service in the Armed Forces of the Union;

(c) a person residing in the circle, who has become landless on account of his land having been compulsorily acquired under the provisions of any law relating to acquisition of land on or after the date of vesting;

(d) a landless person, residing in the circle, retired, released or discharged from service (other than service as an officer) in the Armed Forces of the Union;

(e) landless political sufferer residing in the circle who has not been granted political pension;

(f) a landless agricultural labourer residing in the circle and belonging to a scheduled caste or scheduled tribe;

(g) any other landless agricultural labourer residing in the circle;

(h) a bhumidhar, sirdar or asami holding land less than 1.26 hectares (3.125 acres);

(i) any other person.

Explanation I - For the purpose of this sub-section -

(i) 'landless' refers to a person who or whose spouse or minor children hold no land as bhumidhar, sirdar or asami; and except in clause (c), also held no land as such within two years immediately preceding the date of allotment; and

(ii) 'agricultural labourer' means a person whose main source of livelihood is agricultural labour or assistance or participation with any person in the actual performance of agricultural operations on any land in consideration of a right to share in the produce grown on such land.

Explanation II - For the purposes of clause (e), 'political sufferer' means a person who is certified by the Collector to have undergone either preventive detention or sentence of imprisonment (either as a substantive sentence or in default of payment of fine) for not less than three months for participation in any movement connected with the national struggle for Freedom during the period between 1930 and 1947.

(2) The land that may be allotted to -

(i) an education institution under clause (a) of sub-section (1) shall not exceed such area as together with the area held by it immediately before the allotment would aggregate to more than 5.04 hectares (12.50 acres);

(ii) any person under clause (b), clause (c), clause (d), clause (e), clause (f), clause (g) or clause (i) of sub-section (1) shall not exceed an area of 1.26 hectares (3.125 acres); and

(iii) any person under clause (h) of sub-section (1) shall not exceed such area as together with the land held by him as bhumidhar, sirdar or asami immediately before the allotment would aggregate to more than 1.26 hectares (3.25 acres).

(3) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such

allotment and if he is satisfied that the allotment is irregular he may:-

(i) cancel the allotment and the lease, if any, and thereupon the right, title and interest of the allottee or lessee or any person claiming through him in the land allotted or leased shall cease, and such land shall revert to the Gaon Sabha, and

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

(4) Every order passed by the Collector under Sub-section (3) shall subject to the provisions of Section 333, be final."

9. From the perusal of the clause (a) of section 14 of U.P. Act No. IV of 1969, it would transpire that the power of inquiry with respect to cancellation of lease referred in sub-section (1) of section 198 of the Act vested in Assistant Collector in-charge of the Sub Division, has been substituted by mentioning the words, "the Collector." However, in view of section 23, as has been quoted above, with respect to sub-section (1) of section 198 of the Act, the power prior to 28.6.1968 shall continue to vest in the Assistant Collector in-charge of the Sub Division, meaning thereby, for cancellation of lease executed prior to 28.6.1968, the power of cancellation shall remain in tact with the Assistant Collector of the sub division. This has further been substituted by the U.P. Act No. 35 of 1973 by substituting section 198 in toto in view of section 3 of the amended Act, where sub-section (3) has been inserted and as has been quoted above, the power of cancellation of lease has been conferred to the Collector while exercising his suo motu power or on an application filed by the aggrieved person.

10. On the bare reading of the aforesaid amendments and in view of the fact that the lease of respondent no. 5 was granted on 21.7.1973, it is doubtless that the power of cancellation of lease on the relevant date was vested in the Collector and not in Assistant Collector in-charge, therefore, order impugned passed by the Deputy Collector is without jurisdiction. It is settled law that the order passed without jurisdiction is nullity in the eye of law and no legal consequences can flow from such orders, as the jurisdiction can neither be assumed nor presumed nor conferred or acquired by acquiescence of the parties and the only fate of such order is that the order becomes void abinitio. Reference may be given to **Managing Director, Army Welfare Housing Organization Vs. Sumangal Services Pvt. Ltd.** 2004 (9) SCC 619, **Sarup Singh and Another Vs. Union of India and Another** 2011 (11) SCC 198 and a Division Bench of this Court in the case of **Committee of Management Shri Jawahar Inter College and Another Vs. State of U.P. and Others** (Special Appeal No. 164 of 2012 decided on 25.1.2012).

11. However, the question remains that although the order impugned in the revision, i.e., cancellation of the lease, is without jurisdiction, but it is apparent that the grievance of the petitioners, which is on merit, pointing out the irregularity in the process of allotment has never seen the light of the day. The right of seeking cancellation of the lease is a right conferred by the statute under sub-section (2) of section 198 of the Act at the relevant time and on the date when the application was filed, it was vested in

Collector under sub-section (3) of section 198 of the Act.

12. I am of the opinion that once the irregularity in the process of allotment was pointed out by the aggrieved persons, i.e., the petitioners, it was incumbent upon the Assistant Collector in-charge, who was dealing with the matters, to return the application for presentation before the Collector, who was competent to deal with such matters in view of amended sub-section (2) of section 198 of the Act vide U.P. Act No. IV of 1969 and in view of sub-section (3) of section 198 of the Act vide U.P. Act No. 35 of 1970, but the Assistant Collector in-charge had failed to return the application for presentation before the Collector and exercised power which was not vested in him. The learned Member, Board of Revenue although had held that the order passed by the Sub Divisional Officer is without jurisdiction, but he also failed in performing his duties being a supervisory authority of the revenue courts relating with such matters taking note of the statutory right conferred by the statute to the petitioner to seek cancellation of the lease in view of sub-section (2) of section 198 of the Act vide U.P. Act No. IV of 1969 and in view of sub-section (3) of section 198 of the Act vide U.P. Act No. 35 of 1970, by giving a liberty to the petitioners either to approach the Collector or by directing the Collector to look into the grievance of the petitioners on merit and pass an appropriate order on the application of thte petitioners in accordance with law.

13. Sri Tyagi has submitted that the petitioner are not aggrieved persons within the meaning of sub-section (1) of section 198 of the Act and they do not fall in the eligibility zone for grant of lease and they have filed application only on the ground that on the leased land, their old trees are standing. This Court in the case of Munshi Vs. State of U.P. and Others 2012 (11) ADJ 70 has held that the persons, who is in possession of the leased land and if the lease has been granted without evicting him in accordance with the provisions contained under section 122-B of the Act, he can always be treated to be a person aggrieved and he can maintain the application for cancellation of the lease.

14. Reverting back to the facts of this case, as I have noticed and found that there can be no illegality in the order passed by the learned Member, Board of Revenue, so far as it is held that the order cancelling the lease by the Sub Divisional Officer was without jurisdiction, but simultaneously, looking into the grievance of the petitioners on merit, which is still unredressed, this Court provides an opportunity to the petitioners to approach the Collector for cancellation of the lease granted in favour of the father of respondent nos. 5/1 and 5/2.

15. In case such application is filed by the petitioners, along with a certified copy of the order of this Court, the Collector concerned is directed either to decide the application of the petitioners himself or by directing it to be decided by any other Additional Collector, as the case may be, without entertaining any objection to the limitation. The parties are at liberty to lead their evidence and advance their submissions before the Collector concerned.

16. With the aforesaid observation / direction, this writ petition is disposed of.

APPELLATE JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 10.04.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.

Smt. Pushpa and another
...Respondents/appellants
Versus
Smt. Anshu chaudhary . ..Respondent

Counsel for the Petitioners:
Sri Sumit Daga, Sri Alok Kumar Singh

Counsel for the Respondent:
Sri S.K.Tripathi, Sri Shailendra Singh
Sri M.A. Qadeer

Code of Civil Procedure Section-11- 'Resjudi-cata' explained-application under guardian & Wards Act-decided on merit-by which grand father given custody of minor child-subsequent change of circumstances when respondent being natural mother of the child-got working-as lecturer-considering welfare of minor-mother being natural guardian-can not be denied the custody of minor girl-principle of Resjudicata-has no application

Held: Para-17
The Apex Court in the above judgment said that the terms of Section 11 of C.P.C. would not be strictly applicable in a case where decree was passed in terms of compromise, however, principle of estoppel would still apply.

Held: Para-22
There is one more reason on account of which we are of the view that Application No.19 of 2012 filed by the respondent cannot be held to be barred by Section 11 of C.P.C. or principle of estoppel. There are series of judgments taking the view that the order of custody of a child under the provisions of the 1890 Act are temporary in nature and are in the nature of interlocutory order which cannot be held to be final adjudication. The appointment of guardian to one person and custody of child given at one set of circumstances may no longer be beneficial to the welfare of the child and the custody and guardianship can be changed from time to time looking to the relevant facts and circumstances. The Apex Court in Rosy Jacob's case (supra) held that all orders relating to the custody are temporary in nature. Following was laid down in paragraph 18 of the judgment:

THE HON'BLE MANOJ MISRA, J.

First appeal No. 212 of 2013

Held: Para-28
In view of the foregoing discussions, we are of the view that application filed by the respondent could not have been barred by res-judicata or estoppel and the respondent had every right to maintain the application and pray for custody.

CPC-Order XXIII, Rule 3-A- Application decided in terms of compromise-when the respondent being natural mother of minor girl was unemployed-by change of circumstances after getting appointed as lecturer in Govt. Girls Inter College-moved application for getting custody of her minor child-whether second application maintainable? held-"Yes'

Held: Para-31
The Durga Prasad Tandon's case (supra) was a case where suit was filed for setting aside the decree which was obtained by compromise. In above circumstances the Court held that bar of Order XXIII, Rule 3-A of C.P.C. shall apply. The said case has no application in the present case since firstly the subsequent application was not for setting aside the earlier order passed on compromise and secondly the application was filed on the basis of changed circumstances. In view of the aforesaid, we are of the view that Application

No.19 of 2012 was not barred by Order XXIII, Rule 3-A of C.P.C.

Case Law discussed:
2011 All. C.J. 700=(2011) 3 SCC 408; 2000(2) 379; 1973(1) SCC 840; 1989 Supp (2) SCC 627; AIR 1964 SC 82; (1886) ILR 8 All 324, p. 32; AIR 1967 SC 591; AIR 1970 SC 406; AIR 2000 Madhya Pradesh 1; (1998) 1 SCC 112; (2001) 4 SCC 71; AIR 1992 Kerala 290;

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

1. This first appeal has been filed by the appellants, who are grandmother and grandfather of a minor girl Km. Resha aged about 6 years, against the judgment and order dated 27th February, 2013 passed by the Additional Principal Judge, Family Court, Meerut by which the Court has allowed the application filed by the respondent, the mother of child, for custody of the child.

2. We have heard Sri Sumit Daga and Sri Alok Kumar Singh learned counsel for the appellants and Sri M.A. Qadeer, Senior Advocate, assisted by Sri S.K. Tripathi for the respondent.

3. Brief facts giving rise to this first appeal are necessary to be noted. The respondent Smt. Anshu Chaudhary was married on 6th December, 2005 with Amit Chaudhary, the son of the appellants. Km. Resha, a girl child, was born from the wedlock on 28th January, 2007. The husband of the respondent died on 8th December, 2010 in a car accident. The respondent along with her daughter continued to live with appellants till 28th February, 2011 after which it is alleged that respondent along with her child were turned out from the house. The respondent started living with her parents at T.P. Nagar, Meerut. The respondent's further case is that on 18th March, 2011 the appellants with their daughter and son-in-law came to T.P. Nagar, residence of the respondent's father, and snatched Km. Resha with regard to which a complaint was also submitted. Smt. Pushpa, appellant No.1, filed an application being Application No.18 of 2011 under Section 7 of the Guardians and Wards Act, 1890 (hereinafter referred to as the 1890 Act) praying that she be appointed as guardian of the minor Km. Resha. Smt. Anshu Chaudhary also filed an application being Application No.19 of 2011 praying that Km. Resha be given in her custody. In both the cases a joint application for compromise was submitted by appellant Smt. Pushpa and respondent Smt. Anshu Chaudhary that Smt. Pushpa shall be guardian of Km. Resha with whom the minor shall live and the minor in vacation shall live with her mother. The Court on the basis of the compromise passed an order on 29th October, 2011. In the end of the year 2011, the respondent was appointed as Lecturer in Government Girls Inter College, Bareilly where she joined and started working. The respondent filed an application under Section 10/12 of the 1890 Act being Application No.19 of 2012 in the Court of Principal Judge, Family Court, Meerut praying that custody of minor child be given to her who is her natural mother. In the application it was pleaded that minor is not getting good education and she is not being looked after well. It was pleaded that respondent is earning and shall well look after the child. Affidavits were filed by the respondent in support of her case. The statement of respondent was also recorded by the Principal Judge, Family Court and she was cross examined by the appellants. Affidavits were also filed by

the appellants and the statements of the appellants were also recorded. The Additional Principal Judge, Family Court by judgment and order dated 27th February, 2013 allowed the application of the respondent and directed the appellants to handover the custody of child within 30 days. This first appeal under Section 19 of the Family Court Act has been filed by the appellants against the judgment and order of the trial Court.

4. Learned counsel for the appellants, challenging the order of the Additional Principal Judge, Family Court, submitted that the application filed by respondent being Application No.19 of 2012 was barred by principles of res-judicata in view of the fact that earlier the custody was given to appellant No.1 on the basis of a compromise dated 29th October, 2011 between the parties. It is submitted that the respondent, if aggrieved by the earlier order of the Court dated 29th October, 2011 appointing appellant No.1 as guardian, should challenge the earlier order dated 29th October, 2011 instead of filing another application. It is submitted that earlier decision dated 29th October, 2011 operated as res-judicata and the Application No.19 of 2012 was liable to be dismissed on this ground alone. It is further submitted that appellants, who are grandmother and grandfather of the child, are financially well off to take care of all the needs of the child. It is submitted that child is studying in an institution and all expenses of the child are being borne by the appellants. It is submitted that appellant No.2, who was working as Electrician in Daurala Sugar Mill, is also running a medical store from where sufficient income is received. The appellants have also taken life insurance policy in favour of the child. It is further stated that appellants have also engaged a home tutor to teach the child at home. The appellants are fully competent to take care of the child and there was no occasion to change the guardianship or to give custody of the child to the respondent.

5. Learned counsel for the appellant has placed reliance on judgment of the Apex Court in the case of **M. Nagabhushana vs. State of Karnataka and others** reported in 2011 All. C.J. 700=(2011) 3 SCC 408 and judgment of a learned Single Judge of this Court in the case of **Durga Prasad Tandon and others vs. Gaur Bramhan Sabha, Nainital and others** reported in 2000(2) Allahabad Rent Cases 379.

6. Sri M.A. Qadeer, Senior Advocate, appearing for the respondent, refuting the submissions of learned counsel for the appellants, submitted that the Additional Principal Judge, Family Court has rightly allowed the application filed by the respondent, mother of the child. It is submitted that earlier decision dated 29th October, 2011 was only a compromise decision and was not a decision on merits, hence principles of res-judicata are not attracted. It is submitted that respondent, the mother, is working as teacher in Government Girls Inter College and receiving a salary of about 32,000/- per month and is fully competent to take care of all the needs of the child. It is stated that mother being natural guardian is entitled to have custody of the child. It is further submitted that circumstances have changed after 29th October, 2011 and application filed by the respondent for custody of the child was fully maintainable.

7. Sri Qadeer, Senior Advocate, appearing for the respondent has placed reliance on a judgment of the Apex Court in the case of **Rosy Jacob vs. Jacob a Chakramakkal** reported in 1973(1) SCC 840.

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

9. From the pleadings on the record and submissions made by learned counsel for the parties, following issues emerge for consideration in the present appeal:-

(i)Whether earlier order of the Principal Judge, Family Court dated 29th October, 2011 giving custody of child to appellant No.1 on the basis of compromise submitted by both the parties, shall operate as res-judicata in subsequent application No.19 of 2012 filed by the respondent praying for custody of the child?

(ii)Whether Application No.19 of 2012 filed by the respondent was barred by the provisions of Order XXIII, Rule 3A of C.P.C.?

(iii)Who among, mother on one hand and grand parents on other hand, is best entitled to have custody of the child taking into consideration relevant facts and circumstances specially the welfare of the child?

10. Before we proceed to consider the issues, as noted above, it is necessary to have a look over the relevant statutory provisions governing the field. The 1890 Act was enacted to consolidate and amend the law relating to guardian and wards. Section 7 of the 1890 Act provides for power of the Court to make order as to the guardianship. Section 8 provides for persons entitled to apply for orders. Section 9 provides that application in respect of guardianship of a person shall be made to the District Court having jurisdiction to the place. Section 10 provides for form of the application and the facts which are required to be stated in the application. Section 12 empowers the Court to make interlocutory order for production of minor and interim protection of person and property. Section 13 provides for hearing of evidence before making the order. Section 17 enumerates the matters to be considered by the Court in appointing guardian. Section 17 of the 1890 Act, which is relevant for the purpose, is quoted below:-

"17. Matters to be considered by the Court in appointing guardian.- (1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

* * * * *

(5) The Court shall not appoint or declare any person to be a guardian against his will."

11. The Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as the 1956 Act) was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus. Section 5 of the 1956 Act gives overriding effect to the Act. Section 6 deals with natural guardian of a Hindu minor. Section 6(a) which is relevant, is quoted below:-

"6. **Natural guardians of a Hindu minor** - The natural guardian of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or unmarried girl- the father, and after him, the mother, provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

....."

12. Section 13 of the 1956 Act enumerates welfare of minor to be paramount consideration, which is quoted below:-

"13. Welfare of minor to be paramount consideration - (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of opinion that his or her guardianship will not be for the welfare of the minor."

13. Now we come to the first issue as to whether application filed by the respondent being Application No.19 of 2012 was barred by principles of res-judicata. Section 11 of the Code of Civil Procedure provides for res-judicata. For applicability of Section 11 of C.P.C. Certain ingredients have to be fulfilled which have been enumerated in Section 11 itself. Section 11 of the C.P.C. is quoted below:-

"11. res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

*[Explanation VII.- The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to proceedings for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.-An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in as subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."

14. To constitute a matter res-judicata, the following conditions must exist:-

(i)The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually (explanation III) or constructively (explanation IV) in the former suit.

(ii)The former suit must have been a suit between the same parties or between parties under whom they or any of them claim. Explanation VI is to be read with this condition.

(iii)The parties as aforesaid must have litigated under the same title in the former suit.

(iv)The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue has been subsequently raised. Explanation II is to be read with this condition.

(v)The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the first suit. Explanation V is to be read with this condition.

15. The Apex Court in the case of **Pandurang Ramchandra Mandlik and another vs. Shantibai Ramchandra Ghatge** and others reported in 1989 Supp (2) SCC 627, had occasion to consider the expression "heard and finally decided". It

was held by the Apex Court that expression "heard and finally decided" means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. Following was observed by the Apex Court in paragraph 20 of the said judgment:-

"20. The expression 'heard and finally decided' in Section 11 means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. It is essential that it should have been heard and finally decided...."

16. Present is a case where in earlier applications filed for custody and guardianship, a compromise application was submitted by appellant No.1 and respondent on 29th October, 2011 on the basis of which appellant No.1 was appointed as guardian. Whether on the basis of an order passed on compromise, the plea of res-judicata can be sustained is the issue which had come for consideration in several cases before the Apex Court. In the case of **Sunderbai and another vs. Devaji Shankar Deshpande** reported in AIR 1964 SC 82, the Apex Court had occasion to consider the issue "whether the suit was barred by res-judicata by reason of consent decree passed in Suit No.291 of 1937". The Apex Court laid down following in paragraph 12 of the said judgment:-

"12. The bar of 'res judicata' however, may not in terms be applicable in the present case, as the decree passed in Suit No. 291 of 1937 was a decree in terms of the compromise. The terms of section 11 of the Civil Procedure Code would not be strictly applicable to the same but the underlying principle of estoppel would still apply. Vide: the commentary of Sir Dinshaw Mulla on section 11 of the Civil Procedure Code at page 84 of the 11th Edition under the caption 'Consent decree and estoppel':

"The present section does not apply in terms to consent decrees; for it cannot be said in the cases of such decrees that the matters in issue between the parties 'have been heard & finally decided' within the meaning of this section. A consent decree, however, has to all intents and purposes the same effect as 'res judicata' as a decree passed 'in invitum'. It raises an estoppel as much as a decree passed 'in invitum."

17. The Apex Court in the above judgment said that the terms of Section 11 of C.P.C. would not be strictly applicable in a case where decree was passed in terms of compromise, however, principle of estoppel would still apply.

18. Before we proceed further, it is useful to recall a judgment of Justice Mahmud in the case of **Sita Ram vs. Amir Begam** reported in (1886) ILR 8 All 324, p. 332 in which learned Judge has explained the differences between the plea of res-judicata and an estoppel. Following was laid down by Justice Mahmud:-

"Perhaps the shortest way to describe the difference between the plea of res judicata and an estoppel, is to say that while the former prohibits the court from entering into an inquiry at all as to a matter already adjudicated upon, the latter prohibits a party after the inquiry has already been entered upon, from proving

anything which would contradict his own previous declaration or acts to the prejudice of another party who relying upon those declaration or acts to the prejudice of another party has altered his position. In other words, res judicata prohibits an inquiry in limine, whilst an estoppel is only a piece of evidence."

19. The Apex Court had occasion to consider plea of res-judicata in context of compromise decree in the case of **Pulavarthi Venkata Subba Rao and others vs. Valluri Jagannadha Rai** reported in AIR 1967 SC 591. In the said case it was contended before the Apex Court that compromise decree is a decree which finally determine the right of the parties, hence principles of res-judicata can be applicable when a subsequent suit is filed between the parties raising same issue. Repelling the contention, following was laid down in paragraph 10:-

"10. The appellants then seek to reach the same result by invoking the principle of res judicata. It is contended that the earlier decision amounts to res judicata and the respondents- were not entitled to raise the same issue which by implication must be held to be decided against them by the compromise judgment and decree. In the alternative, it is contended that the earlier compromise decree creates an estoppel against the respondents because the appellants at that time had shown some concession in the amount which they were claiming and a decree for a lessor amount was passed. This estoppel was said to be an estoppel by judgment. In our opinion, these contentions cannot be accepted. The Act as amended confers this right upon petty agriculturists to save them from the operation of loans taken at usurious rates of interest. No doubt the conduct of respondents in omitting to press the claim for reduction of the amount of the claim on the first occasion is significant, but this did not Constitute res judicata, either statutory or constructive. The compromise decree was not a decision by the Court. It was the acceptance by the Court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it. Only a decision by the court could be res judicata, whether statutory under s.11 of the Code of Civil Procedure, or constructive as a matter of public policy on which the entire doctrine rests. The respondents claim to raise the issue over again because of the new rights conferred by the Amending Act, which rights include, according to them, the re-opening of all decrees which had not become final or which had not been fully executed. The respondents are entitled to take advantage of the amendment of the law unless the law itself barred them, or the earlier decision stood in their way. The earlier decision cannot strictly be regarded as a matter which was "heard and finally decided". The decree might have created an estoppel by conduct between the parties; but here the appellants are in an unfortunate position, because they did not plead this estoppel at any time. They only claimed that the principle of res judicata governed the case or that there was an estoppel by judgment. By that expression, the principle- of res judicata is described 'in English law. There is some evidence to show that the respondents had paid two sums under the consent decree, but that evidence cannot be looked into in the absence of a plea of estoppel by conduct

which needed to be raised and tried. The appellants are, however, protected in respect of these payments by the proviso to cl. (iii) of s. 16 of the Amending Act."

20. Again in the case of **Baldevdas Shivlal and another vs. Filmsitan Distributors (India) Pvt. Ltd. And others** reported in AIR 1970 SC 406, same issue came before the Apex Court. In the said case submission was considered that previous judgment being a judgment of consent, the same shall operate as res-judicata. Repelling the submission, following was laid down in paragraph 8 of the said judgment:-

"8. The Trial Judge in overruling the objection did not decide any issues at the stage of recording evidence : he was not called upon to decide any issues at that stage. The observations made by him obviously relate to the arguments advanced at the Bar and can in no sense be regarded even indirectly as a decision on any of the issues. But the High Court has recorded a finding that the agreement dated November 27, 1954, created a lease and that the consent decree operated as res judicata. A consent decree, accord- ing to the decisions of this Court, does not operate as res judicata, because a consent decree is merely the record of a contract between the parties to a suit, to which is superadded the seal of the Court. A matter in contest in a suit may operate as res judicata only if there is an adjudication by the Court : the terms of s. II of the Code leave no scope for a contrary view. Again it was for the Trial Court in the first instance to decide that question and there- after the High Court could, if the matter were brought before it by way of appeal or in exercise of its revisional jurisdiction, have decided that question. In our judgment, the High Court had no jurisdiction to record any finding on the issue of res judicata in a revision application filed against an order refusing to uphold an objection to certain question asked to a witness under examination."

21. The Madhya Pradesh High Court in the case of **Smt. Rehana Parveen vs. Naimuddin** reported in AIR 2000 Madhya Pradesh 1, had occasion to consider the similar issue raised on an application filed under the provisions of the Guardian and Wards Act, 1890 where an earlier order was passed on the basis of compromise. In the said case the issue was custody of the minor daughter. The application was filed by mother for custody of minor daughter which application was opposed on the ground that by another order in Case No.36 of 96, the matter of custody of minor daughter was already decided, hence the said order shall operate as res-judicata and the matter cannot be agitated. The trial Court rejected the application of mother against which matter was taken in revision in the High Court. It was contended that there was substantial change of circumstances, hence the application filed by mother could not have been rejected on the ground of res-judicata. The High Court accepted the plea of mother that earlier order shall not operate as res-judicata. Following was laid down in paragraphs 3, 4, 5 and 6 of the said judgment by the Madhya Pradesh High Court:-

3. The learned counsel for the petitioner has urged firstly that the earlier order dated 31-3-97 in Guardian and Wards Case No. 36/96 was passed on the basis of compromise arid was not on merits, and would not therefore constitute res-judicata, as has been laid down in

Pulavarthi Venkata Subba Rao v. Valluri Jagannadha too, AIR 1967 SC 591. It is pointed out that the petitioner is the second wife of the respondent. It has been submitted in the above context that the respondent-husband after the above order passed as a result of consent and compromise between the parties, married a third, wife who died an unnatural death. A child was also born from the third marriage. Therefore, the respondent has married for the fourth time. It has therefore been urged that there is considerable change in the circumstances since the order granting custody of minor was passed. It was further submitted that the view of changed circumstances, as above, it would not be in the interest and welfare of minor that she should remain in the custody of the respondent-husband. It has therefore been urged that the matter deserves reconsideration. Reliance has been placed on Surajmal v. Radheshyam, AIR 1988 SC 1345.

4. As against this, the learned counsel for the respondent has submitted that the parties had with full knowledge of the implications thereof in the previous case No. 36/96, voluntarily entered into an agreement which was duly considered by the trial Court, where after the order dt/- 31-3-97 was passed, keeping the ultimate welfare of the child in mind. It has therefore, been urged that the order passed as above, does not call for interference at the instance of petitioner-wife.

5. It is noticed that the order of the previous case No. 36/96 between the parties was passed on the basis of agreement between the parties. Hence, as laid down in Pulavarthi Venkata Subba Rao (supra) the same was not a decision on merits by the Court; hence would not operate as res-judicata and thus would not operate as bar to the consideration of this application for custody of the child, under Guardian and Wards Act. Reference in the above connection may also be made to Baldevdas Shivlal v. Filmistan Distributors (India) Pvt. Ltd., AIR 1970 SC 406. Moreover, there is substantial change in the circumstances of the parties as has been averred in the application, which requires the same to be considered on merits.

6. It may further be pointed out that while hearing and deciding the matter of custody of child paramount consideration before the Court always is the ultimate welfare of the minor. No other consideration possibly could prevail with the Court, and nothing could prohibit a Court from consideration of the matter if need be, even if it is for the second or third time. The technical principle of res-judicata would not be operative more so, if substantial change in circumstances is averred and found prima facie justified. If such is the case, the subsequent application for custody of the minor cannot be thrown out at the threshold holding it to be not maintainable. The circumstances in the instant case as averred by the petitioner in her petition and as contended by her learned counsel prima-facie justify reconsideration of her petition on merits."

22. There is one more reason on account of which we are of the view that Application No.19 of 2012 filed by the respondent cannot be held to be barred by Section 11 of C.P.C. or principle of estoppel. There are series of judgments taking the view that the order of custody of a child under the provisions of the 1890 Act are temporary in nature and are in the nature of interlocutory order which cannot be held to be final

adjudication. The appointment of guardian to one person and custody of child given at one set of circumstances may no longer be beneficial to the welfare of the child and the custody and guardianship can be changed from time to time looking to the relevant facts and circumstances. The Apex Court in Rosy Jacob's case (supra) held that all orders relating to the custody are temporary in nature. Following was laid down in paragraph 18 of the judgment:-

"18. The appellant's argument based on estoppel and on the orders made by the court under the Indian Divorce Act with respect to the custody of the children did not appeal to us. All orders relating to the custody of the minor wards from their very nature must be considered to be temporary orders made in the existing circumstances. With the changed conditions and Circumstances, including the passage of time, the Court is entitled to vary such orders if such variation is considered to be in the interest of the welfare of the wards. It is unnecessary to refer to some of the decided cases relating to estoppel based, on consent decrees. cited at the bar. Orders relating to custody of wards even when based on consent are liable to be varied by the Court, if the welfare of the wards demands variation."

23. In the case of Dhanwanti Joshi vs. Madhav Unde reported in (1998)1 SCC 112, again same proposition was laid down. In the said case the Apex Court held that there must be proof of substantial change in the circumstances presenting a new case. Following was laid down in paragraph 21:-

"21. It is no doubt true that orders relating to custody of children are by their very nature not final, but are interlocutory in nature and subject to modification at an future time upon proof of change of circumstances requiring change of custody but such change in custody must be proved to be in the paramount interests of the child [Rosy Jacob vs. Jacob a. Chakramakkal (1973 (1) SCC 840)]. However, we may state that in respect of orders as to custody already passed in favour of the appellant the doctrine of res judicata applies and the family Court in the present proceedings cannot re-examine the facts which were formerly adjudicated between the parties on the issue of custody or are deemed to have been adjudicated. There must be proof of substantial change in the circumstances presenting anew case before the court. It must be established that the previous arrangement was not conductive to the child's welfare or that it has produced unsatisfactory results. Ormerod L.J. pointed out in S vs. W [(1981) 11 Fam.Law 21 (82) {CA)] that

"the status quo argument depends for its strength wholly and entirely on whether the status quo is satisfactory or not, the more satisfactory the status quo, the stronger the argument for not interfering. The less satisfactory the status quo, the less one requires before deciding to change".

24. In the case of **R.V. Srinath Prasad vs. Nandamuri Jayakrishna and others** reported in (2001)4 SCC 71, it was again held by the Apex Court that custody orders by their nature can never be final, however, before a change is made it must be proved to be in the paramount interest of the children. Following was observed in paragraph 11 of the judgment:-

"11. The High Court appears to have overlooked the settled principle that custody orders by their nature can never be final; however , before a change is made it must be proved to be in the paramount interest of the children. In a sensitive matter like this no single factor can be taken to be decisive. Neither affluence nor capacity to provide confortable living should cloud the consideration by the Court. Here we may refer to the decision of this Court in Jai Prakash Khadria vs. Shyam Sunder Agarwalla and another 2000(6) SCC 598. In such matters usually, Courts while granting the custody of minor children to one party extend the facility of visiting them to the other. At the cost of repetition we may state that we are not discussing the merits of the case pleaded by the parties in detail since the application for the custody is pending for adjudication before the Family Court at Hyderabad."

25. In the present case the respondent's case before the Additional Principal Judge, Family Court was that circumstances have substantially changed under which the respondent is claiming custody of the children. There is material on the record which indicate that respondent got a job of lecturer in Government Girls Inter College, Bareilly in the end of the year 2011 which was a changed circumstance on the basis of which respondent has claimed for custody. It is on the record that at the time when compromise order was passed for custody on 29th October, 2011, the respondent was not receiving any earning and after she being appointed as Lecturer, she was getting salary of Rs.32,000/- per month. We are of the view that getting a job of lecturer in girls' institution by the respondent and earning of about Rs.32,000/- per month was relevant change in the circumstances on the basis of which respondent could have very well filed the application for custody. In the Application No.19 of 2012, the respondent has also come with the case that minor is not getting good education and she is not being well looked after. It was further stated by the respondent that at the time when compromise was entered, she was not in a fit state of mind, her husband having died less than a year from the aforesaid date.

26. The learned counsel for the appellants has placed reliance on two judgments, one of the Apex Court and another of a learned Single Judge of this Court. In **M. Nagabhushana vs. State of Karnataka and others** case (supra) the Apex Court had occasion to consider the principles of res-judicata. The Apex Court laid down that principles of res-judicata seek to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties. Elaborating the principles of res-judicata, following was laid down by the Apex Court in paragraphs 14 and 15 of the said judgment:-

"14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, `interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is `nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the

extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

15. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."

27. There cannot be any dispute to the proposition as laid down by the Apex Court in the said case. In the aforesaid case the land acquisition proceedings were challenged before the High Court by means of the writ petition. The land acquisition proceedings were challenged in a previous writ petition in the year 2003 in which land acquisition proceedings were quashed but in appeal the judgment was reversed. The Division Bench order was also upheld. Subsequently another writ petition was filed in the year 2007 challenging the acquisition proceeding. In above context, the Apex Court held that principles of res-judicata are fully applicable. The said case does not help the appellants in the present case.

28. In view of the foregoing discussions, we are of the view that application filed by the respondent could not have been barred by res-judicata or estoppel and the respondent had every right to maintain the application and pray for custody.

29. The issue, which is to be considered next, is as to whether the application filed by the respondent was barred by Order XXIII, Rule 3-A of C.P.C. Order XXIII, Rule 3-A of C.P.C. is as under:-

"**3-A. Bar to suit** - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."

30. The judgment of learned Single Judge in **Durga Prasad Tandon's** case (supra) was a case where the compromise decree was challenged on the ground that it was obtained by playing fraud and exercising coercion in a suit. The Suit No.155 of 1989 was filed praying for cancellation of decree dated 24th July, 1987 on the ground that compromise was obtained by coercion, fraud etc. The trial Court dismissed the suit as not maintainable. The lower appellate Court recorded a finding that compromise decree was not obtained by fraud or exercise of undue coercion. The trial Court had dismissed the suit as not maintainable in view of Order XXIII, Rule 3-A of C.P.C. Although the trial Court dismissed the suit only on the ground that suit was barred under Order

XXIII, Rule 3-A of C.P.C. but the the lower appellate Court scrutinise the evidence and on appraisal of evidence recorded a finding that there was no fraud in earlier decree. The High Court held that suit was barred under Order XXIII, Rule 3-A of C.P.C. The High Court dismissed the second appeal taking the view that the suit was barred under Order XXIII, Rule 3-A of C.P.C.

31. **The Durga Prasad Tandon's** case (supra) was a case where suit was filed for setting aside the decree which was obtained by compromise. In above circumstances the Court held that bar of Order XXIII, Rule 3-A of C.P.C. shall apply. The said case has no application in the present case since firstly the subsequent application was not for setting aside the earlier order passed on compromise and secondly the application was filed on the basis of changed circumstances. In view of the aforesaid, we are of the view that Application No.19 of 2012 was not barred by Order XXIII, Rule 3-A of C.P.C.

32. Now comes the last issue i.e. welfare of the child. As noted above, the provisions of Section 17 of the 1890 Act and Section 13 of the 1956 Act provides that the welfare of the minor is of paramount consideration for taking a decision regarding guardianship and custody. The welfare of a child is neither determined by economic affluence nor a deep mental or emotional concern. The welfare of the child is all round welfare which is to be considered taking into consideration entire facts and circumstances. The physical well being, education, supplying the daily necessities such as food, clothing and shelter is the primary consideration. Welfare of child lies in providing good education to the child to create surroundings which may give an atmosphere to overall development of personality. A Division Bench of Kerala High Court in the case of **Munnodiyil Peravakutty vs. Kuniyedath Chalil Velayudhan** reported in AIR 1992 Kerala 290, while considering the relevant factors to determine the welfare of the child, laid down following in paragraph 6:-

"6. Capacity of the custodian to supply the daily necessities such as food, clothing and shelter is the primary consideration. Secondly the education of the child. The custodian must possess the capacity to create surroundings in which the child will be in touch with education. In the case of a custodian who is himself educated and given to reading and writing it is easier for the child to keep itself abreast of letters. If the custodian is not educated, he cannot create the requisite background in the home. Thirdly awareness of the need, to keep good health and the capacity to provide the means of keeping good health is another important factor. Fourthly a knowledgeable parent would greatly contribute to the child's welfare by taking steps like emphasising healthy eating habits, providing for vaccination, other measures of health-care, timely treatment and the company of books. Less educated or ignorant parents may not be able to create these conditions. Fifthly, the economic capacity to educate in a good school, with private coaching, where necessary, meeting expenses of transport, children's excursions and so on is no less an important factor."

33. The Apex Court in **Rosy Jacob's** case (supra) had occasion to

consider the issue of custody between mother and father. Following observations were made by the Apex Court:-

"... There is a presumption that a minor's parents would do their very best to promote their children's welfare and, if necessary, would not grudge any sacrifice of their own personal interest and pleasure. This presumption arises because of the natural, selfless affection normally expected from the parents for their children...."

34. In an earlier judgment a Division Bench of this Court in the case of **Mt. Haliman Khatoon vs. Mt. Ahmadi Begum and others** reported AIR (36) 1949 Allahabad 627, while considering the question of custody under Section 17 of the 1890 Act had occasion to consider claim of custody by mother on one side and paternal aunt on the other side. After considering the claim of both the parties, the Division Bench leaning in favour of mother, had made following observations in paragraph 7:-

"**7**. ... As between the two Musammat Haliman Khatun, the mother and Zohra Khatun, the paternal aunt,- the mother is certainly a better person. She has natural affection. Her natural affection for her son cannot be excelled by anybody else..."

35. As noted above, the mother is a natural guardian, father being already dead. The grandfather, appellant No.2 was working as Electrician who has submitted an application for voluntary retirement and is running a medical store. The grandmother is not a well educated lady. The Additional Principal Judge, Family Court has held that as far as financial capacity of appellants is concerned, they can provide basic needs to the child. As observed above, the financial capacity of a person to provide basic necessities is not the only criteria on the basis of which the decision for appointment of guardian is to be based. The mother is getting salary of Rs.32,000/- per month being working as Lecturer in Government Girls Inter College. The mother being in teaching profession, has to be held to be more competent to help the daughter in education and to provide such atmosphere which may allow her to grow as well educated child. Although the right of natural guardian is not absolute but unless the natural guardian is disqualified due to any reason from having the custody of her child, normally natural guardian is not to be deprived of the custody of the child. The Additional Principal Judge, Family Court has also noted that respondent has only issue, the minor daughter, and she being young lady has to carry on her life looking to her daughter and taking care of her daughter whereas the appellants have their another daughter who lives at nearby place and has also two grand children. The husband being dead, the respondent has better claim to have custody of the minor daughter as compared to the appellants who are grand parents.

36. The Additional Principal Judge, Family Court has recorded in the judgment that when the child came before the Court there was positive inclination of the child towards both the parties. It was observed that although child is living with grant parents but her love to her mother is fully intact.

37. The Apex Court in **Dhanwanti Joshi's** case (supra) had laid down that

welfare is an all-encompassing word. Following has been observed in paragraphs 22 and 23 of the said judgment:-

"22. We shall next consider the point which solely appealed to the Family Court and the High Court in the present proceedings namely that the respondent is financially well- off and can take care of the child better and give him superior education is USA. Lindley, L.J. in Re. vs. McGrath (Infants) 1893 (1) Ch. 143 (148) stated that:

"....the welfare of the child is not to be measured by money alone nor by physical comfort only. The word 'welfare' must be taken in its wides sense. The moral and religious welfare must be considered as well as its physical well-being. Nor can the ties of affection be disregarded."

23. As to the "secondary" nature of material considerations, Hardy Boys, J. of the New Zealand Court said in Walker vs. Walker & Harrison (See 1981 N.Z.Recent Law 257) (cited by British Law Commission, working Paper No. 96 Para 6.10):

"Welfare is an all-encompassing word. It includes material welfare, both in the sense of adequacy of resources to provide a pleasant home and a comfortable standard of living and in the sense of an adequacy of care to ensure that good health and due personal pride are maintained. However, while material considerations have their place they are secondary matters. More important are the stability and the security, the loving and understanding care and guidance, the warm and compassionate relationships, that are essential for the full development of the child's own character, personality and talents"

38. While determining the issue of welfare of child, thus, all relevant factors have to be taken into consideration. There has to be very strong reason to deny the custody of minor child to mother who is regarded as first teacher of a child. Selfless affection, the care and nursing which a child can feel with her mother is unparallel. Swami Vivekanand in one of his lectures had said that mother represents colourless love that knows no barter. Following was said by Swami Vivekanand:-

"The highest of all feminine types in India is mother, higher than wife. Wife and children may desert a man, but his mother never. Mother is the same or loves her child perhaps a little more. Mother represents colourless love that knows no barter, love that never dies. Who can have such love?- only mother, not son, nor daughter, nor wife."

39. The learned Additional Principal Judge in its judgment dated 27th February, 2013 has also taken care to protect the interest of the appellants. The learned Judge has provided that appellants being grand parents can meet the child in the school according to the rules of the school as and when they desired. Further it has been observed by the Court that in winter and summer vacations, the grand parents can take the child to their residence or come to meet the child. The learned Judge, thus, while directing for giving custody of child to the mother, has protected the interest of the appellants also by providing the rights as noted above.

40. Taking into consideration all facts and circumstances and the findings recorded by the Additional Principal Judge, Family Court, we are of the view that no error has been committed by the Court in holding that paramount welfare of the child shall be in giving her in the custody of the respondent, the mother. We do not find any error in the judgment and order dated 27th February, 2013.

41. The appeal lacks merit and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2013

BEFORE
THE HON'BLE UMA NATH SINGH,J.
THE HON'BLE MAHENDRA DAYAL, J.

Special Appeal Defective No. 218 of 2013

State of U.P. and others ...Petitioners
Versus
Ilam Chand Verma and Ors .Respondents

Counsel for the Petitioners:
C.S.C.

Counsel for the Respondents:
Anurag Srivastava

High Court Rules chapter VIII Rule 5- Special Appeal-against judgment of Single Judge-quashing notification by Registrar-Cooperative Societies-appeal on ground as per law declared by Apex Court in Prabhodh Verma Case-Writ of certiorari can not be issued-held-for ommision of such important question of law state should file review of petition before Single Judge-instead of appeal-liberty given accordingly.

Held: Para-5
On due consideration of rival submissions, we are of the view that the appellant State instead of filing this Special Appeal, should have filed a review petition in case such an important question of law has escaped the notice of the Court. For a profitable use, we deem it appropriate to reproduce the relevant paragraphs 31 and 50 of the judgment which appear to be germane for the disposal of the plea raised herein.

Case Law discussed:
Probodh Verma and others, etc etc. v. State of U.P. and others and Dal Chand and others, etc. etc. v. State of U.P. and others, etc.

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

1. We have heard learned counsel for the parties and perused the pleadings of Special Appeal, which arises out of a judgment dated 18.4.2012, passed by learned Single Judge, in Writ Petition No. 2125 (S/S) of 2006.

2. Learned counsel for the State, Smt. Sangita Chandra submitted that the Service Rules sought to be quashed had been notified in the Official Gazette, therefore, it was not in the nature of an office/ government order passed by the Registrar of the Co-operative Societies. It is also a submission of learned counsel that the writ of certiorari cannot be exercised for quashment of Statutory Service Rules notified in the Official Gazette and rather such statutory provisions can only be declared as ultra vires qua the Parent Act or the Constitution of India.

3. Learned counsel for the State has placed reliance on a Three Judge Bench Judgment of the Hon'ble Apex Court reported in AIR 1985 Supreme Court 167 **(Prabodh Verma and others, etc. etc. v. State of U.P. and others and Dal Chand**

and others, etc. etc. v. State of U.P. and others, etc.) in support of her contention.

4. On the other hand, learned counsel Shri Manish Sharma, appearing for respondent no.1 tried to justify the order passed by the learned Single Judge. We are informed that in respect of other private respondents, notice has been accepted by one Shri Anurag Srivastava, learned counsel but he is not present to assist the Court nor is there any request on his behalf for adjournment of the matter.

5. On due consideration of rival submissions, we are of the view that the appellant State instead of filing this Special Appeal, should have filed a review petition in case such an important question of law has escaped the notice of the Court. For a profitable use, we deem it appropriate to reproduce the relevant paragraphs 31 and 50 of the judgment which appear to be germane for the disposal of the plea raised herein.

"30. A writ of certiorari can never be issued to call for the record or papers and proceedings of an Act or Ordinance and for quashing such Act or ordinance. The writ of certiorari and the writs of habeas corpus, mandamus, prohibition and quo warranto were known in English common law as "prerogative writs". "Prerogative writs,' are to be distinguished from "writs of right" also known as "writs of course". Writs issued as part of the public administration of justice are called "writs of right" or "writs of course" because the Crown is bound by Magna Carta of 1215 to issue them., as for instance, a writ to commence an action at common law. Prerogative writs are (or rather, were) so called because they are issued by virtue of the Crown's prerogative, not as a matter of right but only on some probable cause being shown to the satisfaction of the court why the extraordinary power of the Crown should be invoked to render assistance to the party. The common law regards the Sovereign as the source. Or fountain of justice, and certain ancient remedial processes of an extraordinary nature, known as prerogative writs, have from the earliest times issued from the Court of King's Bench in which the Sovereign was always present in contemplation of law. (See Jowitt's "Dictionary of Law" vol.2, p. 1885, and Halsbury's "Laws of England", 4th ed., vol. 11, para. 1451, f.n.3).

50. To summarize our conclusions:

(1) A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually, and, if the petitioners refuse to so join them, the High Court ought to dismiss the petition for non- joinder of necessary parties.

(2) The Allahabad High Court ought not to have proceeded to hear and dispose of Civil Miscellaneous Writ No. 9174 of 1978-Uttar Pradesh Madhyamik Shikshak Sangh and Others v. State of Uttar Pradesh and Others-without insisting upon the reserve pool teachers being made respondents to that writ petition or at least some of them being made respondents thereto in a representative capacity as the number of the reserve pool teachers was too large and, had the

petitioners refused to do so, to dismiss that writ petition for non-joinder of necessary parties.

(3) A writ of certiorari or a writ in the nature of certiorari cannot be issued for declaring an Act or an Ordinance as unconstitutional or void. A writ of certiorari or a writ in the nature of certiorari can only be issued by the Supreme Court under Article 32 of the Constitution and a High Court under Article 226 of the Constitution to direct inferior courts, tribunals or authorities to transmit to the court the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same.

(4) Where it is a petitioner's contention that an Act or Ordinance is unconstitutional or void, the proper relief for the petitioner to ask is a declaration to that effect and if it is necessary, or thought necessary to ask for a consequential relief, to ask for a writ of mandamus or a writ in the nature of mandamus or a direction, order or injunction restraining the concerned State and its officers from enforcing for giving effect to the provisions of that Act or Ordinance.

(5) Though a High Court ought not to dismiss a writ petition on a mere technicality or because a proper relief has not been asked for, it should not, therefore, condone every kind of laxity, particularly where the petitioner is represented by an advocate.

(6) The Allahabad High Court, therefore, ought not to have proceeded to hear and dispose of the said Civil Miscellaneous Writ No. 9174 of 1978 without insisting upon the petitioners amending the said writ petition and praying for proper reliefs.

(7) By reason of the provisions of section 30 of the General Clauses Act, 1897, read with clauses (54) and (61) of section 3 thereof, it would not be wrong phraseology, though it may sound inelegant, to refer to a provision of an Ordinance promulgated by the President under Article 123 of the Constitution or prior to the coming into force of the constitution of India, by the Governor-General under the Indian Councils Act, 1861, or the Government of India Act, 1915, or the Government of India Act, 1935, as "section" and to a sub-division of a section, numbered in round brackets, as sub-section".

(8) Similarly, by reason of the provisions of section 30 of the Uttar Pradesh General Clauses Act, 1904, read with clauses (40) and (43) of section 4 thereof, it would not be wrong phraseology, though it may sound inelegant, to refer to a provision of an Ordinance promulgated by the Governor of Uttar Pradesh under Article 213 of the Constitution or prior to the coming into force of the Constitution of India, by the Governor of the United Provinces under the Government of India Act, 1935, as "section" and to a sub-division of a section, numbered in round brackets, as "sub-section".

(9) Neither the Uttar Pradesh High Schools and Intermediate Colleges (Reserve Pool Teachers) Ordinance, 1978 (U.P. Ordinance No. 10 of 1978), nor the Uttar Pradesh High Schools and Intermediate Colleges (Reserve Pool Teachers) Second) Ordinance, 1978 (U.P. Ordinance No. 22 of 1978), infringed

Article 14 or Article 16(1) of the Constitution or was unconstitutional or void.

(10) The reserve pool teachers formed a separate and distinct class from other applicants for the posts of teachers in recognized institutions.

(11) The differentia which distinguished the class of reserve pool teachers from the class of other applicants for the posts of teachers in recognized institutions was the service rendered by the reserve pool teachers to the State and its educational system in a time of crisis.

(12) The above differentia bore a reasonable and rational nexus or relation to the object sought to be achieved by U,P. Ordinances Nos, 10 and 22 of 1978 read with the Intermediate Education Act, 1921, namely, to keep the system of High School and Intermediate Education in the State of Uttar Pradesh functioning smoothly without interruption so that the students may not suffer a detriment.

(13) The preferential treatment in the matter of recruitment to the posts of teachers in the recognized institutions was, therefore not discriminatory and did not offend Article 14 of the Constitution.

(14) As the above two classes were not similarly circumstanced. there could be no question of these classes of persons being entitled to equality of opportunity in matters relating to employment guaranteed by Article 16(1) of the Constitution and the preferential treatment given to the reserve pool teachers was, therefore not violative of Article 16(1) of the Constitution.

(15) The case of Uttar Pradesh Madhymik Shikshak Sangh and Others v. State of Uttar Pradesh and Others was wrongly decided by the Allahabad High Court and requires to be overruled.

(16) The termination of the services of the reserve pool teachers following upon the judgment of the Allahabad High Court was contrary to law and the order dated May 21, 1979 of the Government of Uttar Pradesh and the order dated May 29, 1979, of the Additional Director of Education, Uttar Pradesh, were also bad in law.

(17) Each of the reserve pool teachers had a right under U.P. Ordinance No. 10 of 1978 as also under U.P Ordinance No. 22 of 1978 to be appointed to a substantive vacancy occurring in the post of a teacher in a recognized institution which was to be filled by direct recruitment.

(18) Each of the reserve pool teachers who had already been appointed and was continuing in service by reason of the stay orders passed either by the Allahabad High Court or by this Court is entitled to continue in service and to be confirmed in the post to which he or she was appointed with effect from the date on which he or she would have been confirmed in the normal and usual course.

(19) Those reserve pool teachers who were not appointed as provided by U.P. Ordinance No. 10 of 1978 or U.P. Ordinance No. 22 of 1978 were not so appointed because of the interim orders passed by the Allahabad High Court and the judgment of the High Court in the

Sangh's case. In view of the fact that this Court has held that the Sangh's case was wrongly decided by the High Court, the injustice done to these reserve pool teachers requires to be undone.

(20) In view of the fact that the vacancies to which these reserve pool the present incumbents from their jobs for no fault of theirs. It will, therefore, be in consonance with justice and equity and fair to all parties concerned if the remaining reserve pool teachers are appointed in accordance with the provisions of U.P. Ordinance No. 22 of 1978 to substantive vacancies occurring in the posts of teachers in recognized institutions which are to be filled by direct recruitment as and when each such vacancy occurs.

(21) This will equally apply to those reserve pool teachers whose services were terminated and who had not filed any writ petition or who had filed a writ petition but had not succeeded in obtaining a stay order, as also to those reserve pool teachers who had not been appointed in view of the interim orders passed by the High Court and thereafter by reason of the judgment of the High Court in the Sangh's case and who have not filed any writ petition.

6. Thus, the special appeal is disposed of with liberty to appellant State to file a review petition within a week before the learned Single Judge irrespective of the delay occasioned on account of filing of this Special Appeal.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.04.2013

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

teachers would have been appointed have already been filled and in all likelihood those so appointed have been confirmed in their posts, to appointed these reserve pool teachers with effect from any retrospective date would be to throw out

Special Appeal No. 304 of 2012

Ram Kishore And Ors. ...Petitioners
Versus
State of U.P. & Ors. . ..Respondents

Counsel for the Petitioners:
Bulbul Godiyal Madhumita Bose
Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Minimum Basic Pay-entitlement-daily wager working in Trade Tax department w.e.f 1994 Although not entitled for regularization under Rule-but direction of Single Judge to pay D.A.-considering percentage change general price index over time neutralize the prices index also effects reflects erosion in purchasing power-D.A. and no other allowances or increment payable held admissible to those daily wagers also.

Held: Para-20
It may be mentioned that in India, the Dearness Allowance has a history dating back of World War II. At that time, many of the lower-paid employees received Dearness Allowance Based on their wages or salaries. Many changes to Dearness Allowance and its computations have occurred over the last so many years, according to both private and government studies. For example, now a days, to calculate the D.A., 12 months average of pay and a set index level is considered to get the percentage increase in price/cost of living. Dearness Allowance is paid on a range of base-pay levels. At the time of revision of the pay scale, the Pay

Commission always merged D.A. with the new pay band. Thus, the rising cost affects the daily wager too. So, we are of the view that the daily-wagers, who are getting the minimum pay scale, are also entitled for getting the dearness allowances only. Except it, no other allowance or increment is allowable to them as observed by Hon'ble Apex Court (supra).

Case Law discussed:

Uttar Pradesh Regularization of daily wages Appointment on Group-D Post, Rules, 2001; (1996) 11 SCC; (2003) 6 SCC 123; (2006) SCC (L&S) 1804; 1986 UPLBEC 313; 2006 SCC (L&S) 1819

(Delivered by Hon'ble Dr. Satish Chandra, J)

1. Except the Special Appeal No.304 of 2012, all the special appeals have been filed by the State-appellant against the various orders passed by the learned Single Judge. But the facts, circumstances and prayers are identical in all the special appeals, hence, all the special appeals are disposed of by this consolidated order for the sake of breviate.

2. The brief facts of the cases are that all the private opposite parties-petitioners are working as daily wagers in the Estate Department and Trade Tax Department of the State-appellant. They filed various writ petitions, where the learned Single Judge has granted the minimum of the pay scale to them. Further, dearness allowance was also awarded on the minimum of the pay scale. Being aggrieved the State-appellant has filed the present special appeals. In Special Appeal No.304 of 2012, appellant could not get the said order from the learned Single Judge. So, he is also before this Court.

3. With this background, Sri Shobhit Mohan Shukla, learned Standing Counsel submits that on 11.12.2012, this Hon'ble Court in Special Appeal No.304 of 2012, has passed the following order. The said order is reproduced as under:-

"As the appellants have been admittedly granted minimum pay scale under a final order dated 02.02.2006 passed in Writ Petition No.1534 (S/S) of 2002, which was not called in question in higher forum and has thus attained finality, prima facie it appears that the appellants would also be entitled to get other allowances including the dearness allowance as admissible to other similarly situated candidates in other services. Dearness allowance is not relatable to the employee but to the scale he is drawing."

4. Further, for the purpose of facts, learned Standing Counsel reads out the order passed by the learned Single Judge in Writ Petition No.1500 (S/S) of 2009 dated 03.05.2011. The same on reproduction reads as under:-

"Heard Mrs. Bulbul Godiyal, learned counsel for petitioners as well as learned Standing Counsel.

The writ petition has been filed seeking direction to the opposite parties to include dearness allowance in the minimum pay scale paid to the petitioners.

Learned counsel for petitioners submits that the petitioners were appointed on daily wages during the period 1994 to 2000 and since then they have been continuing.

The petitioners had filed Writ Petition No. 1534 (SS) of 2002 for regularization of their services wherein the Court vide order dated 2.2.2006 had directed the opposite parties to pay minimum of the pay scale to the petitioners considering the fact that the petitioners have worked for more than ten and half years. On the basis of the said order the petitioners are getting the minimum of the regular pay scale i.e. Rs.2550/- per month.

It is submitted that under similar facts and circumstances several persons, in whose favour the Court had issued directions for payment of minimum pay scale, have been given dearness allowance and as such the petitioners have been put to hostile discrimination.

Learned Standing Counsel on the other hand submitted that the petitioners have no right to get the dearness allowance. They are getting the minimum of the regular pay scale in compliance of the Court's order.

It is also submitted that there is no rule, regulation, or the Government Order for payment of regular pay scale to the daily wages employees. The petitioners are not covered under the ambit of U.P. Regularization of Daily Wages Appointments on Group 'D' Post Rules, 2001. The writ petition is therefore misconceived.

I have considered the submissions made by the parties counsel.

It is admitted fact that the petitioners have been engaged on daily wages during the period 1994 to 2000 and they are not covered under Rules of 2001, as such, they have no right to be considered for regularization.

So far as the contention of learned counsel for petitioners that they shall be given dearness allowance as they are getting the minimum of the regular pay scale is concerned, there is nothing on record to indicate that there is any provision with regard to payment of minimum of the regular pay scale to the daily wages employees. The petitioners are getting the minimum of the regular pay scale on the strength of the order dated 2.2.2006 passed in Writ Petition No. 1534 (SS) of 2002.

As such, I am of the considered opinion that no such direction for payment of dearness allowance can be issued in the facts and circumstances of the present case.

The writ petition being devoid of merit is hereby dismissed."

5. Learned counsel also submits that regarding the daily wager's appointment on Group-D posts,on 21.12.2001, the State Government notified the '***Uttar Pradesh Regularization of Daily Wages Appointment on Group-D Post, Rules, 2001*** in exercise of power bestowed on it by the Proviso-2 Article-309 of the Constitution of India. As per Rule-4(1)(i) the persons who were directly appointed on daily wages basis on a Group-D post in Government service before **29.06.1991** and are continuing in service as such on the commencement of the said Rules are subject to other conditions enumerated in sub-rule 4(1)(ii) and Rule-4(2) are, eligible for consideration for regular appointment against permanent or

temporary vacancy, as may be available in Group-D post.

6. It is also a submission of the learned Standing Counsel that by issuing the Government Order dated 08.09.2010, the State Government directed for consideration of cases of all the daily wager appointees who are covered under the cut off date of 29.06.1991 working either in the Government service or in Local Bodies, Development Authorities or Corporations etc., have been given opportunity for regularization by creation of supernumerary post. It may be clarified that the appellant of special appeal no. 304 of 2012 and most of the respondents in connected appeals are not covered under the cut off date and other respondents do not fulfill other conditions as prescribed under Rule-4 of the Regularization Rules.

7. Another submission of the State Government is that the daily wages employees/workers are not entitled to the salary and allowances admissible to the regular employees of the State Government and such class of employees are not entitled to the minimum of the regular pay scale.

8. For this purpose, he relied on the ratio laid down in the following cases:-

1. State of Haryana vs. Jasmer Singh, reported in (1996) 11, SCC 77;

2. State of Haryana & another vs. Tilak Raj & others reported in (2003), 6 SCC 123; and

3. State of Haryana vs. Charanjeet Singh, reported in (2006) SCC (L&S) 1804.

9. In the aforesaid cases, it was observed by the Hon'ble Apex Court that the daily wagers are not entitled for the minimum of the pay scale, but they are entitled for payment of minimum daily wages only prescribed for such daily wages worker and admittedly they are getting so.

10. Learned counsel also submits that the respondents and other daily wagers are materially and quantitatively different from the employees working in a regular establishment and from two separate classes, which are distinct, therefore, claim for the parity and all benefits in view of the Article 14 and 16 of the Constitution of India are not justified in view of the law laid down by the Hon'ble Supreme Court (supra). If the wages are equated with the minimum of pay scale it does not mean that such employee becomes entitled for payment of pay and addition of pay i.e. compensatory allowances.

11. Lastly, learned counsel submits that the opposite-parties are not entitled to get the dearness allowances. So, the various impugned orders to this effect, passed by the learned Single Judge may kindly be set aside.

12. On the other hand, learned counsel including Miss Madhumita Bose, for private-opposite parties relied on the orders passed by the learned Single Judge.They made a request to allow dearness allowance to the daily wager.

13. After hearing all the parties and on perusal of the record, it appears that the private-opposite parties are working as daily wagers in the Trade Tax

Department and Estate Department since long. The learned Single Judge by passing various orders have allowed the minimum of the pay scale to all the petitioners, who are working more than a decade and thus have a long service tenure.

14. Needless to mention that as per **Fundamental Rule 21 of the Uttar Pradesh Fundamental Rules** defines the word " pay" which is as under:-

*"**21. Pay-Pay** means amount drawn monthly by Government servant as-*

(i) the pay, other than special pay or pay granting in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, technical pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the Governor."

15. In view of above, it is clear that the pay means amount drawn monthly by a Government servant which includes overseas pay, technical pay; special pay; personal pay and any other emoluments. Though the word "**dearness allowance**" is not mentioned, nonetheless it covers under the word of "other emoluments" which may be specially payable to the employees. The dearness allowance is to meet the rising cost due inflation.

16. It may be mentioned that inflation is consisting in the general level of prices of goods and services in the economy over a period of time. When the general price level rise, each unit of currency buys fewer goods and services. Consequently, inflation also reflects an erosion in the purchasing power of money a loss of real value in the internal medium of exchange and unit of account within economy. A chief measure of price inflation is the inflation rate, annualized percentage change in a general price index over time neutralize the price index dearness allowance is paid to the employees.

17. In the case of **Vishwanath and others Vs. State of U.P. and others, 1986 UPLBEC 313**, this Hon'ble Court observed that:

"....the petitioners are no doubt daily wage workers and have no security of tenure of their service but since they are performing the same duties and functions as are being carried out by regular class IV employees of the High Court, they are entitled to the same salary and allowances which are being paid to class IV employees..."

18. In the case of **State of U.P. & others vs. Puttilal, 2006 SCC (L & S) 1819**, Hon'ble Supreme Court observed that:

"The principle of equal pay for equal work has held that a daily-wager, if he is discharging the similar duties as those in the regular employment of the Government, should at least be entitled to receive the minimum of the pay scale though he might not be entitled to any increment or any other allowance that is permissible to his counterpart in the Government.

The Hon'ble Apex Court further direct that these daily-wagers would be entitled to draw at the minimum of the pay scale being received by their counterparts by the Government and would not be entitled to any other allowances or increment so long as they continue as daily-wagers.

19. Needless to mention that the dearness allowance is applicable to the minimum of the pay scale for which the daily-wager are entitled, of course, they are not entitled for the other allowances like washing, medical etc. as mentioned by the Apex Court (supra). The purpose of paying dearness allowance is to meet the inflation. So, the dearness allowance is to be determined as per price index from time to time. Everybody is suffering with the inflation.

20. It may be mentioned that in India, the Dearness Allowance has a history dating back of World War II. At that time, many of the lower-paid employees received Dearness Allowance Based on their wages or salaries. Many changes to Dearness Allowance and its computations have occurred over the last so many years, according to both private and government studies. For example, now a days, to calculate the D.A., 12 months average of pay and a set index level is considered to get the percentage increase in price/cost of living. Dearness Allowance is paid on a range of base-pay levels. At the time of revision of the pay scale, the Pay Commission always merged D.A. with the new pay band. Thus, the rising cost affects the daily wager too. So, we are of the view that the daily-wagers, who are getting the minimum pay scale, are also entitled for getting the dearness allowances only. Except it, no other allowance or increment is allowable to them as observed by Hon'ble Apex Court (supra).

21. In view of above, to meet the inflation, dearness allowance is admissible to daily wagers who are getting minimum of the pay scale admissible to them. To this effect, the order passed by the learned Single Judge in Writ Petition No.1500 (S/S) of 2009 is modified to this extent. In other special appeals, orders passed by the learned Single Judge are hereby sustained along with the reasons mentioned therein and the special appeals filed by the State are hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 344 of 2013

Ram Das Singh and Anr Appellants
Versus
Duli Chand ...Appellants/Plantiff

Counsel for the Defendants:
Sri Ashok Mehta
Sri Pradeep Singh Sisodia

Counsel for the Appellants:
Sri Raj Kumar

Code of Civil Procedure, Section 100-second Appeal-additional evidence photostate copy of map-alleged to prepared by Lekhpal-whether admissible in evidence-being secondary evidence?-held-'No' unless execution of original document proved Secondary evidence-not admissible-lower appellate Court without considering these aspect-held-otherwise without any basis-

complete ignorance of aforesaid procedure-order set a side.

Held: Para-23

Next is the question that even when a secondary evidence is admitted, unless a formal proof thereof is dispensed with under any provision of statute, such a document has to be proved otherwise also it is not admissible. In the present case, Lower Appellate Court while entertaining Xerox copy of alleged revenue map has completely ignored all the aforesaid procedure. Though it has admitted additional evidence at the stage of appeal but without satisfying requirement of law with regard to admission of secondary evidence as also its proof. Such document could not have been read in evidence.

Case Law discussed:

AIR 1935 PC 125; 30 IA 44; 7 CWN 849; (2007) 5 SCC 730; AIR 1975 SC 1748; AIR 2002 P & H 342; JT 2002(2) SC 163; AIR 2004 AP 439

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

1. Heard Sri Ashok Mehta, learned counsel for the appellants and Sri Raj Kumar, Advocate for the respondents. Since all the parties are represented, hence as requested and agreed, I proceed to decide this appeal finally at this stage.

2. The substantial question of law, which has arisen in this case is:

A. Whether Lower Appellate Court was justified in admitting a document namely paper no.7C/5, photocopy of a map, alleged to have been prepared by Lekhpal of Village Hindalpur having complied with requirement of Section 65/66 of Indian Evidence Act, 1872.

3. Before Trial Court, aforesaid document was neither sought to be relied by plaintiff nor there was any occasion for it to look into the aforesaid document. The suit was dismissed by Trial Court vide judgment dated 21st July, 2011 deciding issues no.2 and 3 against plaintiff and issue no.1 in favour of defendants-appellants. However, the aforesaid judgment and decree of Trial Court has been reversed by Lower Appellate Court vide judgment and decree dated 16th January, 2003 passed by lower Appellate Court i.e. Additional District Judge, Court No.1, Ghaziabad, which is impugned in this appeal.

4. Lower Appellate Court has proceeded in a strange manner. On one hand, in para 19, it has discussed that Trial Court has not considered paper no.109-C. If the aforesaid document was not admissible in evidence, even then findings ought to have been recorded by Trial Court in this regard but it had failed in both the ways that neither it has considered the said document nor it has discussed and held that aforesaid document was not admissible in evidence. Having said so, Lower Appellate Court itself has not discussed and considered aforesaid document and its consequence on the dispute in case but proceeded to look into a new document namely paper no.7-C/5 which was an alleged revenue map of Village Hindalpur and a photocopy thereof was produced. Lower Appellate Court has held that since primary evidence was not adduced, the aforesaid document, as a secondary evidence, was admissible and in this regard has observed that plaintiff sought to obtain a certified copy of the aforesaid documents from revenue records but the same was not supplied by concerned authorities. The plaintiff also submitted an

application no.105-C before Trial Court requesting it to summon the aforesaid revenue map from the concerned Lekhpal but the application was rejected by Trial Court by order dated 11.2.2011. It is in these circumstances, plaintiff-respondent adduced copy of aforesaid map in the form of a photocopy/ Xerox copy and the same was admissible being a secondary evidence under Section 65 read with Section 66 of Indian Evidence Act, 1872 (hereinafter referred to as "Act, 1872").

5. The question, whether Lower Appellate Court was justified in admitting aforesaid secondary evidence or not, inasmuch as, in paras 20 and 21, the aforesaid document itself has been held to be foundation for recording findings of reversal and in case such document as secondary evidence was inadmissible, entire edifies of judgment of lower appellate court would fall.

6. Learned counsel for the plaintiff-respondent stated that document in question comes within the ambit of Section 65(c) of Act, 1872. Section 65 of Act, 1872 read as under:

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

(a) When the original is shown or appears to be in the possession or power--

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily movable;

(e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) when the original consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by

any person who has examined them, and who is skilled in the examination of such documents.

7. However, I find no force in the submission. It is alleged that map in question is a revenue map prepared under the provisions of U.P. Land Revenue Act, 1901 (hereinafter referred to as "Act, 1901"). Such a document would qualify to be a "public document" within the meaning of Section 74 of Act, 1872 which reads as under:

"Public documents.- The following documents are Public documents :-

(1) documents forming the acts, or records of the acts--

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents."

8. Considering the map prepared for revenue purposes Privy Council in Tarakdas Acharjee Choudhury and Ors. Vs. Secretary of State & Ors. AIR 1935 PC 125 followed earlier decisions in Jagadindra Vs. Secretary of State, 30 IA 44 and Abdul Hamid Vs. Kiran Ch, 7 CWN 849 observed that maps and surveys for revenue purposes, are official documents prepared by competent persons, and with such publicity and notice to persons interested, as to be admissible and contain valuable evidence of the state of things at the time they are made. They are not conclusive and may be shown to be wrong but in absence of evidence to the contrary, they may be judicially received in evidence as correct when made. The map prepared under the authority of Government, therefore, would qualify the definition of "public document" under Section 74 of Act, 1872.

9. That being so, vide Section 65(e) read with subsequent clarification, no other kind of secondary evidence except certified copy of document could have been admissible.

10. Admittedly, in the case in hand, document in question was not a certified copy of the revenue map prepared by revenue authorities under relevant statute so as to qualify to be a public document under Section 74 of Act, 1872, in respect whereto it could have been admissible as a secondary evidence vide Section 65(e) of Act, 1872. In the case in hand, it is a Xerox copy of an alleged revenue map, which was not a certified copy. What a secondary evidence would be, has been noticed in Section 63 of Act, 1872, which reads as under:

"Secondary evidence - Secondary evidence means and includes -

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

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

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

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

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

11. It has not been explained anywhere that Xerox copy of alleged revenue map was prepared and obtained by plaintiff-respondent so as to qualify to be a secondary evidence as stated in Section 63. In Smt. J.Yashoda Vs. Smt. K.Shobha Rani, (2007) 5 SCC 730, the Court has held that Section 63 is exhaustive in so far as it declares secondary evidence for the purpose of Act, 1872. The Court says:

" The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence."

12. It further observed that secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The rule which is the most universal, namely that the best evidence the nature of the case will admit, shall be produced, decides this objection that rule only means, that, so long as the higher or superior evidence is within one's possession or may be reached by him, he shall give, no inferior proof in relation to it.

13. Then referring to Section 65, the Court said that it deals with the proof of the contents of the document tendered in evidence. In order to enable a party to produce secondary evidence it is necessary for the party to prove existence and execution of the original document. Under Section 64, documents are to be provided by primary evidence. Section 65, however, permits secondary evidence to be given for the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

14. In Ashok Dulichand Vs. Madahavla Dube & Anr., AIR 1975 SC 1748, the Court considered Section 65(a) of Act, 1872 and said:

"....Secondary evidence may be given of the existence, condition or contents of a document when the original is shown or appears to be in possession or power of the person against whom the document is sought to be proved or of any person out of reach of, or not subject to, the process of the Court of any person legally bound to produce it, and when, after the notice mentioned in Section 66 such person does not produce it."

15. The Court thereafter declined to admit secondary evidence by observing:

"....It was however, nowhere stated in the affidavit that the original document of which the Photostat copy had been filed by the appellant was in the possession of Respondent No. 1. There was also no other material on the record to indicate the original document was in the possession of respondent No. 1. The appellant further

failed to explain as to what were the circumstances under which the Photostat copy was prepared and who was in possession of the original document at the time its photograph was taken."

16. In P.K.Gupta Vs. Varinder Sharma, AIR 2002 P & H 342, with reference to Section 65(c) of Act, 1872, the Court said that secondary evidence of existence, condition or contents of a document can also be adduced when the party offering evidence of its contents cannot produce the original in reasonable time. But such a delay in production of the document should not have arisen from the fault or neglect of the party who wish to adduce secondary evidence of the document. The Court also said:

"...To succeed in getting permission to adduce secondary evidence it must be shown that the document was in existence which was capable of being proved by secondary evidence and secondly proper foundation must be laid to establish the right to adduce secondary evidence."

17. The principle underlying secondary evidence is well known with regard to proof of facts that best evidence must come before the Court. The best evidence, which, of course, is the original document would furnish an opportunity to the Court to examine various surrounding facts attached with the original alone like the voraciousness of the signatures of the parties, the age of the document and other host of factors depending on the facts of each case. It is in absence of the best evidence, the secondary evidence is permitted to be adduced. The objective being judicial investigation by Court to fathom the truth. It is for this reason that the law although insists upon production of the best evidence i.e. the original document yet it permit with proper safeguards production of secondary evidence of the original if certain conditions are satisfied, namely, the existence of the document which might have been lost or destroyed or the party in whose possession the original is shown or appears to be have refused to produce it before the Court despite notice or its existence, condition or contents have been proved to be admitted in writing so on and so forth. The rule regarding secondary evidence is not an open rule allowing any piece of photostat copies or an oral account of the original and the likewise to be tendered as secondary evidence.

18. In T.Mohan Vs. Kannammal & Anr., JT 2002 (2) SC 163, the Court held that secondary evidence could be received as genuine if the existence of the document is admitted.

19. In K. Krishna Appala Naidu Vs. B. Sohanlal & Ors., AIR 2004 AP 439, in the context of Section 65 and 66 of Act, 1872, the Court said that principle that as long as the original exists and is available, it being the best evidence, must be produced, is engrafted in the Section. The secondary evidence is admissible only in the absence of primary evidence. The Section provides for an alternative method of proving contents of a document, which for various reasons, cannot be produced in evidence. Where original document is in existence, but not produced, secondary evidence by production of copies is not admissible unless conditions are satisfied. The provision has been designed to provide protection to persons who, in spite of their best efforts, are unable to, for the circumstances beyond their control, to place before the Court, primary evidence

of a document as required by law. Secondary evidence should not and cannot be allowed unless the circumstances exist to justify as provided under Act, 1872. Further, if the document is to be admitted in secondary evidence, the facts thereof have to be proved. The certified copy of the original can be treated as secondary evidence. But the contents of the documents sought to be marked as secondary evidence cannot be admitted in evidence without production of the original document. Under no circumstances can secondary evidence be admitted as a substitute for inadmissible primary evidence.

20. Under what circumstances the secondary evidence relating to document must be proved by primary evidence is an exception to the cases falling under Sections 65 and 66 of Act, 1872. The person seeking to produce secondary evidence relating to a document can do so only when the document is not in his possession. To enable a person to take recourse to Sections 65 and 66 of Act, 1872, it would be necessary to establish that the document sought to be summoned was executed and that the said document is not with him, but in possession of the person against whom the application is made to be produced for proving against him.

21. In the present case, it does not appear that Court below cared to observe, follow and comply conditions precedent before entertaining secondary evidence and that too making the foundation to record a finding crucial to decide the entire plaint case in a particular manner i.e. in favour of plaintiff. It has not been stated anywhere and atleast nothing is available from record as to how and when plaintiff had any occasion to obtain a photostat copy of revenue map, who allowed him to obtain it and wherefrom he got it. There was nothing to prove its authenticity also but the Court below, in a very indiscreet manner, has admitted and believed the said document, to record a finding on a substantial disputed fact, so as to form inference in a particular way.

22. There is one more aspect that whenever a secondary evidence is to be admitted, very existence of such a document has to be established.

23. Next is the question that even when a secondary evidence is admitted, unless a formal proof thereof is dispensed with under any provision of statute, such a document has to be proved otherwise also it is not admissible. In the present case, Lower Appellate Court while entertaining Xerox copy of alleged revenue map has completely ignored all the aforesaid procedure. Though it has admitted additional evidence at the stage of appeal but without satisfying requirement of law with regard to admission of secondary evidence as also its proof. Such document could not have been read in evidence.

24. In view of above, I find it difficult to sustain judgment and decree of Lower Appellate Court founded on a document i.e. paper no.7C/5.

25. The appeal is allowed. The appellate judgment dated 16th January, 2013 is set aside. The matter is remanded to Lower Appellate Court to decide appeal after excluding document filed as paper no. 7C/5 or unless parties satisfy requirement of Sections 65 and 66 in respect to aforesaid document, afresh, in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.04.2013

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

First Appeal From Order No. 873 of 2013

Code of Civil Procedure.- Order 43 Rule 1(r) Appeal against order passed under Order XXXIX rule 3-issue notice on injunction Application-held-not appealable-appeal dismissed on ground of maintainability.

Held: Para-9
Therefore, in view of the legal proposition referred to above, we hold that the impugned order is an order under Rule 3 of Order 39 C.P.C. and no appeal lies against that order under Order 43, Rule 1(r) of the Code of Civil Procedure.

Case Law discussed:
AIR (88) 1951 Allahabd 8.

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

F.A.F.O. No. 873 of 2013
Amrik Singh

Versus

M/s Bala Ji Rice Mills, Bandda, Road, Khutar, Tehsil Puwayan, District Shahjahanpur (U.P.) through its partner Rakesh Kumar Sharma and others

Counsel for the appellant: Sri B. B. Paul

CORAM:
Hon'ble Rakesh Tiwari, J.
Hon'ble Anil Kumar Sharma, J.

Amrik Singh ...Petitioner
Versus
M/S Bal Ji Rice Mills and Ors...Respondents

Counsel for the Petitioner:
Sri B.B. Paul; Sri A.P. Paul

Counsel for the Respondents:
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1. This appeal challenges the order dated 8.3.2013 passed by Civil Judge (Senior Divison) Shahajahanpur in O. S. no. 222 of 2013, whereby instead of granting exparte ad interim, notices have been issued to the defendants-respondents. The impugned order reads as under:

" 8-3-2013

प्रार्थना पत्र 8ग मय शपथ पत्र 9ग पर वादी के विद्वान अधिवक्ता को एकपक्षीय रूप से सुना।

वादी की प्रार्थना है कि अस्थायी निषेधाज्ञा इस आशय की जारी की जावे कि प्रतिवादीगण मिल मेसर्स बाला जी राइस मिल की तथा उसका समस्त मशीने भवन आदि की बिक्री संविदा आदि करने से वाद के लम्बन काल में बाज रहे।

वादी के वद्वान अधिवक्ता को सुना। चूंकि दाखिल अभिलेखीय साक्ष्य से वादी का एकक्षीय रूप से प्रथम दृष्टया मामला बनता प्रतीत नहीं हो रहा है जिस कारण प्रतिवादी गण को भी सुना जाना आवश्यक हैं।

आदेश

01– प्रतिवादीगण को नोटिस जारी हो। वादी आवश्यक पैरवी करे।

02– पत्रावली प्रार्थनापत्र 8ग पर सुनवाई हेतु दिनांक 19.03.2013 को पेश हो। ष

2. Learned counsel for the appellant has vehemently argued that through the impugned order the learned trial court without discussing the facts of the case and evidence adduced by the plaintiff has

declined to grant ad interim injunction, so it has grossly erred in not granting exparte ad interim injunction order in favour of the plaintiff and against the defendants-respondents.

3. At the very outset we requested the learned counsel for the appellant to address the Court about maintainability of the appeal. In support of his contention he has placed reliance on the case of **H. Bevis and Co. Vs. Ram Behari and others AIR (88) 1951 Allahabd 8**. We have carefully perused the report of this case and find that it does not at all support the contention of the appellant. In this case there was difference of opinion between the two Hon'ble Judges of the division bench of this Court on the issue of maintainability of the appeal against the order issuing notices to defendants on application for ad interim injunction and the matter was referred to third Hon'ble Judge, who took the view that order refusing to issue an ad interim injunction as allowed by Rule 3 of Order 39 of Code of Civil Procedure is not appeal able. Thus, by majority view it was held that appeal against the aforesaid order is not maintainable. However, in the peculiar facts and circumstances of the case, the Court treated the appeal as civil revision and ad interim injunction order was granted.

4. Order 39, C.P.C. lays down the provision of grant of temporary injunction and interlocutory orders. Under Order 39 Rule 1, C.P.C. the court is empowered to issue a temporary injunction in any suit. Similarly under Rule 2 the court has been given a power for issue of temporary injunction to restrain the repetition or continuance of breach in a suit. Rule 2A, C.P.C. lays down consequences of disobedience of breach of injunction and Rule 3 of Order 39, C.P.C. empowers the court to direct notice to opposite party where it appears to the court that it is necessary to do so before granting the applicant temporary injunction.

5. The relevant portion of Order 43, Rule 1, C.P.C. as well as Sub-rule (r) is quoted below : --

"1. Appeals from orders.-- An appeal shall lie from the following orders under the provisions of Section 104, namely :--

(a) .....

(r) an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order XXXIX;"

6. From the above Sub-clause (r) it is apparent that an appeal lies only against an order under Rule 1, Rule 2, Rule 2A, Rule 4, and Rule 10 of Order 39, C.P.C. The mere order issuing notice on an application for grant of an injunction clearly comes under the provisions of Rule 3 of Order 39. An order under Rule 3 of Order 39 is not appealable under Order 43, Rule l(r). It is, therefore, clear that whenever a court passes an order for issue of notice on an injunction application, this order is not appealable under Order 43, Rule 1(r), Civil Procedure Code.

7. In the instant case, what the trial Court did is that it neither passed an ex parte injunction in favour of the plaintiff nor refused to grant it. The trial Court on the basis of material placed before it opined that exparte there appears to be no prima facie case in favour of the plaintiff so without notice to the defendants it

would not be just and proper to grant an ex parte temporary injunction. Therefore, the trial Court chose to proceed under Rule 3 of Order 39 of the Code. **Rule 3 reads**;

"The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

It is also required in the provision of this rule that, where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by delay."

8. In **Lakhai Vs. Ram Niwas AIR 1987 All 345**, it was held that (para 7) : .

"The mere order issuing notice on an application for grant of an injunction clearly comes under the provisions of Rule 3 of Order 39. An order under Rule 3 of Order 39 is not appealable under Order 43, Rule 1(r)."

9. Therefore, in view of the legal proposition referred to above, we hold that the impugned order is an order under Rule 3 of Order 39 C.P.C. and no appeal lies against that order under Order 43, Rule 1(r) of the Code of Civil Procedure.

10. Learned counsel for the appellant has valiantly tried to support the plaintiff's case for grant of ad interim injunction and his prima facie case in support thereof, but we refrain to dwell upon these issues, as the matter is still sub-judice before the learned trial Court and any observation made by us on merits of the case may adversely affect case of any party. However, suffice it to say that the learned counsel for the appellant could not place before us any document, except the affidavit of the plaintiff which was filed in the trial Court in support of his contention. The legal position noted above also rules out the contention of the learned counsel for the appellant that the impugned order falls within the ambit of Rule 1 of Order 39 of Code of Civil Procedure.

11. In view of the above, we find that the instant appeal is not maintainable and is accordingly dismissed in limine.

12. Let certified copy of the order be sent to the court concerned within a week.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2013

BEFORE
THE HON'BLE THE HON'BLE SUDHIR AGARWAL,J.

Second Appeal No. 1003 of 2006

Shyoraj Singh and others ...Appellants
Versus
Zahir Ahmad and others ...Respondents

Counsel for the Appellants:
Sri Namwar Singh, Sri S.N. Mishra
Sri Sanjiv Singh, Sri Lalit Kumar

Counsel for the Respondents:
Sri R.K. Yadav, Sri Mohd. Arif
Sri Sharda Madhyan

Transfer of Property Act, 1882-Section-52- Doctrine of 'lis pendens'- explained-

sale deed executed during pendency of litigation-hit by provisions of Section 52 of T P Act.

Held: Para-49
In the present case there is nothing on record to show that plaintiffs sought to raise such plea of collusion or fraud etc. In the circumstances the first part of question formulated above would have to be returned in affirmative holding that sale deed in favour of plaintiffs-appellants executed during pendency of Suit No. 115 of 1969 is void on the principle of lis pendens.

Code of Civil Procedure, Order XXII Rule-5 Order passed-being summary in nature-no bar of resjudicata-impleadment of transferee-held-not necessary party-not entitled to be substituted.

Held: Para-63
Accordingly, I answer the first part of the question in affirmative holding that sale deed in favour of plaintiffs-appellants during pendency of suit is void on the principle of lis pendens and return the second part of the question, namely, whether they are entitled to be substituted, in negative. In substance, both the questions are answered against plaintiffs-appellants.

Case Law discussed:
(1857 1 De G & J; 1907 (9) Bom. L.R. 1173; (1805) 11 Ves. 197; (1813) 2 Ves. & B. 204; AIR 1928 Bom 65; (1873) 11 BHCR 64; ILR (1907) All 339; AIR 1938 Cal 1; AIR 1948 PC 147; AIR 1959 Bom. 475; AIR 1973 SC 569; AIR 1973 SC 2537; AIR 1981 SC 981; AIR 1973 Kant 131; 1979 A.L.J. 1273; AIR 1983 Raj 161; AIR 1987 MP 78; AIR 1986 Delhi 364; AIR 2002 Guj 209; 2007(1) AWC 907(SC); 2012(2) SCC 628; (1906)16 MLJ 372; AIR 1928 All 3; AIR 1985 All 163; 1910 IC (8) 288; AIR 1928 Oudh 146(DB); AIR 1925 Pat 462(DB); AIR 1943 Cal 227; 1996 (5) SCC 539; 1875(11) Bombay High Court 64; (1889) All WN All 91; AIR 1924 Cal 188; AIR 1947 Lahore 175; (1920) ILR 43 Madras 37; AIR 1958 SC 394; 2002(93) RD 445; 1998 ACJ 43 (SC); AIR 1963 SC 1917; 1997 ACJ 126 (SC); 2005 ACJ 753; AIR 2005 SC 2209; 2010 (109) RD 256

(Delivered by Hon'ble Sudhir Agarwal, J)

1. Heard Sri Namwar Singh and Sri Lalit Kumar, Advocates for appellants and Sri R.K. Pandey, Advocate for respondents.

2. The only substantial question of law which was formulated in this appeal after hearing under Order 41 Rule 11 C.P.C. is:

"Whether the sale deed in favour of plaintiffs-appellants during pendency of suit, is void on the principle of lis pendens and if so, whether they are entitled to be substituted?"

3. It is evident from record that Original Suit No. 115 of 1969 instituted by Sri Haji Bashir Ahmad (since deceased and substituted by his legal heirs) resulted in a compromise decree as a result whereof defendant-vendor, who executed sale deed in favour of plaintiffs, in respect to property in dispute, became incompetent to possess any right over the said property and hence could not have conferred title upon plaintiffs. The present plaintiffs-appellants are purchaser of disputed property during pendency of the aforesaid suit.

4. The present proceedings, however, have arisen from a subsequent Original Suit No. 184 of 1996 instituted by plaintiffs-appellants in the Court of Civil Judge (Senior Division), Bulandshahar. The plaint case set up by plaintiffs is that property in dispute was purchased by plaintiffs from Smt.

Saeedan, widow of Allah Diya, by sale deed dated 21.09.1981. Prior thereto, one Haji Bashir Ahmad, instituted Suit No. 115 of 1969 for specific performance on the basis of a contract for sale dated 07.06.1966. Smt. Saeedan instead of executing sale deed in favour of Sri Haji Bashir Ahmad, proceeded to execute a sale deed in favour of Smt. Ramsakhi, Smt. Santosh Devi and Smt. Usha Devi which was illegal. These subsequent purchasers were also impleaded as defendants no. 3 to 5 in Suit No. 115 of 1969. Two more persons, namely, Alimuddin and Ramzani were also impleaded as defendants no. 6 and 7 in the aforesaid suit. The suit was contested by Smt. Saeedan alleging that she had only 1/3rd share in the disputed property while 2/3rd share belong to defendants no. 6 and 7.

5. The suit was decreed by Trial Court, i.e., Additional Civil Judge, Bulandshahar vide judgment and decree dated 13.01.1972, whereagainst Civil Appeal No. 139 of 1972 was filed by Alimuddin and Ramzani, the defendants no. 6 and 7, in the aforesaid suit. This appeal was allowed on 22.08.1976. This Court reversed Trial Court's decree and directed for deciding suit again. Thereagainst Sri Haji Bashir Ahmad preferred Appeal No. 734 of 1978 before Apex Court which was decided on 03.04.1978 whereby it was held that the direction of High Court while remanding matter was not to decide the entire suit afresh but the intention was that Trial Court shall first determine share of Smt. Saeedan and thereafter shall pass decree for specific performance to that extent. Consequently, five additional issues were framed in the Trial Court on 20.07.1982 whereby issue No. 8 was regarding share of Smt. Saeedan in the disputed property. While the matter was pending, Smt. Saeedan executed further sale deed in respect of disputed property on 21.09.1981 in favour of plaintiffs-appellants in the present case. These appellants moved an Application No. 139A under Order XXII Rule 10 C.P.C. for impleadment as defendants in Original Suit No. 115 of 1969. In the meantime, Smt. Saeedan, Alimuddin and Ramjani also died hence their legal heirs were brought on record. The application seeking impleadment preferred by present appellants was rejected by Trial Court by order dated 26.02.1996, whereagainst the present appellants preferred Misc. Civil Appeal No. 50 of 1996 which was also dismissed by Third Additional District Judge, Bulandshahar vide order dated 28.07.1998. Thereagainst the present appellants came to this court in Second Appeal No. 1325 of 1998 but the same was also dismissed by vide judgement dated 24.11.1999.

6. In the meantime the Original Suit No. 115 of 1969, it appears, that, after rejecting present appellants' application for impleadment, was decreed finally on 27.02.1996, on the basis of a compromise entered between parties, wherein, it was admitted that Smt. Saeedan had only 1/3rd share in the entire property and rest 2/3rd was with defendants no. 6 and 7 therein. Consequently and in the light of decree passed by Trial Court, Smt. Saeedan executed sale deed in respect of her 1/3rd share, in the dispute property, in favour of Sri Haji Bashir Ahmad, vide sale deed dated 14.03.1996.

7. The plaintiffs-appellants thereupon instituted Original Suit No. 184 of 1996 for cancellation of sale deed

dated 14.03.1996. The aforesaid suit was dismissed by Trial Court vide judgment and decree dated 07.01.2006 and thereagainst plaintiffs-appellants' Civil Appeal No. 17 of 2006 has also been dismissed by Additional District Judge, Court No. 3, Bulandshahar, i.e., Lower Appellate Court (hereinafter referred to as the "LAC") vide judgement and decree dated 06.11.2006. Hence this appeal.

8. Sri Namwar Singh, learned counsel for the appellants, attempted to argue that compromise decree was illegal being in violation of remand order passed by this Court as clarified by Apex Court.

9. However, I do not find any strength in the submission and the argument is totally fallacious. The Apex Court required the Trial Court to decide first, the question of share of Smt. Saeedan. This question was decided in terms of compromise between the parties and Smt. Saneedan's share was held to be 1/3rd. The suit was decreed accordingly though based on compromise. It is this share which has been transferred by sale, by Smt. Saeedan, in favour of Sri Haji Bashir Ahmad, the decree holder, vide sale deed dated 14.03.1996. It thus cannot be said that direction contained in remand order of this Court, as clarified by Apex Court, has not been observed or complied by concerned courts.

10. Now the only question which is to be considered is the one formulated above, for the reason, that, plaintiffs-appellants before this Court are purchaser of property which was part of disputed property in Original Suit No. 115 of 1969, during pendency of aforesaid suit.

11. It cannot be doubted that the sale deed of plaintiffs-appellants, executed lis pendens, may not be void ab initio from its very inception so long as the suit is pending, but, once the suit is decided, the aforesaid document executed, lis pendens, will face the consequences of suit. In case the suit is decreed and execution of decree results in taking away the very subject matter of instrument executed lis pendens, such instrument shall be bad from its inception giving no right to incumbent in whose favour it had been executed.

12. The plaintiffs-appellants were not heirs and legal representatives of Smt. Saeedan. They were subsequent transferees during pendency of suit and, therefore, sought impleadment in that suit, which having already been negatived by courts below and order has been upheld by this Court, the plaintiffs-appellants were clearly bound by the result of Original Suit No. 115 of 1969. After the same has been decreed, may be on the basis of compromise, the plaintiffs-appellants, who were beneficiary during lis pendens, ceases to have no right over the property in dispute.

13. The doctrine of lis pendens is recognised under Section 52 of Transfer of Property Act, 1882 (hereinafter referred to as the "Act, 1882"). This doctrine is expressed in the maxim "ut lite pendente nihil innovetur". It imposes a prohibition on transfer or otherwise dealing of any property, during the pendency of a suit, provided the conditions laid down in Section 52 are satisfied.

14. The principle of lis pendens, it is said, owe its origin to the maxim of Roman Law "Rem de qua controversia

prohib mur in acrum dedicate", which means, where the subject in dispute owing to contest passes into the custody of the judiciary, parties to it are under an obligation not to withdraw it from the protection of the Judge.

15. Tracing back the genesis of doctrine, it relate back to a decision of 1857 in Bellamy Vs. Sabine, (1857) 1 De G & J 566 wherein Lord Justice Turner said:

"It is, as I thing, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."

16. The definition of lis pendens Corpus Juris Secundum, Vol. LIV, page 570, reads as under:

"Lis pendens literally means a pending suit; and the doctrine of lis pendens has been defined as the jurisdiction, power, or control which a court acquires over property involved in suit, pending the continuance of the action, and until final judgment therein."

17. A Division Bench in **Nathaji Anandrav Patil Vs. Nana Sarjerao Patil, 1907(9) Bom.L.R. 1173** said that doctrine of lis pendens is not based on the equitable doctrine of notice but on the ground that it is necessary to administration of justice that decision of a Court in a suit should be binding not only on the litigant parties but all those who derives title from them pendente lite whether that notice to the suit or not. It refers to the decision in **Bellamy Vs. Sabine (supra)** and a more ancient judgment in **Bishop of Winchester Vs. Paine (1805) 11 Ves. 197** where the Master of Rolls said:

"Ordinarily, it is true, the decree of the Court binds only the parties to the suit. But he, who purchases during the pendency of the suit, is bound by the decree, that may be made against the person, from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title, so acquired. As to them it is as if no such title existed. Otherwise suits would be indeterminable: or which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined."

18. The Division Bench also referred to another decision of Vice Chancellor in **Metcalfe Vs. Pulvertoft (1813) 2 Ves. & B. 204** where it was said:

"The effect of the maxim, pendente lit nihil innovetor understood as making the conveyance wholly inoperative, not only in the suit depending but absolutely to all purposes in all future suits and all future time, is founded in error."

19. A Division Bench of Bombay High Court in **Basappa Budappa Halavalad Vs. Bhimangowda Shiddangowda Patil, AIR 1928 Bom 65** the plaintiff brought a suit against his brother, Basangowda on 02.08.1918 for

partition of joint family property. On 10.08.1918 Basangowda sold the property in suit which was included in the claim of his brother to defendants no. 1 and 2 therein. During pendency of suit, Basangowda died and his widow and children were substituted. The suit was decreed pursuant to a compromise between plaintiffs and heirs of Basangowda wherein half of suit property was awarded to plaintiff. Another suit was instituted against defendants no. 1 and 2 the predecessors of property from Basangowda during pendency of earlier suit for recovery of possession of half of suit property of earlier litigation. The Trial Court dismissed suit but the Lower Appellate Court applying Section 52 of Act, 1882 allowed appeal and decreed suit. It hold that defendants no. 1 and 2 by virtue of doctrine of lis pendens were bound by concerned decree. The matter came to High Court. It was argued that predecessors should have been made party in the earlier suit and since they had not joined the earlier litigation, the ultimate decree passed is not binding on them. Secondly it was contended that they are to be treated as representative of Basangowda within the meaning of Section 47 of C.P.C. and the second suit is barred thereunder since the plaintiff should have asked for possession of property in execution proceedings. Both the contentions were negatives by High Court. The Court said referring to Section 52 of Act, 1882 and relying on decisions in **Gulabchand Manikchand Vs. Dhondi Valad Bhau (1873) 11 BHCR 64** and a Full Bench decision in **Lakshmandas Sarupchand Vs. Dasrat, ILC (1880) Bom 168** the Court said that it was immaterial whether the alienees pendente lite had or had not noticed all the pending proceedings, for, if this were not so, there would be no certainty that litigation would ever come to an end. In such cases the Courts do not recognise the allegations pendente lite as affording any proper ground for staying the suit.

20. Then the Court referred and followed Privy Council decision in Faiyaz Husain Khan Vs. Prag Narain ILR (1907) All 339 and said that pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponents. The subsequent death of Basangowda can make no difference to this principle. Further in the context of argument with reference to Section 47 C.P.C. the Court said that a transfer cannot be recognised by Court as giving subsequent purchases any right to be regarded as representatives for the purpose of attaching plaintiffs' right to sue.

21. In **Ramdhone Bulakidas vs Kedarnath Mohata and others, AIR 1938 Cal 1** Hon'ble Ameer Ali, J. while construing Section 52 of Act, 1882 said that the Section although in general terms, does limit its own operation. It must be a suit in which the rights to immovable property are in issue; the order must be an order relating to rights to such property, and the transaction which will give place or be made subject to the order of the Court must be one which derogates from the other parties' rights to the property in suit. His Lordship then explain what has been said above in para 14 of the judgment as under:

"A cannot transfer his interest in X so as to affect any right in X which the Court might have established in favour of B, Therefore that any order which the Court might have made as to the right of

B in respect of X will override or prevail over any alienation by A. I think however that the order of the Court must relate to rights which the parties claim, or which they might have claimed in the property X. The Court cannot create proprietary right in B on grounds distinct from the' property itself."

22. In other words the aforesaid doctrine is based on the principle that the parties to a suit cannot allowed to shorten the arms of Court in dealing with suit by giving effect to the transfers of disputed property to third party. In other words the doctrine is one of convenience.

23. In **Gouri Dutt Vs. Sukur Mohammed, AIR 1948 PC 147** it was held that broad principle underlying Section 52 of Act, 1882 is to maintain status quo uneffected by act of any party to the litigation pending its determination and the expression "decree" or "order" includes a decree or order made pursuant to the agreed terms of compromise.

24 . In **Krishanaji Pandharinath Vs. Anusayabai, AIR 1959 Bom. 475** it was held that even after dismissal suit, the purchaser is subject to lis pendens of an appeal afterwards, if filed. The broad principles underlying Section 52 is to maintain status quo, unaffected by act of any party, to the litigation, pending its determination. The lis continues so long as a final decree or order has not been obtained and complete satisfaction thereof has not been rendered.

25. In **Jayaram Mudaliar Vs. Ayyaswami and others, AIR 1973 SC 569** the Court said:

"It is evident that the doctrine, as stated in section 52, applies not merely to actual transfers of rights which are subject-matter of litigation but to other dealings with it by any party to the suit or proceeding, so as to affect the right of any other party thereto. Hence it could be urged that where it is not a party to the litigation but an outside agency such as the tax collecting authorities of the Government, which proceeds against the subject-matter of litigation, without anything done by a litigating party, the resulting transaction will not be hit by section 52. Again, where all the parties which could be affected by a pending litigation are themselves parties to a transfer or dealings with property in such a way that they cannot resile from or disown the transaction impugned before the Court dealing with the litigation the Court may bind them to their own acts. All these are matters which the Court could have properly considered. The purpose of Section 52 of the Transfer of Property Act is not to defeat any just and equitable claim but only to subject them to the authority of the Court which is dealing with the property to which claims are put forward."

26. In **Jayaram Mudaliar (supra)** the Court also observed that exposition of doctrine indicate that need for it arisen from the very nature of jurisdiction of the Court and their control over the subject matter of litigation so that parties litigating before it may not remove any part of subject matter outside the power of Court to deal with it and thus make the proceedings infructuous. The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in

immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of Its pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property which are the subject matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated. This has been followed in another decision in **Rajender Singh and others Vs. Santa Singh and others, AIR 1973 SC 2537.**

27. Section 52 has been construed by a three Judge Bench of Apex Court in **Dev Raj Dogra and others vs Gyan Chand Jain and others, AIR 1981 SC 981** and it says that for application of said Section following conditions have to be satisfied:

"1. A suit or a proceeding in which any right to immovable property must be directly and specifically in question, must be pending;

2. The suit or the proceeding shall not be a collusive one;

3. Such property during the pendency of such a suit or proceeding cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under any decree or order which may be passed therein except under the authority of Court. In other words, any transfer of such property or any dealing with such property during the pendency of the suit is prohibited except under the authority of Court, if such transfer or otherwise dealing with the property by any party to the suit or proceeding affects the right of any other party to the suit or proceeding under any order or decree which may be passed in the said suit or proceeding."

28. A Division Bench in **Mohammed Ali Abdul Chanimomin Vs. Bisahemi Kom Abdulla Saheb Momin and another, AIR 1973 Kant 131** said that object of Section 52 is to subordinate all derivative interests or all interests derived from parties to a suit by way of transfer pendente lite to the rights declared by the decree in the suit and to declare that they shall not be capable of being enforced against the rights acquired by the decree-holder. A transferee in such circumstances therefore takes the consequences of the decree which the party who made the transfer to him would take as the party to the suit. This is founded on the principle of public policy and no question of good faith or bona fides arises. The transferee from one of the parties to the suit cannot assert or claim any title or interest adverse to any of the rights and interests acquired by another party under the decree in suit. The principle of lis pendens prevents anything done by the transferee from operating adversely to the interest declared by the decree.

29. This Court in **Thakur Prasad Vs. Board of Revenue and others, 1979 A.L.J. 1273** said that a transfer lis pendens is not a bad transfer. It is a

transfer subject to result of ultimate decree that might be passed in the case.

30. In **Smt. Sayar Bai Vs. Smt. Yashoda Bai and others, AIR 1983 Raj 161** the Court said that during pendency of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and would be bound by the claims which shall ultimately be pronounced. When a suit is filed in respect of immovable property, the jurisdiction, power or control over the property involved in the suit is acquired by the Court, pending the continuance of the action and until the final judgment is pronounced and any transaction or dealing of the property by the parties to the suit or proceedings would not affect the decree or order which may be passed by the Court.

31. In **Ramjidas Vs. Laxmi Kumar and others, AIR 1987 MP 78 (Gwalior Bench)** following several authorities of different Courts including the Apex Court's decision in **Jayaram Mudaliar (supra)** the Court observed that the purpose of Section 52 is not to defeat any just and equitable claim but only to subject them to the authority of Court which is dealing with the property to which the claims are put forward.

32. In **Lov Raj Kumar Vs. Dr. Major Daya Shanker and others, AIR 1986 Delhi 364** it was held:

"31. The principles contained in Section 52 of transfer of Property Act are in accordance with the principle of equity, good conscience or justice, because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Allowing alienations made during pendency of a suit or an action to defeat rights of a Plaintiff will be paying premium to cleverness of a Defendant and thus defeat the ends of justice and throw away all principles of equity."

33. The Court went to the extent that even in those cases where Section 52 of Act, 1882, as such, is not applicable, since it is founded on the principle of justice, equity and good conscious, the principle as such can be applied. However, for the purpose of present case such wider doctrine may not be necessary but what has been observed with respect to Section 52 is unexceptionable.

34. In **Narendrabhai Chhaganbhai Bharatia Vs. Gandevi Peoples Co-op. Bank Ltd. and others, AIR 2002 Guj 209** the Court said:

"20. The principle underlying the object of the aforesaid provision is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The principles contained in this section are in accordance with the principle of equity, good conscience or justice because they rest upon an equitable and just foundation, that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. Allowing alienations made during pendency of a suit or an action to defeat rights of a plaintiff bank will be paying premium to cleverness of a defendant and thus defeat the ends of justice and throw away all principles of equity."

35. In **Hardev singh Vs. Gurmail Singh (Dead) by Lrs., 2007(1) AWC 907 (SC)** the Court said that Section 52 merely prohibits transfer. It does not say that the same would result in an illegality. The only declaration by application of Section 52 is that the purchaser during pendency of suit would be bound by result of litigation. The transaction, therefore, from its inception was not void or of no effect but would abide by the decision in pending suit. The real question up for consideration therein was in regard to Sections 41 and 43 of Act, 1882. The Court clarified doctrine of feeding the estoppel embodied in Section 43 which envisages that where a granter has purported to grant an interest in land which he did not at the time possess, but subsequently acquires the benefit of a subsequent acquisition goes automatically to the earlier grantee or as it is usually expressed, feeds the estoppel. The principle is based on equitable doctrine that a person who promise to perforce more than he can perform must make good his contract when he acquires power of performance. The Court also clarified that transfer where is invalid the above doctrine will have no application.

36. The Apex Court recently in **Jagan Singh Vs. Dhanwanti, 2012(2) SCC 628** has favoured to apply principle of lis pendens irrespective of the fact, whether there was any stay order passed by Court or not. The Court said:

"If such a view is not taken, it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail. The explanation to this section lays down that the pendency of a suit or a proceeding shall be deemed to continue until the suit or a proceeding is disposed of by final decree or order, and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force. In the present case, it would be canvassed on behalf of the respondent and the applicant that the sale has taken place in favour of the applicant at a time when there was no stay operating against such sale, and in fact when the second appeal had not been filed. We would however, prefer to follow the dicta in Krishanaji Pandharinath (supra) to cover the present situation under the principle of lis-pendens since the sale was executed at a time when the second appeal had not been filed but which came to be filed afterwards within the period of limitation. The doctrine of lis-pendens is founded in public policy and equity, and if it has to be read meaningfully such a sale as in the present case until the period of limitation for second appeal is over will have to be held as covered under section 52 of the T.P. Act."

37. The consensus of various Courts in the last more than two decades which includes almost all the High Courts as also the Apex Court, whose decision is law of the land, is very clear that transactions which affects a property in dispute in a pending suit, executed during such pendency, would abide by the decision of Court and no right can be conferred upon a third party which is inconsistent to the ultimate decree passed by Court.

38. Faced with the situation, the effect and consequence of principle laid down in Section 52 of Act, 1882, Sri Singh, learned counsel for the appellants contended that doctrine of lis pendens shall have no application where the suit has been decreed on the basis of a compromise.

39. This submission, in my view, also has no legs to stand and in any case it is also no more res integra but is well settled by various authorities.

40. Section 52 as it stands today in the statute book was slightly differently worded initially and read as under:

"52. During the active prosecution in any Court having authority in British India Chief Justice, or established beyond the limits of British India by the Governor-General in Council of a **contentious suit or proceeding** in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose."

41. The aforesaid provision was amended subsequently by Amending Act No. 20 of 1929.

42. Be that as it may, the initial provision was attempted to be construed as if it would not apply to a compromise decree since it has used the words "contentious suit or proceeding". The matter was considered by a Full Bench in **Annamalai Chettiar vs Malayandi Appaya Naick and others, (1906) 16 MLJ 372.** Rejecting the contention, Court said that mere fact that there is a compromise shows that suit was originally contentious, otherwise there would be nothing to compromise. A decree is none the less a 'decree' as defined in Code of Civil Procedure, even if it is based on compromise. The legal effects of decree contemplated by Section 375 (as the provision existed then in C.P.C.) do not defer from the legal effects of a 'decree' where the suit has been fought to the end. The fact that a decree is given in accordance with the terms which have come to, between the parties, does not prevent the decree being the formal expression by the Court, of an adjudication, on a right claimed or a defence set up within the meaning of the definition. The Court (Charles Arnold White, Kt., C.J.) in para 13 of the judgment said:

"13. I think Section 52 of the Transfer of Property Act should be construed as applying to the case of a compromise decree in the absence, of course, of anything in the nature of fraud or collusion. This seems to be the natural construction of the section and it is in accordance with the principles on which the doctrine of lis pendens is based."

43. The above view was concurred by Subrahmanya Aiyar, J. and Benson, J., though they also wrote their separate opinions.

44. A Division Bench in **Shyam Lal Vs. Solian Lal, AIR 1928 All** 3 said that a transferee pendente lite is bound by the decree just as much as he were a party to the suit. Such transferee puts himself in privity with the suit, and must be treated, not as a stranger to the suit, but as a party to it and consequently bound by the terms of the decree in full. A decree based upon a compromise is just as much binding as a

decree founded upon a decision on merits. This was followed subsequently by a Single Judge of this Court in **Amarnath and others Vs. Deputy Director of Consolidation, AIR 1985 All 163.**

45. In **Dhiraj Singh Vs. Dina Nath, 1910 IC (8) 288** Judicial Commissioner followed the Full Bench judgment in **Annamalai Chettiar (supra)** to hold that the doctrine of lis pendens would apply in case of a compromise decree also.

46. The dictum laid down in **Annamalai Chettiar (supra)** has also been followed in **Sat Narain Singh Vs. Badri Prasad Singh, AIR 1928 Oudh 146(DB).** The same view has been taken in **Mt. Ramdulari Kuer and others Vs. Upendra Nath Basu, AIR 1925 Pat 462(DB)** wherein it has been held:

"To my mind the fact that Rai Bindeswari had taken a kobala before the compromise petition was filed will not affect the rights of the parties and it must be held that the purchase of the plaintiff was during the active prosecution of a contentious suit. That the doctrine of Lis Pendens will apply to a purchase during the pendency of a suit which terminates in a consent decree is settled by authorities."

47. Hon'ble S.C. Agrawal, J. (as His Lordship then was) followed the Full Bench decision in **Annamalai Chettiar (supra)** and another decision of Calcutta High Court in **Hiranya Bhusan Mukherjee v. Gouri Dutt Maharaj, AIR 1943 Cal 227** in **Mohammad Aleem Vs. Maqsood Alam and others, AIR 1989 Raj 43** and said:

"The law is well settled that the doctrine of lis pendens is also applicable in cases where the pending litigation is ultimately compromised by the parties and a compromise decree is passed in terms of the compromise."

48. However, there is an exception. Where it is alleged by subsequent transferee that compromise is collusive and for defeating the rights of subsequent transferee the matter will then be examined in the light of such ground.

49. In the present case there is nothing on record to show that plaintiffs sought to raise such plea of collusion or fraud etc. In the circumstances the first part of question formulated above would have to be returned in affirmative holding that sale deed in favour of plaintiffs-appellants executed during pendency of Suit No. 115 of 1969 is void on the principle of lis pendens.

50. Now coming to the second aspect, whether the appellants, the subsequent transferee of disputed property which was subject matter of Suit No. 115 of 1969 ought to be substituted or impleaded therein. The answer I find in the Apex Court's decision in **Sarvinder Singh v. Dalip Singh and Ors. 1996(5) SCC 539**. The Court held that the alienation pendente lite is inherited by doctrine of lis pendens, by virtue of of Section 52. Alienee cannot be considered to be either a necessary or property party to the suit. It has been held that neither the plaintiff is bound to implead such alienee nor the alienee has an absolute right to be joined as a party. In **Gulabchand Vs. Dhondi, 1875(11) Bombay High Court 64** and **Dammar Singh Vs. Nazir-ud-din, (1889) All WN All 91** it was held that plaintiffs are not bound to make subsequent alienee a party in the suit.

Similarly in **Lakshan Chunder Dey Vs. Sm. Nikunjamoni Dassi and others, AIR 1924 Cal 188** and **Chanan Singh Vs. Warayam Singh, AIR 1947 Lahore 175** it was held that alienee has no absolute right to be joined as a party. In **Subba Reddi vs Veeraraghava Reddi, (1920) ILR 43 Madras 37** it was however held that the Court has a discretion in the matter which must be judicially exercised.

51. To mitigate the hardship to subsequent alienee, in **Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and another, AIR 1958 SC 394** the Court said that the transferee would be entitled to prefer an appeal against the decree or order passed therein if his assigner could have filed such an appeal in view of Section 146.

52. In the case in hand the question of appellants' impleadment has already attained finality, so far as this Court is concerned, in view of the judgment in Second Appeal No. 1325 of 1998, decided on 24.11.1999.

53. Sri Singh placed reliance on **Smt. Sarla Devi Vs. The District Judge, Mainpuri and others, 2002(93) RD 445** and said that rejection of his application for impleadment under Order XXII Rule 10 would make no difference since it does not decide any title and such an order is always subject to the suit.

54. I find neither any parallel of such proposition with the issue in question in the present case nor otherwise any applicability of above authority to the present case. Therein an application for substitution filed by Smt. Sarla Devi on the basis of a will dated 20.01.1981 was rejected by court below while that of real brother of deceased claiming the sole heir and legal representative was allowed. This Court after referring to Order XXII Rule 5 said that inquiry of nature under Order XXII Rule 5 is a summary nature inquiry and it does not decide any title. It does not create any bar of res judicata. In my view the aforesaid decision has no application in the present case.

55. Another decision cited is that of **Balwant Singh and another Vs. Daulat Singh (Dead) by Lrs. And others, 1998 ACJ 43 (SC).** I do not find the above decision also of any help to appellants in the present case inasmuch as there the issue up for consideration before Apex Court was about the effect of mutation entries in revenue record. The Court said that a mutation cannot be construed as conveying title in favour of person whose name is mutated. Mutation entries will neither convey any extinguish title in the property. In para 27 of the judgment the Court said:

"mutation entries do not convey or extinguish any title and those entries are relevant only for the purpose of collection of land revenue."

56. However, the Court relying on its earlier decision in **Gurbaksh Singh Vs. Nikka Singh, AIR 1963 SC 1917** said that anybody affected by mutation entries should have challenged the same as provided under law. In absence of any such challenge the entries cannot be ignored. In other words, the entries in mutation must be taken as correct unless the contrary is established. In the present case the above decision has no application to the issue in question and, therefore

would not help the appellants in any manner.

57. To the same effect is another decision in **Smt. Sawarni Vs. Smt. Inder Kaur and others, 1997 ACJ 126 (SC)** and the same also, therefore, has no application for the reason as already stated with reference to **Balwant Singh (supra).**

58. Sri Singh has also relied on a decision in **Government of Orissa Vs. Ashok Transport Agency and others, 2005 ACJ 753 (SC)** wherein referring Order XXII Rule 10 the Court said that it is for the assignee or transferee to come on record if it so chooses and to defend the suit. It also said that it is equally open to assignee to trust its assigner to defend the suit property but with the consequence that any decree against the assignor will be binding on it and would be enforceable against it. This issue has already attained finality after dismissal of appellants' Second Appeal No. 1325 of 1998 in the earlier suit proceedings and, therefore, with great respect, in my view, even this authority shall not help appellants in the present case.

59. Lastly Sri Singh placed reliance on Apex Court's decision in **Amit Kumar Shaw and another Vs. Farida Khatoon and another, AIR 2005 SC 2209** to contend that his application seeking impleadment in the earlier suit was illegally rejected and refers to the observations made by Apex Court in paras 16, 17 and 18 of the judgment.

60. I am afraid. Here the argument being advanced by appellants is not in an appropriate proceedings, inasmuch as this Court cannot sit in appeal over a decision by coordinate Bench passed in another Second Appeal No. 1325 of 1998. The judgment has attained finality. The appellants before this Court having chosen not to assail aforesaid decision of this Court has surrendered to the same and now in the present appeal which has arisen from another suit, cannot wriggle out of the legal consequences flowing from the above judgment dated 24.11.1999 passed in Second Appeal No. 1325 of 1998, whereby the application seeking impleadment in earlier suit stood finally rejected and that has attained finality. So far as this Court is concerned, I have to proceed by treating that issue regarding impleadment of appellants in earlier suit as already had attained finality and cannot be reconsidered hereat for any purposes whatsoever. It is in these facts and circumstances, I find myself unable to give any credence to appellants on the basis of Apex Court's decision in **Amit Kumar Shaw (supra).**

61. The same reasoning would apply to another decision cited by Sri Singh in **Suresh Kumar Bansal Vs. Krishna Bansal and another, 2010(109) RD 256.**

62. In that view of the matter the question of substitution of plaintiffs-appellants cannot be considered afresh and that too in the present matter. The second part of question formulated above is, therefore, answered in negative, i.e., against appellants.

63. Accordingly, I answer the first part of the question in affirmative holding that sale deed in favour of plaintiffs-appellants during pendency of suit is void on the principle of lis pendens and return the second part of the question, namely, whether they are entitled to be substituted, in negative. In substance, both the

questions are answered against plaintiffs-appellants.

64. In the result, the appeal fails and is accordingly dismissed with costs throughout.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.

Constitution of India-Art. 226- Petitioner working as Executive Engineer-compassionate appointment given-to the dependent of work change employee-following the direction of Single Judge-Subsequently by full Bench decision-earlier judgment set-s-side-whether such conduct of petitioner termed as mis-conduct?-held-"No'_enquiry officer totally oversighted this aspect-punishment order quashed.

Held: Para-7
Thus, earlier judgment relied upon by the petitioner has been overruled by the Full Bench of this Court. But the facts remains that the petitioner has acted in pursuance of earlier judgment of this Court. A decision taken in pursuance of judgment of this Court shall not be constituted misconduct. Though, the judgment relied upon by the petitioner, has been overruled by the Full Bench but since at the time when the compassionate appointment was made, the petitioner had applied the existing law, for which he cannot be faulted.

Held: Para-8
It is always expected from the Government servants that they shall abide by the law laid down by the Courts or higher judiciary. The decision taken in compliance of judgment of High Courts or Supreme Court, shall not be constituted misconduct even if the case relied upon by the officer is overruled at later stage. Accordingly, the punishment awarded to the petitioner, seems to be based on unfounded facts and more so when the petitioner has not committed any misconduct.

THE HON'BLE ASHOK PAL SINGH, J.

Service Bench No. 1307 of 2006

Ashok Kumar Asthana ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manish Mathur, Sri Sandeep Tripathi

Counsel for the Respondents:
C.S.C.

Case Law discussed:
[(2010) (28) LCD 1993]

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

1. Instant writ petition under Article 226 of the Constitution of India, is against the impugned order of punishment on the ground that the petitioner made appointment on the compassionate ground of the dependant of deceased employee who was on work charge basis. The order of appointment was passed in pursuance of U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules, 1974 (in short the Rules).

2. It appears that the petitioner has worked as Executive Engineer Tubewell Division-III, Gorakhpur between 19.8.1996 to 24.9.1998. One Shiv Pujan Sahny, a work charge employee, died in harness. The petitioner appointed the dependant of deceased work charge employee, Smt. Kalawati on the post of Peon in pursuance of the Rules. Treating the appointment made by the petitioner as illegal and as an incident of misconduct, a chargesheet was served on him. In

pursuance of disciplinary proceeding, the inquiry officer submitted report with the finding that the petitioner has committed misconduct while appointing the dependant of a deceased work charge employee under the Rules. The finding has been recorded by the inquiry officer that the 1974 Rules are not applicable to the dependant of deceased work charge employee. Hence no appointment could have been made.

3. While submitting reply to the chargesheet, the petitioner set up a case that he had made appointment in view of law laid down by this Hon'ble Court in Writ Petition No.3558 (S/S) of 1992 (Suresh Chandra Tiwari and others. Vs. State of U.P. and others). In the case of Suresh Chandra Tiwari (supra), this Court has held that dependants of work charge employees may be appointed under the Rules. A copy of the reply dated 18.6.2995 submitted by the petitioner, has been filed as Annexure No.8 to the writ petition.

4. While assailing the impugned order of punishment, learned counsel for the petitioner submits that not only in the case of Suresh Chandra Tiwari (supra) but also in one other judgment of this Court delivered in Writ Petition No.3105 (S/S) of 2006: Gaurav Shukla. Vs. State of U.P. and others, it has been held that dependants of work charge employees may be appointed under the Rules on compassionate ground. Relevant portion from the judgment of Gaurav Shukla is reproduced as under:

"2. Learned counsel for the petitioner has invited attention of this Court towards the judgment reported in (2002) 1 UPLBEC 337-Santosh Kumar Mishra Versus State of U.P. and others and one another Full Bench Judgment of this Court reported in 1999 ACJ 1070 Kalyan Dutt Kaushik Versus D.M.Hardwar and others and other unreported judgments and orders of this Court passed in W.P. No.306 (S/S) of 2006 decided on 12.01.2006, W.P.No.5209 (S/S) of 2004, decided on 17.09.2004 and W.P.No.4840(S/S)/2002, decided on 05.09.2002.

From the perusal of the aforesaid judgments and orders of this Court, it is obvious that the dependants of the workcharge employees shall also be entitled for appointment on compassionate ground. While rejecting petitioner's representation by the order dated 25th of March, 2006, the sole ground relied upon by the competent authority is that the dependants of the workcharge employees shall not be entitled for appointment on compassionate ground. Prima-facie, the impugned order passed by the opposite parties does not seem to be sustainable under law. While deciding the controversy in question by the impugned order, the competent authority had not considered the law laid down in the case of Santosh Kumar Mishra (supra) as well as other cases referred hereinabove. Accordingly, the impugned order is not sustainable under the law and the writ petition deserves to be allowed."

5. On the other hand, learned standing counsel invited attention of this Court to subsequent judgment of Full Bench of this Court reported in **[(2010) (28) LCD 1993]: Pawan Kumar Yadav Vs. State of U.P. and others.** On account of difference of opinion with regard to rights of dependants of deceased work

charge employees, for appointment on compassionate ground, the matter was referred to Full Bench. Para para 26. of the judgment of Pawan Kumar Yadav (supra) is reproduced as under:

"26. On the aforesaid discussion, and in view of the law laid down in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra), we answer the questions posed as follows:-

1. A daily wager and workcharge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a 'Government servant' within the meaning of Rule 2 (a) of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus his dependants on his death in harness are not entitled to compassionate appointment under these Rules.

2. The judgements in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No.24231 of 1998 decided on 2.3.1998); State of U.P. Vs. Maya Devi (Special Appeal No.409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615; and Anju Misra Vs. General Manager, Kanpur Jal Sansthan (2004) 1 UPLBEC 201 giving benefit of compassionate appointment to the dependants of daily wage and workcharge employee have not been correctly decided."

6. A plain reading of Full Bench judgment supra) reveals that controversy was referred on account of difference of opinion with regard to rights of dependants of deceased work charge employees. Full Bench overruled the earlier judgment and held that the dependants of work charge employees shall not be entitled to appointment on compassionate ground. It is held that work charge employee does not hold any post whether substantive or temporary hence provisions contained in the Rules, shall not be attracted. Relevant portion from the judgment of Pawan Kumar Yadav (supra) is reproduced as under:

"1. In Pawan Kumar Yadav V. State of U.P. & Ors. the Court noticed judgements of this Court taking divergent views in the matter of recruitment of dependants of government servants, dying in harness, where the deceased employees were either daily wagers or work-charge employees, who were not regularly appointed, and referred the following questions for decision of larger bench:-

(1). Whether a daily wager and work charge employee, employed in connection with the affairs of Uttar Pradesh, who is not holding any post whether substantive or temporary is a 'Government Servant' within the meaning of 2 Rule 2 (a) of U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974?

(2). Whether the judgement in Smt. Pushpa Lata Dixit Vs. Madhyamik Shiksha Parishad and others, 1991 (18) ALR 591; Smt. Maya Devi Vs. State of U.P. (Writ Petition No.24231 of 1998 decided on 2.3.1998); State of U.P. Vs. Maya Devi (Special Appeal No.409 of 1998); Santosh Kumar Misra Vs. State of U.P. & Ors., 2001 (4) ESC (Alld) 1615;

and Anju Misra Vs. General Manager, Kanpur Jal Sansthan (2004) 1 UPLBEC 201, giving benefit of compassionate appointment to the dependants of daily wager and work charge employees, have been correctly decided?

2. The questions were referred by Hon'ble Mr. Justice A.N. Ray, the then Chief Justice on 13.5.2005 to a Bench of three judges. A large number of writ petitions and special appeals filed subsequently, on the same questions were connected, with the reference. "

7. Thus, earlier judgment relied upon by the petitioner has been overruled by the Full Bench of this Court. But the facts remains that the petitioner has acted in pursuance of earlier judgment of this Court. A decision taken in pursuance of judgment of this Court shall not be constituted misconduct. Though, the judgment relied upon by the petitioner, has been overruled by the Full Bench but since at the time when the compassionate appointment was made, the petitioner had applied the existing law, for which he cannot be faulted.

8. It is always expected from the Government servants that they shall abide by the law laid down by the Courts or higher judiciary. The decision taken in compliance of judgment of High Courts or Supreme Court, shall not be constituted misconduct even if the case relied upon by the officer is overruled at later stage. Accordingly, the punishment awarded to the petitioner, seems to be based on unfounded facts and more so when the petitioner has not committed any misconduct.

9. It is unfortunate that the inquiry officer has not recorded a finding with regard to defence set up by the petitioner regarding applicability of the judgment of Gaurav Shukla and Suresh Chandra Tiwari (supra), at the time when the appointment was made. Such action on the part of the inquiry officer, seems to be not correct. In view of the above, the writ petition deserves to be allowed.

10. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 31.1.2007, passed by the opposite party No.1 as contained inAnnexure No.1 with all consequential benefits. The petitioner shall be entitled for arrears of salary with other service benefits which shall be provided to him expeditiously say, within a period of three months from the date of receipt of a certified copy of the present judgment. The revision of pay scale shall also be done for the purpose of pensionary benefits as well as arrears of salary.

11. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.04.2013

BEFORE
THE HON'BLE HON'BLE ANIL KUMAR,J.

Service Single No. 1458 of 2013

Shyam Nath Chaubey ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri S.N. Bhardwaj

Counsel for the Respondents:
C.S.C.

U.P. Police Group 'D' of Employee.-Rules 2009, Rule 21(3), Rule 3 (M)- Transfer of ordely peon from one unit to other-without prior permission of State Govt.-order passed in contravention of Rule 21(3) unsustainable-quashed.

Held: Para-19

In the instant case, G.R.P. is a one unit of the police force as per definition of "unit" given in Sub-Rule (M) of Rule 3 of Rules, 2009 and persons who are working in the said police force belong to is in contravention to the Sub-Rule (3) of Rule 21 of Rules, 2009 because State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules.

Words and phrases- Establishment-meaning thereof explained-as an institution as a place of business with its fixtures and organized staff.

Held: Para-14

In the case of Ram Kumar Misra v. State of Bihar (1984) 2 SCC 451 Hon'ble Supreme Court held that the word 'establishment' is defined in Section 2 (6) of the Bihar Shops and Establishments Act, 1953, mean an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession. Now it can hardly be disputed that the Bhagalpur and Sultanganj ferries are establishments which carry on business or trade of plying ferries across the Ganges and they are clearly within the meaning of the word 'establishment' in Section 2 (6) of the Bihar Shops and Establishment Act, 1953 and consequently they would also be establishments within the meaning of that expression as used in the amended Entry 27.

Case Law discussed:

Group-D Post as mentioned in Rule 5 of Rules 2009 are governed by the said Rules, thus, the present petitioner falls in the category of the persons as mentioned in Rule 5 of Rules 2009 working in the G.R.P., so he can only be transferred after following procedure as provided under Sub-Rule (3) of Rule 21 of Rules, 2009 i.e. with the prior approval of the Government, the said exercise has not been done in the present case which is clearly established from the material and document on record so the impugned order of transfer

(1975) 4 Supreme Court Cases 348; (1971) 1 SCC 536; (1984)2 SCC 451; 1987 Supp SCC 228; (1992) 4 SCC 118

(Delivered by Hon'ble Anil Kumar, J)

1. Heard Shri S. N. Bhardwaj, learned counsel for the petitioner, Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel and perused the record.

2. By means of the present writ petition, the petitioner has challenged the impugned orders of transfer as well as relieving dated 5.3.2013 (Annexure Nos.1 and 2) passed by opposite party no.2/Superintendent of Police Railway, Lucknow and opposite party no.3/Reserve Sub-Inspector, G.R.P. Lines, Lucknow respectively.

3. Facts in brief of the present case are that the petitioner on 8.9.1988 appointed as daily wager class-IV employee in Government Railway Police (hereinafter referred to G.R.P.). In the said capacity, he worked and discharged his duties uptil 30.5.1990 and on 31.5.1990, appointed on the post of orderly peon. By means of the order dated 5.3.2013 transferred from Lucknow to Sultanpur passed by opposite party no.2.

In pursuance of the same, relieved from service by order dated 5.3.2013 (Annexure No.2) passed by opposite party no.3. Aggrieved by the said order, the present writ petition has been filed by the petitioner.

4. Learned counsel for the petitioner submits that the services of the petitioner is governed by the Rules known as U.P. Police Group D Employees Service Rules 2009 (hereinafter referred to Rules 2009) and as per the provision of Rule 21 (3) of Rules 2009, he cannot be transferred from Lucknow to Sultanpur without prior approval of the State Government.

5. Learned counsel for the petitioner also submits that the impugned orders are in contravention to the transfer policy as his children are studying at Lucknow and their fees have been deposited in the institution and the entire books and copies/notebooks have been purchased by the him so if in the mid session, the petitioner is transferred then in that circumstances, his children who are getting study at Lucknow, they shall suffer irreparable loss in the present era of competition.

6. Accordingly, Learned counsel for the petitioner requests that the impugned order of transfer as well as relieving being contrary to the provisions of Rule 21 (3) of Rules 2009, liable to be set aside and the writ petition may be allowed.

7. Shri Abhinav Narain Trivedi, learned Addl. Chief Standing Counsel submits that the petitioner cannot get the shelter of Rule 21 (3) of Rules, 2009 as he has been transferred from Lucknow to Sultanpur in the same establishment i.e. G.R.P. and for transfer an employee from one place to another in the same establishment prior approval of the State Government is not necessary. So, the petitioner who is class IV employee in G.R.P., posted at G.R.P. Lines, Lucknow, transferred to Sultanpur by order dated 5.3.2013 which is another section under the supervision and control of the Superintendent of Police, Railway, Lucknow, passed after taking into consideration the administrative exigency of service to provide food facility to Class IV employees and officer posted at G.R.P. Police Station, Sultanpur. So, there is no illegality or infirmity in the impugned order of transfer, under challenge, in the present writ petition. Hence, the same is liable to be dismissed.

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

9. In order to decide the controversy involved in the present case, it is appropriate to go through the provisions as provided under Rule 21 (3) and Sub-rule M of Rule 3 of Rules 2009, on reproduction they reads as under:-

"Rule 21 Appointment - (1) On the occurrence of substantive vacancies the appointing authority shall make appointments from the list of candidates prepared under rule 19 or 20 as the case may be in the order of their names as appears in the common list.

(2)The appointing authority shall also make appointment in officiating and temporary vacancy from the said list, and in the manner referred to in sub-rule (1)

(3)A person appointed to a post for a particular district or PAC battalion or

unit shall not be transferred to any other establishment in normal case.

Under specific circumstances, transfer may be affected with prior approval of the Government."

Rule (3) of (M) "Unit" means various brandies of police organization like Criminal Investigation Department, Anti Terrorist Squad, Special Task Force, Special Investigation Team, Intelligence, Security, Anti Corruption Organization, etc.

10. The word 'Establishment' is not defined under Rules 2009. However, the word 'Establishment" is defined in "Words and Phrases Permanent Edition 15" at page 205 as under:-

"Physically separate work places can constitute a single "establishment" under the Equal Pay Act [29 U.S.C.A. 206 (d) if there is significant functional interrelationship between work of employees in various locations."

11. In the same Edition, the same is defined as under:-

"Webster gives, as one of the meanings of the word "institution," "an establishment , especially of a public character, or affecting a community".

12. Further, the Word "Establishment" has been considered by the Hon'ble Supreme Court in the case of **Central Inland Water Transport Corporation Ltd. vs. Their Workmen (1975) 4 Supreme Court Cases 348** held as under:-

"The dictionary meaning of 'establishment' as given in Webster's International Dictionary includes inter alia "an institution or place of business, with its fixtures and organized staff; as, large establishment a manufacturing establishment". 'Establishment' therefore separate identifiable existence."

13. Hon'ble Supreme Court in the case of **Alloy Steel Project v. Workmen (1971) 1 SCC 536** after taking into consideration the provisions of Section 16 of the payment of Bonus Act, interpreted the word "Establishment" and held that the word "establishment" used in Section 16 of the Payment of Bonus Act does not mean the Company itself. When the Hindustan Steel Ltd. Has got alloy steel project besides the Head Office, Rourkela Steel Plant, Bhilai Steel Plant, Durgapur Steel Plant, Coal Washeries Project and Bokaro Steel Project, then all these are separate undertakings or branches controlled by one single Company.

14. In the case of **Ram Kumar Misra v. State of Bihar (1984) 2 SCC 451** Hon'ble Supreme Court held that the word 'establishment' is defined in Section 2 (6) of the Bihar Shops and Establishments Act, 1953, mean an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession. Now it can hardly be disputed that the Bhagalpur and Sultanganj ferries are establishments which carry on business or trade of plying ferries across the Ganges and they are clearly within the meaning of the word 'establishment' in Section 2 (6) of the Bihar Shops and Establishment Act, 1953 and consequently they would also be

establishments within the meaning of that expression as used in the amended Entry 27.

15. Moreover, transfer is an incidence of service and it does not require the consent of the employee. A public servant has no vested right to seek transfer to a location of his choice. An employee can be transferred on administrative exigencies and in public interest. It is not obligatory on the part of the employer to comply with the principles of natural justice before making an order of transfer. The Government is empowered to transfer a civil servant from one post to another or to an equivalent post in the same cadre or grade or carrying the a lien. No employee can claim to a particular posting as the matter of posting is entirely in the domain of the administration.

16. No Government employee has any right to be posted at any particular place forever, because transfer is not only an incidence of service, but also a condition of service, and as such it is necessary in public interest and in the interest of efficiency in public administration. There is no hostile discrimination in transfer from one post to another when the posts are of equal status and responsibility. The transfer in posts, which are in the same grade or cadre or considered equivalent can be affected on administrative exigencies.

17. The general principles in respect to the transfer an employees that can be deducted from various judicial pronouncements and the statutory provisions are as follows: (i) that an employee cannot be transferred out of his cadre or establishment against his wish; (ii) that no transfer can be justified merely because the pay is not affected, when the appointment is made to a specified post or a specified group of posts; (iii) that the Government employee cannot be asked to perform duties which were never expected of him at the time of recruitment; and (iv) that the expectation of future promotion cannot be wiped off by moving a Government employee around.

18. But, the judicial review of order of transfer can be done, if the order of transfer suffers from the vice of mala fide exercise of power when the transfer is made not in public interest or administrative exigency, but simply to accommodate another employee without any justifiable reason. Unless the order of transfer is shown to be an outcome of mala fide exercise of power or violative of any statutory provision or passed by an authority not competent to do so, an order of transfer cannot lightly be interfered with by the courts as a matter of routine for every type of grievance sought to be made.

19. In the instant case, G.R.P. is a one unit of the police force as per definition of "unit" given in Sub-Rule (M) of Rule 3 of Rules, 2009 and persons who are working in the said police force belong to Group-D Post as mentioned in Rule 5 of Rules 2009 are governed by the said Rules, thus, the present petitioner falls in the category of the persons as mentioned in Rule 5 of Rules 2009 working in the G.R.P., so he can only be transferred after following procedure as provided under Sub-Rule (3) of Rule 21 of Rules, 2009 i.e. with the prior approval of the Government, the said exercise has not been done in the present case which is clearly established from the material and

document on record so the impugned order of transfer is in contravention to the Sub-Rule (3) of Rule 21 of Rules, 2009 because State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules.

20. Hon'ble Supreme Court in the case of **Balram Gupta v. Union of India 1987 Supp SCC 228** has observed as under:-

44 22. For the foregoing reasons, the impugned order of transfer as well as relieving dated 5.3.2013 (Annexure Nos.1 and 2) passed by opposite party no.2/Superintendent of Police Railway, Lucknow and opposite party no.3/Reserve Sub-Inspector, G.R.P. Lines, Lucknow respectively are set aside and the opposite party no.2/Superintendent of Police Railway, Lucknow is directed to allow the petitioner to work and discharge his duties on the post of orderly peon at G.R.P., Lucknow

23. In the result, the writ petition is allowed.

24. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.04.2013

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

Service Bench No. 1510 of 2003

Radhey Shyam Gupta ...Petitioner
Versus
U.P. State Agro Industrial Corp ..Respondent

"..... As a model employer the Government must conduct itself with high proity and candour with its employees."

21. In **State of Haryana v. Piara Singh (1992) 4 SCC 118**, Hon'ble the Apex Court held that the main concern of the Court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

Counsel for the Petitioner:
Sri Rakesh Kumar

Counsel for the Respondent:
Sri Manoj K Singh, Sri S. Mirza

A-Constitution Of India, Art.-226-Continuity of Service- Termination order-found illegal-quashed-confined by Apex Court-whether entitled for continuity of Service?-held-'Yes'

Held: Para-37
We further of the view that petitioner is entitled for continuity of service because of the fact that order of termination was declared void by the tribunal which was restored by the Hon'ble Supreme Court. Once the order of termination was quashed by the courts then the employee shall deemed to be in service with all consequential benefits.

B- Constitution Of India, Art.-226- Back wages-termination order found illegal-period in litigation consumed about 22 years-salary denied in absence of certificate no gainful working during these periods given-held-full salary w.e.f. the date of judgment apart from Rs. 1 Lacs towards back wages given.

Held: Para-36
In view of above, so far as payment of wages are concerned, we are of the view that the petitioner is entitled for full salary immediately after pronouncement

of judgment of U.P. Public Services Tribunal i.e. from 31.12.1980 with all consequential benefits. So far as backwages are concerned, we direct the respondents to pay lump-sum amount of Rs. 1,00000/-(one lacs) in lieu of backwages for the reason that petitioner had already attained the age of superannuation and fresh proceeding under financial handbook (Rule 54 (4) Part II to IV will further cause mental pain and agony to the petitioner.

Case Law discussed:
1999(2) SCC 21; 2012(12) SCALE 593; 1999(3) SCC 60; 1991 (2) CAT 61; 1998 SC 344; AIR 1984 SC 1829; 2005(106) FLR 607; 2007 (113) FLR 831; 2005 (104) FLR 863; 2006(109) FLR 159; 2006 (109)FLR 156; 2006 (108) FLR 201; AIR 1955 SC 123; AIR 1994 ALL 298; 2003 (8) SCC 559; 1988 (4) SCC 284; 2011(7) SCC 639

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

1. Heard Shri Rakesh Kumar learned counsel for the petitioner and Shri Shafiq Mirza learned counsel for the respondents and perused the record.

2. U.P. State Agro Industrial Corporation Limited is a corporation constituted under the Companies Act and is a government company and admittedly instrumentality of State in terms of Article 12 of the Constitution of India. The petitioner was appointed in the year 1970 on the post of Accountant and on 20.7.1970 thereafter on the post of Branch Manager in the respondent corporation. His services were terminated by an order dated 23.1.1976. Feeling aggrieved with the impugned order of termination, petitioner filed a regular suit no. 29 of 1976 in the court of Civil Judge Lucknow. Later on after constitution of U.P. State Public Service Tribunal (hereinafter referred as Tribunal) the said case was transferred to the Tribunal. The Tribunal after considering the pleading on record with due opportunity to the parties to lead the evidence arrived to the conclusion that order suffers from vice of arbitrariness and declared the order void and illegal. Operative portion of the order dated 31.12.1980 passed by the tribunal is reproduced as under:-

"In view of the above discussions we are of the view that the termination order was passed by way of punishment and since the claimant had not been given any opportunity, the principles of natural justice were contravened. At the sametime the malafides against Sri R.P.Singh have been established.

In view of the above findings we set aside the termination order and declare that the said order is void and illegal. It will however be open to the O.Ps. to initiate an enquiry if they so desire against the claimant and thereafter deal with his case as permissible under law."

3. Feeling aggrieved with the impugned order passed by the Tribunal the respondent corporation had preferred a Writ Petition No. 1591 of 1981 in this court. The writ petition was heard by a Division Bench and allowed it by the judgement and order dated 10.12.1997, a copy of which has been annexed as Annexure-2 to the writ petition. The Division Bench had set aside the tribunal's order with the finding that the impugned order of termination does not suffer from any impropriety or illegality nor it is violative of Article 311 (2) of the Constitution of India.

4. Feeling aggrieved with the aforesaid judgement, petitioner had preferred Special Leave Petition in the

Hon'ble Supreme Court and leave was granted by their Lordship. The appeal was registered as Civil Appeal No. 6344 of 1998 Radhey Shyam Gupta Vs. U.P. State Agro Industrial corporation.

5. After considering rival submissions and pleadings on record, Hon'ble Supreme Court had allowed the appeal and restored the order passed by the Tribunal with the finding that order of termination was punitive in nature and could not have been passed. The case has also been reported in **1999 (2) SCC 21 Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Limited and another.**

6. It appears that respondent corporation being not satisfied with the order passed by the Hon'ble Supreme Court in appeal again preferred a review petition. That too was dismissed by an oder dated 3.2.1999. Before dismissal of review petition the petitioner had submitted a joining report dated 18.12.1998. In the meantime, review petition was dismissed by Hon'ble Supreme Court by an order dated 3.2.1999. The order passed by the Hon'ble Supreme Court in the review petition, a copy of which has been filed as Annexure-5 to the writ petition is reproduced as under:-

"We have carefully gone through the review petition and the connected papers. We see no merit int he review petition and the same is accordingly dismissed."

7. According to petitioner's counsel in spite of the fact that the judgement of the tribunal attained finality up to Hon'ble Supreme Court respondents had not granted arrears of salary and other post retiral dues. The submission of the learned counsel for the petitioner Shri Rakesh Kumar is that after dismissal of appeal by Hon'ble Supreme Court it was incumbent upon the respondents corporation to pay the arrears of salary and other service benefit since, no fresh enquiry was instituted by the opposite party.

8. Learned counsel for the petitioner has relied upon the cases reported in 2**012 (12) SCALE 593, Pradip Kumar Vs. Union of India and others; Dipti Prakash Banerjee Vs. Satvendra Nath Bose National Centre for Basic Sciences, Calcutta and others, 1999 (3) SCC 60; G. Chokkan and others Vs. The Assistant Engineer Coaxial Maintenance ERODE and others (Madras), 1991 (2) CAT 61 (AISLJ); Union of India and Another Vs. Sri Babu Ram Lalla, AIR 1988 SC 344; S.M.Saiyad Vs. Baroda Municipal Corporation, AIR 1984 SC 1829 and A.L.Kalra Vs. The Project and Equipment Corporation of India Ltd.**

9. On the other hand, Shri Shafiq Mirza learned counsel for the respondent corporation submits that the petitioner is not entitled for payment of arrears of salary and other service benefits since he does not fulfill requisite conditions and also had not discharged duty.

10. Shri Shafiq Mirza has relied upon the cases reported in **2005 (106) FLR 607, General Manager, Haryana Roadways and Rudhan Singh; 2007 (113) FLR 831, Haryana Urban Development Authority Vs. Om Pal; 2005 (104) FLR 863, Kendriya Vidyalaya Sangathan and another;2006 (109) FLR 159, Kunwar Heresh Saran**

Saxena and State of u.P. and another; 2006 (109) FLR 156, State of M.P. and others and Arjunlal Rajak; 2006(108) FLR 201, U.P. State Brassware Corporation Ltd. and another Vs. Udai Narain Pandey.

11. So far as factual matrix of the case is concerned it has not been disputed by the parties' that the order of termination was set aside and declared as null and void (supra). Accordingly, petitioner is entitled for all retiral benefits including arreas of salary. Petitioner, while approaching this Court, has claimed following reliefs:-

"A. A writ, order or direction in the nature of Mandamus commanding the opposite party to pay full back wages iwth all consequential benefits by calculating the revised pay scale and the increments accruing thereon to the petitioner from the date of termination till date of retirement.

B. To issue a Writ, order or direction in the nature of Mandamus to grant retiral benefits such as Employees' Provident Fund, Insurance, pension etc.

C.Any other writ, direction or order as the Hon'ble Court may deem fit and proper in the circumstances of the case.

D. To award costs of the writ petition in favour of the petitioner."

12. Shri Shafiq Mirza learned counsel for the respondent corporation has opposed the relief claimed by the petitioner and submits that he is not entitled for any backwages on the principle of "no work no pay".

He submits that there is no evidence that petitioner is not in a gainful employment. He further submits that payment of post retiral dues was rejected by an order dated 3.7.1999. He further submits that backwages may not be allowed in a mechanical way.

13. So far as argument advanced by Shri Shafiq Mirza that the petitioner has not submitted any representation indicating therein that he is not in a gainful employment is concerned, attention has been invited towards a representation dated 30.1.1999, a copy of which has been filed as Annexure-7 to the writ petition which indicates that petitioner has made a statement that for the period of almost 23 years he suffered mental pain and agony as well as financial hardship on account of non employment and pendency of matter before the different courts. In Para 12 to the writ petition there is specific pleading with regard to representation dated 30.1.1999. In response to para 12 to the writ petition, it has been stated in the counter affidavit that it has been rejected.

14. However, fact remains that while submitting representation the petitioner has stated that for 23 years he had suffered unemployment, mental pain and agony. Once the petitioner has come forward with a specific case that he is not in a gainful employment and he suffered mental pain and agony then it was incumbent to record finding with regard to gainful employment. Nothing has been brought on record while filling counter affidavit that the petitioner was in job or in gainful employment. No notice was served on the petitioner to furnish material or lead evidence with regard to his unemployment.

15. In view of above, inference may be drawn that petitioner was not in a

gainful employment for the period of 23 years.

16. Now coming to the second limb of the argument with regard to arrears of salary and other post retiral dues. A plain reading of the judgement and order passed by the tribunal reveals that the order of termination was declared void and illegal. However, Tribunal had not granted any order with regard to payment of salary. Fact remains, in case, order is declared void abinitio means no order is in existence and petitioner shall deem to be continue in service. A person who deem to be in service shall entitled for payment of salary with immediate effect i.e. from 10.12.1997 the date when tribunal had pronounced the judgement and which has been affirmed by Hon'ble Supreme Court.

17. Once the order of termination was declared null and void then not only petitioner shall deem to be in service but it shall amount to continuity in service from the date of initial appointment and the all service benefits including the post retiral dues to be calculated treating the petitioner in service.

18. In Blacks Law Dictionary, Ninth Edition by Bryan A. Garner, the word void has been defined as under:-

"**Void** of no legal effect; null. The distinction between void and voidable is often of great practical importance. Whenever technical accuracy is required, void can be properly applied only to those provisions that are of no effect whatsoever-Those that are an absolute nullity."

19. In The Law Lexicon by P Ramanatha Aiyar, 2nd Edition the word void has been defined as under:-

"**Void**. No valid, of no effect; invalidate.

Null; ineffectual; having no legal force or binding effect; incapable of being enforced by law

A thing which is void is "non-est" and it is not necessary that it be set aside though it may be sometimes convenient to do so

Void and not being valid. There is no real difference between transfer being void or not being valid. Sanction obtained from the charity commission subsequent to the sale transaction is not valid."

20. Hon'ble Supreme Court in a case reported in **AIR 1955 SC 123, Behram Khurshid Pesikaka Vs. State of Bombay**, held that word void used in Article 31 of the Constitution of India does not mean that existing law shall obliterated from the statute book since it has not been given any retrospective effect. After the coming into force of the Constitution the effect of Article 13(1) on such repugnant laws is that it nullifies them and makes them ineffectual and nugatory and devoid of any legal force or binding effect.

21. Full Bench of Allahabad High Court in **AIR 1994 All 298, Nutan Kumar Vs. II Additional District Judge Band** while interpreting the expression "void" in relation to a juristic act held that it means without legal force, effect or consequence; not binding; invalid; null;

worthless; cipher; useless; and ineffectual. Accordingly, since the order of termination has been declared void it become ineffectual, worthless, in valid and nonest, deemed to be extinguished from petitioner's service career with continuity of service for all practical purposes.

22. The case of **Pradip Kumar** (supra) relied upon by the petitioner's counsel relates to the services of the employee concerned who was working as probationer. Their Lordship of Hon'ble Supreme Court had directed to restore his services with all backwages.

23. The case of **Dipti Prakash Banerjee** (supra) relates to termination of services. The order of termination was set aside on the ground that it is punitive in nature. Their Lordship of Hon'ble Supreme Court while allowing the appeal against the order passed by the High Court held that since there is no evidence with regard to gainful employment the appellants shall be entitled for backwages. Relevant portion from the judgement of Dipti Prakash Banerjee (supra) is reproduced as under:-

"para46.

Learned senior counsel for the respondent submitted on the basis of State of Haryana v. Jagdish Chander that merely because an order of termination was set aside on grounds of lack of opportunity, it was not necessary to direct reinstatement and back wages. Reliance in Jagdish Chandra's case was placed upon Managing Director, ECIL v. B. Karunakar . It is true that such an order not granting reinstatement or back wages was passed in Jagdish Chander's case following Karunakar's case. But it has to be noticed that in Karunakar case, there was a regular departmental inquiry but the inquiry report was not given to the officer. This Court directed the report to be given and set aside the proceedings from that stage and stated that no order for reinstatement or backwages need be passed at that stage. But in cases like the present where no departmental inquiry whatsoever was held, Karunakar case, in our view, cannot be an authority. As to backwages, on facts, the position in the present case is that there is no material to say that the appellant has been gainfully employed. The appellant is, therefore, entitled to reinstatement and backwages till the date of reinstatement from the date of termination and to continuity of service. Point 4 is decided accordingly".

24. The case of **Union of India (supra**) also relates to a situation where their Lordship had granted the backwages.

25. In the case of **S.M.Saiyad** (supra) while allowing the appeal Hon'ble Supreme Court had set aside the order of High Court directing for payment of backwages after deducting certain amount. Relevant portion from the judgement of S.M.Saiyad (supra) is reproduced as under:-

*"**Para 8** We, accordingly, allow this appeal and set aside the decision of the High Court refusing the back wages for the period December 12, 1969 to October 26, 1976 and directed that the appellant shall be entitled to back wages including salary and allowances and other benefits to which would be entitled as if he had continued the service. While making the payment of back wages as per this order the respondent is entitled to deduct the amount of Rs. 150/- p.m. from January*

20, 1973 to October 26, 1976 from the amount which becomes payable to the appellant. The respondent must compute the amount payable as herein directed and pay what becomes payable, to the appellant within a period of two months from today.

26. In the case of A.L.Kalra (supra) also the controversy before Hon'ble Supreme Court with regard to punishment awarded on account of misconduct in the form of dismissal from service was in question. The appeal was allowed with the finding that every arbitrary executive action affecting public employment is violative of Article 14 and 16 of the Constitution of India. Hon'ble Supreme Court restored the services of appellant with continuity of service. It is further held by Hon'ble Supreme Court that once order of termination is held to be bad, no other punishment in the guise of denial of backwages can be imposed. Relevant portion from the judgement of A.L.Kalra (supra) is reproduced as under:-

"Para 32 and 33

32. The last question then is to what relief the appellant is entitled ? Once the order of removal from service is held to be illegal and invalid and the appellant being in public employment, the necessary declaration must follow that he continues to be in service uninterruptedly. This aspect does not present any difficult and the declaration is hereby granted.

33. When removal from service is held to be illegal and invalid, the next question is whether : the victim of such action is entitled to backwagcs. Ordinalily, it is well-settled that if termination of service is held to be bad, no other punishment in the guise of denial of back wages can be imposed and therefore, it must as a necessary corollary follow that he will be entitled to all the back wages on the footing that he has continued to be in service uninterruptedly. But it was pointed out in this case that the appellant was employed as Factory Manager by M/s. KDR Woollen Mills, A-90, Wazirpur Industrial Area, Delhi from where he resigned with effect from August 8, 1983. It was also submitted that he was drawing a salary of Rs. 2500 per month. Now if the appellant had procured an alternative employment, he would not be entitled to wages and salary from the respondent. But it is equally true that an employee depending on salary for his survival when he is exposed to the vagaries of the court litigation cannot hold on to a slender distant hope of judicial process coming to his rescue and not try to survive by accepting an alternative employment, a hope which may turn out to be a mirage. Therefore, the appellant was perfectly justified in procuring an alternative employment in order to keep his body and soul together as also to bear the expenses of litigation to vindicate his honour, integrity and character".

27. On the other hand, the cases relied upon Shri Shafiq Mirza learned counsel for the respondent corporation speak otherwise. In the case of General Manager, Haryana Roadways (supra) under para 10,11 and 12, their Lordship of Hon'ble Supreme Court held that when work is not done remuneration may not to be paid with the finding that employees shall not be entitled for payment of backwages. Their Lordship has granted 50 per cent of backwages to the employees concerned.

28. In the case of **Haryana Urban Development Authority** (supra) in lieu of backwages the lump sum amount of 25 per cent backwages by Hon'ble Supreme Court.

29. In the case of **Kendriya Vidyalaya Sangathan** (supra) also where allegation with regard to absconding from services no backwages were granted. Relevant portion from the judgement of Kendriya Vidyalaya Sangathan (supra) is reproduced as under:-

"para 15 Applying the above principle, the inevitable conclusion is that the respondent was not entitled to full back wages which according to the High Court was natural consequence. That part of the High Court order is set aside. When the question of determining the entitlement of a person to back wages is concerned, the employee has to show that he was not gainfully employed. The initial burden is on him. After and if he places materials in that regard, the employer can bring on record materials to rebut the claim. In the instant case, the respondent had neither pleaded nor placed any material in that regard.

30. In the case of **State of M.P. Vs. Arjunlal Rajak** (supra) it has been held by Hon'ble Supreme Court that the payment of backwages should not be mechanical one and industrial court should apply mind while taking a decision with regard to backwages.

31. Similar proposition has been reiterated in the case of **Udai Narain Pandey** (supra) by Hon'ble Supreme Court. In the case of Udai Narain Pandey (supra), their Lordship had granted 25 per cent of the total backwages.

32. Keeping in view the different pronouncements of Hon'ble Supreme Court law emerges that for payment of backwages there can not be strait-jacket formula. All shall depend upon the facts and circumstances of the each case and court may exercise jurisdiction while passing the order for payment of backwages.

33. In view of the aforesaid discussion, we are of the view that question with regard to payment of backwages and wages from the date of pronouncement of judgement may be considered by this Court. Petitioner suffered on account of pendency of litigation right from tribunal to Hon'ble Supreme Court.

34. It is well settled proposition of law that no one should put to suffer because of pendency of litigation in the part of courts vide Bharat Damodar Kale Vs. State of A.P., 2003 (8) SCC 559; Atma Ram Mittal Vs. Ishwar Singh Punia, 1988 (4) SCC 284; Narmada Bachao Andolan Vs. State of Madhya Pradesh and another, 2011 (7) SCC 639 and State of Rajasthan and others Vs. Khandaka Jain Jwellers. The order passed by the Tribunal set aside by the High Court and was restored by Hon'ble Supreme Court. Accordingly, petitioner cannot be put to suffer only because of the pendency of litigation.

35. Even after pronouncement of judgement by the Hon'ble Supreme Court in the year 1997 the petitioner has suffered with mental pain and agony and financial hardship and respondents had declined to pay the wages and get the

matter pending on unfounded ground by taking dilatory tactics.

36. In view of above, so far as payment of wages are concerned, we are of the view that the petitioner is entitled for full salary immediately after pronouncement of judgement of U.P. Public Services Tribunal i.e. from 31.12.1980 with all consequential benefits. So far as backwages are concerned, we direct the respondents to pay lump-sum amount of Rs. 1,00000/- Hon'ble Supreme Court. Once the order of termination was quashed by the courts then the employee shall deemed to be in service with all consequential benefits.

38. In view of above, writ petition is allowed. A writ in the nature of mandamus is issued commanding the respondents to pay backwages to the tune of Rs. 1,00000/-(one lacs) expeditiously, say within a period of three months from the date of receipt of a certified copy of this order.

39. Respondents are further directed to pay arrears of full salary immediately after the date of pronouncement of judgement, by the tribunal i.e. from 31.12.1980 along with interest @ 8 per cent till the age of superannuation after deducting whatever amount has already been paid.

40. A writ in the nature of mandamus is further issued directing the respondents subject to above to pay all other consequential benefits available to the petitioner in accordance to rules considering the petitioner's continuity in service from the date of appointment.

(one lacs) in lieu of backwages for the reason that petitioner had already attained the age of superannuation and fresh proceeding under financial handbook (Rule 54 (4) Part II to IV will further cause mental pain and agony to the petitioner.

37. We further of the view that petitioner is entitled for continuity of service because of the fact that order of termination was declared void by the tribunal which was restored by the

41. Let the order be complied with by the respondents within three months from the date of receipt of a certified copy of this order.

42. Writ petition is allowed accordingly.

43. Let a certified copy of this order be provided to the parties' counsel on payment of usual charges within a week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 26.04.2013

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 1537(MS) of 2010

Housing Development Finance Corporation Ltd. Petitioner
Versus
District Consumer Disputes Redressal Forum(I) ...Respondent

Counsel for the Petitioner:
Shakti Ojha

Counsel for the Respondent:
C.S.C.

Sri Adnan Ahmad and Sru Manish Mishra

Constitution of India, Art.-226- Jurisdiction of Distt. Consumer Forum-application to returned the Documents as had cleared entire amount of loan-other hand heavy amount claimed overdue-Distt. forum passed interim order-contrary to provisions of Section 34 of Securitisation Act-held without jurisdiction-order impugned quashed.

Held: Para-8

In reply without disputing the proposition of law laid down by Hon'ble the Supreme Court as well as by this Court, the learned counsel for the respondents submitted that he has not challenged any proceeding of Recovery of Debt rather he has moved an application to return his record being consumer of the Bank. Therefore, the same is well maintainable. However, upon perusal of the facts I am of the view that substantially the petitioner has invoked the jurisdiction of the District Consumer Forum to interfere in the proceeding of Recovery of Debt posing as he has cleared of dues, whereas still the loan is due. Therefore, I am of the view that petitioner's complaint is also based on concealment of facts. He has not approached the District Consumer Forum with clean hands. Besides it, I am further of the view that since substantially the matter relates to recovery of debt, the District Consumer Forum lacks the jurisdiction.

Case Law discussed:

(2009) 8 Supreme Court Cases 646; 2009 (27) LCD 1666;

(Delivered by Hon'ble Shri Narayan Shukla, J)

1. Heard Mr Shakti Ojha, learned counsel for the petitioner as well as Mr Adnan Ahmad, learned counsel for the respondent.

2. By challenging the orders dated 9th of November, 2009 as well as 11th of January,2010, passed by District Consumer Disputes Redressal Forum (I), Lucknow, Opposite Party No. 1, in Complaint Case No. 1117 of 2009, in fact, the petitioner has challenged the proceedings of the complaint itself being without jurisdiction.

3. Learned counsel for the petitioner submits that the proceeding of the complaint has arisen out of notice issued under Section 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as Securitisation Act). The respondent instituted a complaint under Section 12 of the Consumer Protection Act, 1986 for issuing directions to return his documents as well as the papers of the agreement as he has cleared whole dues, whereas the learned counsel for the petitioner submits that still there are huge dues against the petitioner for payment. Thus, he submits that the respondent's complaint is based on concealment of fact. The petitioner also raised preliminary objection against the maintainability of the complaint before the District Consumer Disputes Redressal Forum (hereinafter referred to as District Forum), but the District Forum overruled the objection and passed the interim order on 9.11.2009, restraining the opposite parties not to dispossess the complainant from the house in dispute. The said order is under challenge in the instant writ petition.

4. Learned counsel for the petitioner drew the attention of this court towards the provisions of Section 34 of the Securitisation Act which bars the Civil Court or other authority to entertain such complaint and take action. Section 34 is extracted below;

"**Civil Court not to have jurisdiction** :- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any auction taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.'

5. He also cited decision as follows;

Nihar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation, reported in (2009) 8 Supreme Court Cases 646.

6. In this case the Hon'ble Supreme Court framed following question for determination;

" Whether the High Court/or this Court has power to transfer a suit pending in the civil court situated in one State to Debts Recovery Tribunal situated in another State?

7. Hon'ble Supreme Court considered various provisions of the Code of Civil Procedure, Securitisation Act as well as Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as Debt Recovery Act) and discussed in detail about their jurisdiction to deal with the case arising out of the Debt Recovery Act. In this case Hon'ble the Supreme Court also discussed about the jurisdiction of the Civil Court and held that the jurisdiction of the Civil Court would be ousted in respect of the matters which relates to a debt payable to a Bank or Financial Institutions. He also cited a judgment of this Court i.e. **Allahabad Bank Moti Bagh, Faizabad Vs. Bipin Behari Lal Srivastava and others**, reported in **2009(27) LCD 1666**. In this case this Court considered the several judgments of the Hon'ble Supreme Court and ultimately held that it is only Debt Recovery Tribunal which has jurisdiction to take cognizance of such matter.

8. In reply without disputing the proposition of law laid down by Hon'ble the Supreme Court as well as by this Court, the learned counsel for the respondents submitted that he has not challenged any proceeding of Recovery of Debt rather he has moved an application to return his record being consumer of the Bank. Therefore, the same is well maintainable. However, upon perusal of the facts I am of the view that substantially the petitioner has invoked the jurisdiction of the District Consumer Forum to interfere in the proceeding of Recovery of Debt posing as he has cleared of dues, whereas still the loan is due. Therefore, I am of the view that petitioner's complaint is also based on concealment of facts. He has not approached the District Consumer Forum with clean hands. Besides it, I am further of the view that since substantially the matter relates to recovery of debt, the District Consumer Forum lacks the jurisdiction.

9. Therefore, the orders impugned are hereby quashed. The writ petition stands allowed. However, respondent's right to approach the appropriate forum

against the proceeding of Recovery of Debt is not interfered with.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.04.2013

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

U/S 482/378/407 No. 1672 Of 2011

Abdul ...Petitioner
Versus
The State of U.P. And Another Respondents

Counsel for the Petitioner:
Sri Parijaat Belaura

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section-482-Quashing of proceeding-offence under section-401-argument that if allegation taken to be true on its face value-no offence made out against applicant-as no allegation of habitual offender-held-the word "other gang person-denotes the gang with whom applicant associated-involved in commission of theft-application rejected.

Held: Para-16
The aforesaid view of this Court was expressed with reference to the Goonda Act in which the word habitual is used with regard to an individual and not with reference to a gang. But in view of the provisions of Section 401 I.P.C., word habitual has been used with reference to a gang who habitually deals in theft or roberry. This fact has not been challenged by any other accused who was in the company of gang alongwith present applicant at the relevant time. Hence there was sufficient evidence that the applicant was associated with a gang who habitually committed offence of theft by administering narcotic substance on the passenger of the train.

Case Law discussed:
1912, Cr./L.J.R. Page 539; air 1992 SC 604; 1990, 4 SCC Cases 552; (1984) 3 SCC 14; (1995) 3 SCC 237

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

1. By means of this application under Section 482 Cr.P.C., the applicant has made prayer to quash the charge sheet no.- 182 of 2010 arising out of Case Crime No.-338 of 2010 under Section 401 I.P.C., P.S. G.R.P. Charbagh, Lucknow and entire proceedings pending in the Court of Chief Judicial Magistrate, Northern Railway, Lucknow.

2. In brief the facts giving arise to the present application are that on 9.7.2010 at about 22:15 hours, the police force of G.R.P. Charbagh received a secret information that a gang of thieves is present behind the Hanuman Temple, then police party reached there and after hearing their conversation they were confirmed that it was a gang of thieves and thereafter police party apprehended three persons on the spot and on interrogation these persons disclosed that by administering narcotic powder, they used to commit theft of the belongings of the passengers of trains. The apprehended accused persons were searched by the police in accordance with law and thereafter the present applicant was found in possession of the narcotic powder and the other accused Rajesh Chandra Joshi was also found in possession of narcotic powder and also one unlicensed knife. Three cases under different sections were registered against the accused persons. Case Crime No.-338 of 2010 under Section 401 I.P.C. was registered against the accused persons in which after

investigation the police has submitted charge sheet which is under challenge in the instant application. The other cases were under Sections 8/21/22 N.D.P.S. Act and another under Section 4/25 Arms Act.

3. Submission of the learned Counsel for the applicant is that even if the allegations made against the accused persons are taken to be true on its face value even then no offence under Section 401 I.P.C. can be said to have been made out against the applicant. In support of his contention he has placed reliance on the pronouncement of **Hon'ble Bombay High Court in the case of Criminal Appeal No.-516 of 2011 Emperor Vs. Tukaram Malhari, 1912, Cr./L.J.R. page 539** wherein the Hon'ble Apex Court has held as under:-

"Under Section 401 of the Penal Code, it has to be determined whether a party of accused persons constitute a gang of persons associated for the purpose of habitual theft, evidence that each individual of the party is a convicted thief , is relevant evidence for the purposes of that question."

4. Learned A.G.A has submitted that word habitually is important and prosecution shall prove its case during trial by adducing evidence that the applicant is habitual offender and at this stage proceedings cannot be quashed on this ground.

5. Before proceedings further, legal position on the point of quashing the proceeding has to be considered.

6. Hon'ble the Apex Court in the case of **State of Haryana and others v. Ch. Bhajan Lal and others** reported in **[AIR 1992 SC 604]** after considering large number of cases on the point of quashing the proceedings held at paras 108 and 109 as follows:

"(108) In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extra-ordinary power under Article 226 of the inherent powers under section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any Court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under section 156 (1) of the Code except under an order of a Magistrate within the purview of section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the

commission of any offence and make out a case against the accused.

(4) Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

"(109) We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the F.I.R. or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice.?"

7. Before proceedings further, it is necessary to quote, Section 401 I.P.C., which reads as under:-

"Punishment for belonging to gang of thieves- Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."

8. Perusal of the aforesaid Section, makes it clear that in order to constitute the offence under Section 401 I.P.C. the following ingredients are necessary:-

(I)That the accused belongs to any wandering or other gang of persons.

(II)That such gang of persons was associated for the purpose of habitually

Committing theft or robbery.

(III)That such a gang was not being a gang of thugs or dacoits.

9. In the facts of the instant case the present applicant was found in the association with two other persons and it was accepted by them that they used to administer narcotic drugs on the passenger of train and thereafter they commit theft and narcotic substance was also recovered from and also illegal weapon. So, it was sufficient for the police to prima-facie establish that they belong to a gang of thieves. Now, the grievance of the learned Counsel for the applicant is that since there is no evidence that the applicant was habitual offender

therefore no offence can be said to have been made out under Section 401 I.P.C.

10. It is pertinent to mention here that this charge sheet has been challenged only by the accused Abdul and not by the other accused persons. The perusal of the 401 I.P.C. makes it clear that the word habitually virtually qualifies the word gang and not to the person who is member thereof. The use of words by the legislature " or other gang of persons associated for the purpose of habitually committing theft or robbery" makes it clear that the gang with which the accused was associated was habitually involved in commission of theft or robbery. To attract Section 401 I.P.C. the accused must belong to such a gang which is associated for the purpose of habitually committing theft or robbery.

11. Accordingly, it is not necessary, that each member of the gang was in the habit of committing theft or any particular act of theft or roberry. Once it has been proved that a gang was formed for the purpose of habitually committing theft of the persons, who thereafter joined the gang in committing one or more theft comes within the purview of Section 401 I.P.C.

12. Belongings to a gang of persons associated for the purpose of habitually committing theft is punishable under Section 401 I.P.C. The term belong used in Section 401 I.P.C. implies something more than the idea of casual association, which involves the notion of continuity and indicates more or less intimate connection with a body of persons extending over the period of time sufficiently wrong to warrant inference that person arrested has associated himself with the gang for the common purpose, which is the commission of theft. So, it is more than a casual association. The substance of the Section is the agreement habitually to commit theft not the actual commission or admitted commission of theft or roberry.

13. The existence of such an agreement and participation of any person in that agreement may be inferred from circumstances. The word habitually has been considered by the **Hon'ble Apex Court in the case of Ayub alias Pappu Khan Nawab Khan Pathan Vs. S.N.Sinha and Another, 1990, 4 SCC Cases 552, Writ Petition(Criminal) No.-687 of 1990**, in para -5 of the said judgment followed its earlier verdict in the Case of **Vijay Narayan Singh Vs. State of Bhihar (1984) 3 SCC 14** and quoted para 31 of that judgment, which is being reproduced as under:-

"The expression 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts or omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions."

14. However, this observation was given with reference to Gujarat Prevention of Anti Social Activities Act 1985. In another judgment in the case of Mustakmiya Jabbarmiya Shaikh Vs. M.M.Mehta, Commissioner of Police & Others, (1995) 3 SCC 237, the Hon'ble Apex Court has again occasion to

consider the meaning of word 'habitually' in para 8 as under:-

" The expression 'habit' or 'habitual' has however, not been defined under the Act. According to The Law Lexicon by P.Ramanatha Aiyar, Reprint Edn. (1987), p. 499, 'habitually' means constant, customary and addicted to specified habit and the term habitual criminal may be applied to anyone who has been previously convicted of a crime to the sentences and committed to prison more than twice. The word 'habitually' means 'usually' and 'generally'. Almost similar meaning is assigned to the words 'habit' in Aiyar's Judicial Dictionary, 10th Edn. p. 485. It does not refer to the frequency of the occasions but to the invariability of practice and the habit has to be proved by totality of facts. It, therefore, follows that the complicity of a person in an isolated offence is neither evidence nor a material of any help to conclude that a particular person is a "dangerous person" unless there is material suggesting his complicity in such cases which lead to a reasonable conclusion that the person is a habitual criminal."

15. In the case law relied upon by the learned Counsel for the applicant, i.e. **Shanker Ji Shukla Vs. Ayukt, Allahabad Mandal, Allahabad & Others 2005 (52) ACC 638**, wherein this court has held in para 5, as under:-

"The emphasis is on the word habitual and a single or two acts after a long gap does not amount to the term ' Habitually'. The expression 'habitually' means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify any inference of habit."

16. The aforesaid view of this Court was expressed with reference to the Goonda Act in which the word habitual is used with regard to an individual and not with reference to a gang. But in view of the provisions of Section 401 I.P.C., word habitual has been used with reference to a gang who habitually deals in theft or roberry. This fact has not been challenged by any other accused who was in the company of gang alongwith present applicant at the relevant time. Hence there was sufficient evidence that the applicant was associated with a gang who habitually committed offence of theft by administering narcotic substance on the passenger of the train.

17. In view of the above discussion, this application under Section 482 Cr.P.C. is devoid of merits and deserves to be dismissed and it is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2013

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Writ Petition No. 1784 (M/S) Of 2013

Smt. Shyam Wati ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Dr. L.P. Mishra;Sri R.N.S. Chauhan

Counsel for the Respondents:
C.S.C.; Mrs. Arti Ganguli
Sri Heman Kumar Mishra

(A) U.P. Panchayat Raj Rules 1997-Chapter XIII Rule 256 and 257-readwith U.P. Panchayat Raj Act 1947-Section 27(2)-Surcharge of Rs. 2,99,461/- upon village Pradhan-on random checking of three member committee appointed by DPRO-members of committee below than Distt. Level officer-held-procedure prescribed under Rule not followed at all-order in itself illegal.

Held: Para-23

In view of this and in view of the undisputed position that the surcharge is to be levied in accordance with the (B) U.P. Panchayat Raj (Removal of Pradhans, U.P. Pradhans & Member)-Enquiry Rules 1997- Rule 2(c)-Enquiry Committee-appointed by DPRO and not by Distt. Magistrate-two member of committee being below to Distt. level officer-could not be nominated as enquiry officer-held-committee neither appointed by competent authority-nor constituted by competent person-financial and administrative power of pradhan could not be ceased.

Held: Para-43

It is to be noted that the decision making exercise on the part of enquiry committee while submitting the preliminary enquiry report should constitute of persons statutorily competent to apply mind and the decision making process of participation of some persons who are not statutorily competent cannot legally be made a basis for an action contemplated under the statute. The preliminary enquiry report submitted by the three member committee cannot be treated to be the enquiry report of the District Panchayat Raj Officer alone, as such, it can safely be concluded that the enquiry report submitted by the enquiry committee which neither appointed by the competent authority nor constituted of competent persons to hold the enquiry could be valid report for the purpose of taking a decision to cease the financial procedure prescribed under Section 27 (2) of the Act and the procedure has been prescribed under Chapter-XIII of 1947 Rules which contained Rules 256 and 257 and there being no other set of rules and the power having been exercised under the impugned order in regard to levying of surcharge and its recovery and the recovery of the surcharge amount having been exercised under Section 27 (1) of the Act, there is no escape from the irresistible conclusion that the impugned order passed by the District Magistrate, Unnao in that regard is per se illegal.

and administrative powers of the petitioner.

Case Law discussed:

2006 (3) AWC 2787; [2011 (29) LCD 221]; 1969 (1) SCC 825; 1969 (1) SCC 308; (1984) 2 SCC 41; (2001) 6 SCC 260; (2008) 7 SCC 117; (2010) 11 SCC 557; (2011) 5 SCC 435; AIR 1936 Privy Council 253; AIR 1964 SC 358; (2004) 2 SCC; (2003) 2 SCC 111; 2013 (1) ADJ 228; 1998 (89) Revenue Digest 771; 2008 (1) CRC 714

(Delivered by Hon'ble Ritu Raj Awasthi,J.)

1. Learned counsel for petitioner informs that he does not want to to file rejoinder affidavit as purely legal questions are involved in the writ petition which can be decided even in absence of the same, learned Standing Counsel also agrees, as such, with the consent of parties' counsel, the writ petition has been heard finally.

2. Heard Dr. L.P. Mishra, learned counsel for petitioner, Mr. Sanjay Sareen, learned Standing Counsel for the State as well as Mr. Hemant Kumar Mishra, learned counsel for opposite party no. 7 and perused the record.

3. The writ petition has been filed by an elected Pradhan of Gram Panchayat Tar Gaon, Development Block Bichchiya, District Unnao challenging the order dated 04.03.2013 of District Magistrate, Unnao levying a sum of Rs. 2,99,461/- as surcharge and directing for recovery of the said amount and further ceasing of the financial and administrative powers of petitioner as Pradhan in exercise of powers under Section 95 (1) (g) of Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act').

4. Learned counsel for petitioner submits that the impugned order reveals that the same has been passed taking note of inspection report dated 13.8.2012 submitted by the District Development Officer, District Unnao with regard to works undertaken under the Scheme known as Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) and other works undertaken during the tenure of petitioner as Pradhan and on the basis of enquiry report submitted by the committee comprising of (i) District Panchayat Raj Officer, Unnao, (ii) Blcok Development Officer, Development Block, Bichchiya, Unnao and (iii) Assistant Engineer, District Rural Development Agency, Unnao appointed by the Chief Development Officer, Unnao. The said report is said to be based on random checking undertaken by the said three member committee on 20.12.2012 and was communicated to the District Magistrate, Unnao under the covering letter dated 24.1.2013. As per the said report, it prima facie reveals misuse/wrong expenditure done by the petitioner and the Secretary, Gram Panchayat, Tar Gaon, Bichchiya, Unnao and, as such, the same amounts to misuse of funds together with misuse of authority.

5. It is submitted that in furtherance of the inspection report dated 13.8.2012 and the complaint made by Member of Legislative Assembly, the Chief Development Officer, Unnao vide letter dated 25.5.2012 had appointed a three member committee comprising of (i) District Panchyat Raj Officer, Unnao, (ii) Block Development Officer, Development Block Bichchiya, Unnao and (iii) Assistant Engineer, District Rural Development Agency, Unnao for holding preliminary enquiry. The aforesaid enquiry committee undertook the spot inspection on 20.12.2012 making the random checking of work under MGNREGA scheme. It was on the basis of said enquiry report that a show cause notice dated 02.02.2013 along with copy of the enquiry report was issued to petitioner to show cause. The petitioner had submitted an explanation dated 20.2.2013 denying the allegations. It was thereafter that the impugned order levying surcharge and ceasing financial and administrative powers was passed.

6. Submission of learned counsel for petitioner is that so far as the impugned order as it relates to levying of surcharge and direction for recovery from the petitioner is concerned, it has been passed in exercise of powers under Section 27 (1) of the Act. The Uttar Panchayat Raj Rules, 1947 (hereinafter referred to as '1947 Rules'), particularly Rule 256 provides that the Chief Audit Officer shall submit the report relating to the allegations of misuse of funds and consequence negligence or misconduct of Pradhan after calling an explanation from the Pradhan, Up Pradhan, Member,

Officer or Servant of the Gram Panchayat and it is only on the basis of report of the Chief Audit Officer, Cooperative Societies and Panchayats that a surcharge can be levied.

7. The contention is that in the present case since there has been no report made by the Chief Audit Officer, Cooperative Societies and Panchayatas as required under the Rule 256 (1) or the Rules contained in Chapter XIII of U.P. Panchayat Raj Rules, 1947 and no procedure as prescribed under Rules 256 and 257 has been followed, as such, no surcharge can legally be levied against the Pradhan without adopting the procedure prescribed under the said Chapter.

8. Mr. Hemant Kumar Mishra, learned counsel for opposite party no. 7 has submitted that the surcharge rules as relied upon by the petitioner are of no help to petitioner as perusal of Rule 256 (1) makes a mention of a loss, waste or misuse of any money or other property belonging to a Gram Sabha as a direct consequence of negligence of Pradhan or any other person concerned and as evident from perusal of impugned order, the allegations related to misuse of funds of MGNREGA, as such, Rules 256 and 257 are of no avail.

9. Section 27 of the Act on reproduction reads as under:

*"**27. Surcharge** (1) Every Pradhan or of a (Gram Panchayat) every member of a (Gram Panchayat) or of a Joint Committee or any other committee constituted under this Act and every Sarpanch, Sahayak Sarpanch or Panch of a Nyaya Panchayat shall be liable to surcharge for the loss, waste or misapplication of money or property [belonging to the Gram Panchayat or Nyaya Panchayat] as the case may be, if such loss, waste or misapplication is direct consequence of his neglect or misconduct while he was such Pradhan, member, Sarpanch, Sahyak Sarpanch or Panch;*

Provided that such liability shall cease to exist after the expiration of ten years from the occurrence of such loss, waste or misapplication, or five years from the date on which the person liable ceases to hold his office, whichever is later.

(2) The prescribed authority shall fix the amount of the surcharge according to the procedure that may be prescribed and shall certify the amount to the Collector who shall, on being satisfied that the amount is due, realize it as if it were an arrear of land revenue.

(3) Any person aggrieved by the order of the prescribed authority fixing the amount of surcharge may, within thirty days of such order, appeal against the order to the State Government or such other appellate authority as may be prescribed.

(4)Where no proceeding for fixation and realization of surcharge as specified in sub-section (2) is taken the State Government may institute a suit for compensation for such loss, waste or misapplication, against the person liable for the same."

10. A perusal of sub-Section (2) of Section 27 of the Act makes it clear that amount of surcharge is to be fixed by the prescribed authority, it shall be certified by the prescribed authority and sent to the Collector who on being satisfied that the amount is due shall get it realized as arrears of land revenue from the Pradhan

or any other person mentioned under Section 27 (1) of the Act so made liable for surcharge. The procedure for levying of surcharge, determination of amount of surcharge and its recovery has been prescribed under the Rules popularly known as "Surcharge Rules" contained under Chapter XIII of 1947 Rules. Rules 256 and 257 of the said Chapter deal with surcharge which on reproduction read as under:

"Rule 256(1) In any case where the Chief Audit Officer, Co-operative Societies and Panchayats, considers that there has been a loss, waste or misuse of any money or other property belonging to a Gaon Sabha as a direct consequence of the negligence or misconduct of a Pradhan, he may call upon the Pradhan, Up-Prahdan, Member, Officer or servant, as the case may be, to explain in writing why such Pradhan, Up-Pradhan, Member, Officer, or servant should not be required to pay the amount misused or the amount which represents the loss or waste caused to the Gaon Sabha or to its property and such explanation shall be furnished within a period not exceeding two months from the date such requisition is communicated to the person concerned:

Provided that an explanation from the Pradhan, Up-Pradhan or member of the Gaon Panchayat shall be called for through the District Magistrate and from the officer or servant through the Panchayat Raj Officer.

Provided also that no explanation shall be called for from any member who is recorded in the minutes of the Gaon Panchayats or any of its committee as having been absent from the meeting at which the expenditure objected to was sanctioned or who voted against such expenditure.

Note- Any information required by the Chief Audit Officer, Cooperative Societies and Panchayats or any officer subordinate to him not below the rank of Auditor, Panchayats for preliminary enquiry, shall be furnished and all connected papers and records shall be shown to him by the Pradhan immediately on demand.

(2) Without prejudice to the generality of the provisions contained in sub-rule (1) the Chief Audit Officer, Cooperative Societies and Panchayts, may call for the explanation in the following cases:

(a) where expenditure has been incurred in contravention of the provisions of the Act or of the rules or regulations made thereunder;

(b)Where loss has been caused to the Gaon Sabha by acceptance of a higher tender without sufficient reasons in writing.

(b) where loss has been caused to the Gaon sabha by acceptance of a higher tender without sufficient reasons in writing.

(c) where any sum due to the Gaon Sabha has been remitted in contravention of the provisions of the Act or the rules or regulations made thereunder;

(d) where the loss has been caused to the Gaon sabha by neglect in realizing its dues; or

(e) where loss has been caused to the founds or other property of the Gaon Sabha on account of want of reasonable care for the custody of such money or property.

(3) On the written request of the Pradhan, Up-Pradhan, Member, Officer or servant from whom an explanation has been called for, the Gaon Panchayat shall give his necessary facilities for inspection of the record connected with the

requisition for surcharge. The Chief Audit Officer may, on application from the person surcharged, allow a reasonable extension of time for submission of his explanation if he is satisfied that the person charged has been unable, for reasons beyond his control, to consult the record for the purpose of furnishing his explanation.

*"**257. (1)**. After expiry of the period prescribed in sub-rule (1) or (3) of Rule 256, as the case may be, and after examining the explanation, if any, received within time, the Chief Audit Officer shall submit the papers along with his recommendations to the District Magistrate of the district in which the Gram Sabha is situated in case of Pradhan, Up-Pradhan and Members and to the District Panchayat Raj Officer of the district in which the Gram Sabha is situated in case of Officers and servants.*

(2) The District Magistrate or the District Panchayat Raj Officer, as the case may be, after examining and after considering the explanation, if any, shall require the Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat to pay the whole or part of the sum to which such Pradhan, Up-pradhan, Member, Officer or servant is found liable:

***PROVIDED**, firstly, that no Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat would be required to make good the loss, if from the explanation of the Pradhan, Up-Pradhan, Member, Officer or servant concerned or otherwise the District Magistrate or the District Panchayat Raj Officer, as the case may be, is satisfied that the loss was caused by an act of the Pradhan, Up-pradhan, Member, Officer or servant in the bonafide discharge of his duties:*

PROVIDED secondly, that in the case of loss, waste or misuse occurring as a result of a resolution of the Gram Panchayat or any of its committees the amount of loss to be recovered shall be divided equally among all the members including Pradhan and Up-pradhan, who are reported in the minutes of the Gram Panchayat or any of its Committee as having voted for or who remained neutral in respect of such resolution:

***PROVIDED** thirdly, that no Pradhan, Up-Pradhan, Member, Officer or servant shall be liable for any loss, waste or misuse after the expiry of four years from the occurrence of such loss, waste or misuse or after the expiry of three years from the date of his ceasing to be a Pradhan, Up-Pradhan, Member, Officer or servant of the Gram Panchayat, which ever is later."*

11. In the case in hand, undisputedly, there has been no notice to petitioner from the Chief Audit Officer, Cooperative Societies and Panchayats, there has been no report of the Chief Audit Officer to District Magistrate rather on the other hand there is no material on record to indicate that at any point of time petitioner was called upon by the Chief Audit Officer to submit her explanation nor there is any material on record to indicate that on receipt of any report along with relevant papers from the Chief Audit Officer, the District Magistrate had called upon the petitioner to submit her explanation.

12. It is also to be noted that there is nothing on record nor has been submitted by the parties' counsel to indicate that there are any other set of rules prescribed

in exercise of powers under Section 27 of the Act for levying surcharge, as such, I am of the considered view that the impugned order as it relates to levying of surcharge and direction for recovery from petitioner for the surcharge amount is thus not permissible in law for the reason that the procedure as prescribed under Section 27 (2) of the Act i.e. under Chapter XIII of 1997 Rules, Rules 256 and 257 in particular, have not been followed at all as no proceedings as prescribed under the said Rules have been undertaken.

13. Mr. Hemant Kumar Mishra, learned counsel for opposite party no. 7 tried to carve out a distinction between the words 'Gram Panchayat' and 'Gram Sabha' in order to submit that Rule 256 of U.P. Surcharge Rules would not be applicable in the present facts and circumstances of the case.

14. It is submitted that under Rule 256 (1) the Chief Audit Officer, Cooperative Societies and Panchayats is required to submit the report with respect to any loss, waste or misuse of any money or other property belonging to Gram Sabha as a direct consequence of negligence of Pradhan or other authorities of Gram Panchyat whereas in the present case the matter relates to misuse of funds and power by the Pradhan of Gram Panchayat. The perusal of the Gram Panchayat Act indicates that 'Gram Sabha' is a name of village or cluster of villages having 'Panchayat Area' notified as such by the State Government and 'Gram Panchayat' is a body notified as such by the State Government. In fact, 'Gram Panchayat' is a body entrusted with management of such 'Gram Sabha' comprising of a 'Panchyat Area'. In this regard it is necessary to go through the provisions under the Act which on reproduction read as under:

*"**2. Definitions.** - In this Act, unless there is anything repugnant in the subject or context :-*

(g) "Gram Sabha" means a body established under Section 3, consisting of persons registered in the electoral rolls relating to a village comprised within the area of a Gram Panchayat"

15. The term "Panchayat area" has been defined under Section 2(kkk) (ii) which reads as under:-

2 (kkk) (ii). "Panchayat area" means the territorial area of a Gram Panchayat declared as such under sub-section (1) of Section 11-F."

16. The composition and constitution of the Gram Panchayat is contemplated under Section 12 reference of which has been made in Section 2(h) and Section 12(1) dealing with the composition of Gram Panchayat reads as under:-

"12. Gram Panchayat. - (1) (a) There shall be constituted for every Panchayat area, a Gram Panchayat bearing the name of the Panchayat area.

(b) Every Geam Panchayat shall be a body corporate.

(c) A Gram Panchayat shall consist of a Pradhan and, in the case of a Panchayat area having a population of

[i] (upto one thousand) nine members;

[ii] more than one thousand but not more than two thousand, eleven members;

[iii] more than two thousands but not more than three thousands, thirteen members, or

[iv] more than three thousand, fifteen members.

(d) For the purpose of election of members of Gram Panchayat every Panchayat area shall be divided into territorial constituencies in such manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the Panchayat area.

(e) Each territorial constituency of a Gram Panchayat shall be represented by one member in the Gram Panchayat.

(f) The territorial constituencies of a Gram Panchayat may be delimited in the prescribed manner and, if necessary, rules in this regard may be made with retrospective effect from a date not earlier than the date of commencement of the Uttar Pradesh Panchayat Laws (Amendment) Act, 1994."

17. Section 11-F of the Act relates to declaration of Panchayat Area and the said Section 11-F reads as under:-

"11-F. Declaration of Panchayat area *(1) The State Government may, by notification, declare any area comprising a village or group of villages, having , so far as practicable, a population of one thousand, to be a Panchayat area for the purpose of this Act by such name as may be specified:*

PROVIDED that for the purposes of declaration of a Panchayat area no revenue village or any hamlet thereof shall be divided:

PROVIDED further that in the hill districts of Nainital, Almora, Pithoragarh, Tehri, Pauri, Dehradun, Chamoli or Uttarkashi, the State Government may declare the area of a Gaon Sabha established under Section 3 of this Act as it stood before the commencement of the Uttar Pradesh Panchayat Laws (Amendment) Act, 1994, to be a Panchayat area though such area may have a population of less than one thousand.

(2) The State Government may, on the request of the Gram Panchayat concerned or otherwise, and after previous publication of the proposal, by notification at any time -

[a] modify the area of any Panchayat area by including therein or excluding there from any area of a village or group of villages;

[b] alter the name of the Panchayat area; or

[c] declare that any area shall cease to be a Panchayat area."

18. The formation of a Gram Sabha is provided under Section 3 of the Act which reads as under:-

3.Gram Sabha. *- The State Government shall, by notification in the Official Gazette, establish a Gram Sabha for a village or group of villages by such name as may be specified:*

PROVIDED *that where a Gram Sabha is established for a group of villages, the name of the village having the largest population shall be specified as the name of the Gram Sabha."*

19. A perusal of the aforesaid Statutory prescriptions makes it clear that a Gram Sabha is a body which is notified by the State Government as a Gram Sabha by the notification in the Official Gazette comprising of a village or a group of villages by giving it the name of the

village having the largest population where a Gram Sabha is established for a group of villages otherwise in the event of Gram Sabha being constituted for one village, the name of the Gram Sabha is to be the name of the village. A Gram Panchayat is to be a body corporate and virtually is a body to manage the affairs of a Gram Sabha having its territorial jurisdiction over the concerned Panchayat area as declared under Section 11-F. In view of the statutory prescriptions in regard to the formation, declaration or composition of a Gram Sabha, Panchayat area and a Gram Panchayat, it is more than evident that a Gram Panchayat is a body corporate for managing the affairs of a Gram Sabha. Further the powers, duties, functions and administration of Gram Panchayats is dealt with under Chapter-IV of the Act and a perusal of Section 15, 15-A, 16, 16-A, 17, 18, 19, 20, 21, 22, 23 and 24 contained in this Chapter makes it abundantly clear that the Gram Panchayat is to exercise its powers, duties and functions and has to administer a Gram Panchayat in regard to the Panchayat area i.e. the area of a Gaon Sabha and nothing else and nothing more.

20. In view of the above, the argument raised on behalf of opposite party no. 7 on the basis of use of the word "Gaon Sabha" in rule 256 is of no avail to him and is not sustainable.

21. Sri Sanjay Sareen, the learned State Counsel appearing on behalf of opposite party nos. 1 to 6 has very fairly brought to the notice of this Court a Division Bench judgment of this Court in the case of **Indu Devi Vs. District Magistrate, Chitrakoot and others; 2006 (3) AWC 2787** wherein in paragraph 11 it has been held that prima facie findings of the competent authority under the proviso attached to Section 95 (1) (g) of Act in regard to misconduct could not be a ground for passing an order levying surcharge under Section 27 of the Act. Sri Sareen while bringing the aforesaid case to the notice of the Court which, though, could go against the order impugned in the writ petition, has acted very fairly in discharge of duties of an officer of the Court as an Advocate while assisting this Court and deserves appreciation from this Court.

22. The relevant paragraphs 11, 12, 13, 14 & 15 of the judgment in the case of **Indu Devi (supra)** on reproduction read as under:

"11. The prima facie finding of the competent authority under Section 95 (1) g) proviso is not same as finding of misconduct as contemplated under Section 27 of the Act. We are satisfied that on the basis of mere prima facie finding of guilt, the order of surcharge could not have been passed under Section 27 of the Act.

12. However, learned counsel for the appellant has submitted that the final inquiry as contemplated in Section 95 (1) (g) has not yet been concluded and further submits that no further proceeding under Section 27 of the Act has been drawn.

13. In view of the aforesaid, we are satisfied that without conclusion of final inquiry under Section 95 (1) (g) of the Act with regard to finding of misconduct on the part of the Pradhan, the order of surcharge could not have been passed.

14. From the material brought on record, it is clear that it is necessary that a final inquiry as contemplated in Section 95 (1) (g) and/or under Section 27 of the Act be concluded by competent authority. We direct accordingly.

15. The District Magistrate may take appropriate steps for conclusion/completion of the inquiry under Section 95 (1) (g) and/or under Section 27 of the Act, within six months from today. The appellant writ petitioner shall communicate this order to the District Magistrate within two weeks from today. Till the final order is passed within six months, no recovery shall be made from the appellant-writ petitioner, as directed vide impugned order dated 29.3.2000."

23. In view of this and in view of the undisputed position that the surcharge is to be levied in accordance with the procedure prescribed under Section 27 (2) of the Act and the procedure has been prescribed under Chapter-XIII of 1947 Rules which contained Rules 256 and 257 and there being no other set of rules and the power having been exercised under the impugned order in regard to levying of surcharge and its recovery and the recovery of the surcharge amount having been exercised under Section 27 (1) of the Act, there is no escape from the irresistible conclusion that the impugned order passed by the District Magistrate, Unnao in that regard is per se illegal.

24. So far as the seizure of financial and administrative powers of petitioner by the impugned order is concerned, Dr. L.P. Mishra, learned counsel for petitioner submitted that since the preliminary enquiry was not held as per the requirement under Section 95 (1) (g) of the Act as such the decision taken to cease the financial and administrate powers on the basis of said enquiry report is patently wrong and illegal.

25. It is to be noted that by the impugned order dated 04.03.2013, the District Magistrate, Unnao constituted a three member committee to exercise financial and administrative powers of Pradhan till the conclusion of the enquiry and final decision in this regard.

26. It is submitted that the proviso attached to Section 95 (1) (g) of the Act provides that where 'in an enquiry held by such person and in such manner as may be prescribed', a Pradhan is prima facie found to have committed financial and other irregularities such Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.

27. Submission is that the phrase '**in an enquiry held by such person and in such manner as may be prescribed**' is very vital. The person to hold enquiry and the manner of holding enquiry for prima facie satisfaction in regard to commission of financial and other irregularities by a Pradhan stands prescribed under the Rules known as U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred as the Enquiry Rules). Rule 4 of the Enquiry Rules deals with the preliminary enquiry and Rule 5 deals with the cessation of the financial and

administrative powers of a Pradhan during pendency of the final enquiry.

28. In order to appreciate the submission made by learned counsel for petitioner, it is necessary to first go through the relevant provisions in this regard.

29. Section 95 (1) (g) of the Act on reproduction reads as under:

*"**95. (1)** (g) remove a Pradhan, Up-Pradhan or member of a Gram Pachayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he*

(i) absents himself without sufficient cause for more than three consecutive meetings or sittings;

(ii) refuses to act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude;

(iii) has abused his position as such or has persistently failed to perform the duties imposed by this Act or rules made thereunder or his continuance as such is not desirable in public interest;

(iii-a) has taken benefit of reservation under sub-section (20 of Section 11 or sub-section (3) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of Scheduled Caste, the Scheduled Tribes or the backward classes, as the case may be;

(iv) being a Sahayak Sarpanch of a Sahayak Sarpanch of the Nyaya Panchayat takes active part in the politics, or

(v) suffers from any of the disqualifications mentioned in clauses (a to (m) of Section 5-A:

Provided that where, in an enquiry held by such person in such manner as maybe prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a Committee consisting of three members of Gram Panchayat appointed by the State Government.."

30. Rules 4 and 5 of the Enquiry Rules on reproduction read as under:

*"4. **Preliminary Enquiry.**- (1) The State Government may, on the receipt of complaint or report referred to in Rule 3 or otherwise order the Enquiry Officer to conduct a preliminary enquiry with a view to finding out if there is prima facie case for a formal inquiry in the matter.*

(2) The Enquiry Officer shall conduct the preliminary enquiry as expeditiously as possible and submit his report to the State Government within thirty days of his having been so ordered.

*5. **Enquiry Officer**- Where the State Government is of the opinion , on the basis of report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section (1) of Section 95, it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section (1) of Section 95 of the Act and by an order ask an Enquiry Officer, other*

than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold enquiry. "

31. The term 'Enquiry Officer' stands defined in Rule 2 (c) as amended vide notification dated 05.10.2001 w.e.f. 05.10.2001 and the said rule on reproduction reads as under:

*"2 (c) '**Enquiry Officer**' means the District Panchayat Raj Officer or any other district level officer, to be nominated by the District Magistrate."*

32. Dr. L.P. Mishra, learned counsel for petitioner vehemently submitted that in the present case there has been no preliminary enquiry by an Enquiry Officer mentioned in Rule 2 (c) of the Enquiry Rules in as much as that the Enquiry officer was to be appointed by the District Magistrate concerned and on the other hand an Enquiry Committee comprising of three Public Servants was constituted by the Chief Development Officer, Unnao vide order dated 25.05.2012 and not by the District Magistrate, Unnao.

33. Submission is that the Chief Development Officer could not step into the shoes of the District Magistrate for the purpose of appointing Enquiry Officer and it shall be the independent satisfaction of the District Magistrate to appoint the Enquiry Officer for that purpose. It is alone the District Magistrate and for that purpose no other officer to pass the order appointing the Enquiry Oficer.

34. It is further submitted that no public servant can be part of preliminary enquiry envisaged under Rule 4 of the Enquiry Rules who is not a District level officer having been nominated by the District Magistrate for conducting the preliminary enquiry and no public servant who is not a District level officer can even be nominated as Enquiry officer for conducting preliminary enquiry into the allegations of the financial loss or irregularities against a Pradhan.

35. Mr. Hemant Kumar Mishra, learned counsel for opposite party no. 7, on the other hand, emphasized that the Chief Development Officer vide order dated 25.5.2012 had constituted a three member committee consisting of public servant for holding enquiry against the petitioner. One of the members of the said committee was District Panchayat Raj Officer who is also an Officer enumerated and described as 'Enquiry Officer' under Rule 2 (c) of the Enquiry Rules. The eqnuiry report submitted by the enquiry committee appointed by the Chief Development Officer is to be treated as an enquiry report for the purpose of Rules 4 and 5 of the Enquiry Rules. The argument is that the Block Development Officer and Assistant Engineer, District Rural Development Agency may not be District level officers but the District Panchayat Raj Officer who is described as Enquiry Officer under Rule 2(c) of the Enquiry Rules was part of the enquiry committee and, as such, it cannot be said that in absence of nomination by the District Magistrate the enquiry conducted by the committee was bad in the eyes of law as the District Panchayat Raj Officer is described as Enquiry Officer under Rule 2 (c) of the Enquiry Rules and he being the member of the enquiry committee, the said enquiry shall be treated to be conducted by him, as such, no exception can be taken to the impugned order on the ground that the same is based on the report not submitted by an Enquiry

Officer referred to under Rule 4 of the Enquiry Rules.

36. Learned Counsel for opposite party no. 7 has also argued that even if the report of the Enquiry Committee constituted by the Chief Development Officer, Unnao is not taken as the Enquiry Report for the reason that some of the members of the Enquiry Committee being not the district level officers and having not been nominated as Enquiry Officer by the District Magistrate then too the report submitted by such Enquiry Committee together with Inspection report dated 13.08.2012 submitted by the District Development Officer, Unnao could legally have been made basis by the District Magistrate for ceasing the administrative and financial powers of the petitioner as Pradhan by invoking his discretion under the Clause "**or otherwise'** occurring under Rule 5 of the Enquiry Rules.

37. It is relevant to mention here that both the sides i.e. petitioner and the opposite parties in support of their arguments have laid great emphasis on the decision of the Full Bench of this Court in the case of **Vivekanand Yadav Vs. State of U.P. and another; [2011 (29) LCD 221]** which constitutes a binding precedence. Paragraphs 90 and 91 of the Full Bench judgment deserve to be a quote and are quoted as under:

"**90.** Rule 2(c) defines "Enquiry Officer'. It means the DPRO or any other district level officer to be nominated by the D.M. The following contingencies may be there:

[i] A complaint can be made directly to the DM who may ask the enquiry officer as defined under rule 2(c) to conduct a preliminary inquiry under rule 4; and

[ii] A complaint can be made directly to the enquiry officer defined under section 2(c), who may submit a report without the DM asking for it; or

[iii] A complaint can be made to the DM with copy to the enquiry officer, who may submit a report without the DM asking for it; or

[iv] A DM can himself conduct a preliminary enquiry; or

[v] A report can be submitted by any other public servant."

91 In all the aforesaid alternatives, a preliminary enquiry is conducted and a preliminary repot is there. The question is, which one of these can be acted upon under rule 5 to cease the power under proviso to section 95(1) (g) of the Panchayat Raj Act. According to,

The petitioners only first of the aforesaid report can be relied upon;

The respondents all five reports can be relied upon.

In our opinion, answer lies somewhere in between and only the first four reports can be so relied"

38. I am of the considered view that who can hold preliminary enquiry under Rule 4 of the Enquiry Rules is no more res integra after the decision of Full Bench of this Court in the case of **Vivekanand Yadav (supra).**

39. The close scrutiny of the impugned order passed by the District Magistrate makes it clear that the District Magistrate has solely relied upon the report submitted by the enquiry committee constituted by the Chief

Development Officer, Unnao as evident from the following portion of the order:

"उपरोक्तानुसार जॉच टीम द्वारा प्रस्तुत की गई रिर्पोट के अनुसार प्राख्यापित आरोपों एवं प्रधान ग्राम पंचायत तारगांव द्वारा प्रस्तुत किये गये बिन्दुवार स्पष्टीकरण का तथ्यात्मक परीक्षण करने के उपरान्त निम्न प्रकार शासकीय धनराशि के गबन/दुरुपयोग/अपव्यय किया जाना सिद्ध पाया गया है।"

40. It is also to be noted that the said enquiry committee was not appointed by the competent authority i.e. District Magistrate as it was constituted by the order of the Chief Development Officer, Unnao. The committee was comprising of two officers who, though, are the public servants but are not such public servants who could be the district level Officers, as such, they could not be nominated by the District Magistrate as Enquiry Officer as defined under Rule 2 (c) of the Enquiry Rules.

41. There is yet another question which requires consideration.

42. In the present case the enquiry committee has submitted the preliminary enquiry report but the enquiry committee consisted of two out of three members who could not have been nominated by the District Magistrate as Enquiry Officer.

43. It is to be noted that the decision making exercise on the part of enquiry committee while submitting the preliminary enquiry report should constitute of persons statutorily competent to apply mind and the decision making process of participation of some persons who are not statutorily competent cannot legally be made a basis for an action contemplated under the statute. The preliminary enquiry report submitted by the three member committee cannot be treated to be the enquiry report of the District Panchayat Raj Officer alone, as such, it can safely be concluded that the enquiry report submitted by the enquiry committee which neither appointed by the competent authority nor constituted of competent persons to hold the enquiry could be valid report for the purpose of taking a decision to cease the financial and administrative powers of the petitioner.

44. It is to be observed that the intention underlying the provisions contained under Rule 95 (1)(g) of the Act together with the proviso attached to it and the scheme of the Enquiry Rules is to protect a Pradhan, who is a democratically elected person, from subjection to arbitrariness and to minimize the area of discretion in the authority vested with the jurisdiction to exercise the powers of the State Government in the matter of removal of a Pradhan or in the matter of cessation of financial and administrative powers till conclusion of the final enquiry. Such safeguards are in tune to the law laid down by the Apex Court in the case of **Sub-Divisional Officer, Sadar, Faizabad Vs. Shambhoo Narain Singh; 1969 (1) SCC 825**, a judgment rendered by a larger Bench of the Apex Court comprising of three Hon'ble Judges, wherein it has been held that the relationship between a Pradhan and the State Government is not that of a Master and Servant and a Pradhan could not be suspended as a Government servant. Paragraphs 5, 6, 7 and 8 of this judgment deserve a quote and, accordingly, are quoted below:-

*"**5.** A faint attempt was made to show that the relationship between the State Government and the Pradhans is that of master and servants and that being so the State Government has competence to require Pradhans not to discharge their functions as Pradhans during the pendency of an enquiry into the charges made against them. It was urged that if the court is pleased to hold that the relationship between the State Government and the Pradhans is that of a master and the servants then the appellant could call into aid the rule laid down by this Court in Management of Hotel Imperial, New Delhi Vs. Hotel Workers' Union; T. Cajee Vs. H. Jormanik Siem; R.P. Kapur v. union of India; and Balwant Rai Ratilal Patel v. State of Maharashtra. This is a wholly untenable contension. A Pradhan cannot be considered as a servant of the Government. He is an elected representative. There is no contractual relationship between him and the Government much less the relationship of master and servant. As mentioned earlier his rights and duties are those laid down in the Act. Therefore, the rule laid down I the above cited decisions is wholly inapplicable to the facts of this case. In this case there is no question of suspending a servant from performing the du ties of his office even though the contract of service is subsisting. In the case of a master and his servant it is a well established right of the master to give directions to his servant relating to his duties. That power includes within itself the right to direct the servant to refrain from performing his duties but that does not absolve the liability of the master to pay the remuneration contracted to be paid to the servant unless otherwise provided in the contract even during the period the servant is required not to perform his duties.*

***6**. The Gaon Sabha is the creature of a statute. Its powers and duties as well as the powers and duties of its officers are all regulated by the Act. Hence no question of any inherent powers arises for consideration. See Smt. Hira Devi and others Vs. District Board, Shahjahanpur.*

***7.** The only other contention advanced is that power claimed should be held to be an essential power for the proper discharge of the conferred power. It was urged that without such a power, charges framed against any office-bearer cannot be properly inquired into as he may utilize his office to interfere with the course of enquiry and the possibility of his continuing to misuse the office during the pendency of the enquiry cannot be ruled out.*

***8.** It is well recognized that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means as are essentially necessary to its execution. But before implying the existence of such a power the court must be satisfied that the existence of that power is absolutely essential for the discharge of the power conferred and not merely that it is convenient to have such a power. We are not satisfied that the power to place under suspension an officer is absolutely essential for the proper exercise of the power conferred under Section 95(1) (g). It cannot be said that the power in question cannot be properly exercised without the power to suspend pending enquiry. The mere possibility of interference with the course of enquiry or of further misuse of powers are not*

sufficient to enlarge the scope of a statutory power. If it is otherwise the mere power to punish an offender would have been held sufficient to arrest and detain him pending enquiry and trial. There would have been no need to confer specific power to arrest and detain persons charged with offences before their conviction."

45. In a catena of decisions, the Apex Court has held that if Statute provides for an action on the basis of report submitted by an officer or on the basis of conclusions drawn by an officer, then the action cannot be taken nor conclusions can be drawn on the basis of any report submitted or on the basis of conclusions drawn by a person who is not Statutorily empowered to do so, even though an officer submitting a report or drawing a conclusion can be a person higher in rank to an officer statutorily competent to submit a report or to draw conclusions.

46. In the case of **Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and others; 1969 (1) SCC 308,** the Apex Court has held that the Cane Commissioner, Bihar who is statutorily competent under Clause 6(1)(a) of the Sugar Cane Control Order, 1966 to make an order, passed an order in exercise of that power on the basis of the directions of the Chief Minister. The Apex Court clearly held that such an exercise was not statutorily permissible and it could not be said that the orders so passed by the Cane Commissioner were that of the Cane Commissioner, both in fact and in law.

47. In the case of **Chandrika Jha Vs. State of Bihar and others; (1984) 2 SCC 41**, the Apex Court has held that the Registrar, Cooperative Societies was competent under the relevant Byelaws to constitute the First Board for a specific period. In this case, the Chief Minister issued directions from time to time directing the Registrar to extend the term. Analyzing the situation the Apex Court held that neither the Chief Minister was competent to issue directions for extension of the term nor the Minister of the concerned department was competent to direct or to suggest the Registrar in the matter of the constitution of the Board by forwarding list of persons to be nominated as members of the Board and, therefore, action taken on the basis of such direction was bad in law.

48. Similarly, in **Tarlochan Dev Sharma Vs. State of Punjab and others; (2001) 6 SCC 260**, it has been held by the Apex Court that Senior Officers statutorily competent to exercise a power are supposed to exercise the same independently and are not supposed to mortgage their discretion and decision making authority and succumb to political pressure to carry out the commands having no sanctity of law. In this case also the appellant before the Hon'ble Supreme Court was an elected President of a Municipal Council and was removed under an order passed by the Principal Secretary, Government of Punjab. The Hon'ble Apex Court in paragraphs 7, 15 and 16 held as under:-

" 7. In a democracy government by rule of law, once elected to an office in a democratic institution, the incumbent is entitled to hold the office for the term for which he has been elected unless his election is set aside by a prescribed procedure known to law. That a returned candidate must hold and enjoy the office

and discharge the duties related therewith during the term specified by the relevant enactment is a valuable statutory right not only of the returned candidate but also of the constituency or the electoral college which he represents. Removal from such an office is a serious matter. It curtails the statutory term of the holder of the office. A stigma is cast on the holder of the office in view of certain allegations having been held proved rendering him unworthy of holding the office which he held. Therefore, a case of availability of a ground squarely falling within Section 22 of the Act must be clearly made out. A President may be removed from office by the State Government, within the meaning of Section 22, on the ground of "abuse of his powers" (of President), inter alia. This is the phrase with which we are concerned in the present case.

15. *It is interesting to view the present-day bureaucrat-politician relationship scenario:*

"A bureaucratic apparatus is a means of attaining the goals prescribed by the political leaders at the top. Like Alladin's lamp, it serves the interest of whosoever wields it. Those at the helm of affairs exercise apical dominance by dint of their political legitimacy....The Minister make strategic decisions. The officers provide trucks, petrol and drivers. They give march orders. The Minister tells them where to go. The officers have to act upon instructions from above without creating a fuss about it."

16*. In the system of Indian democratic governance as contemplated by the Constitution, senior officers occupying key positions such as Secretaries are not supposed to mortgage their own discretion, volition and decisions making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a government servant. No government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superiors. In Anirudhsinhji Jadeja this Court has held that a statutory authority vested with jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in Purtabpore Co. Ltd. are instructive and apposite. Executive Officers may in exercise of their statutory discretions take into account considerations of public policy and in some context, policy of a Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated, we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order betrays utter non-application of mind to the facts of the case and the relevant law. The*

manner in which the power under Section 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under Section 22 of the Act. To say the least, what has been done is not what is expected to be done by a senior official like the Principal Secretary of a wing of the State Government. We leave it at that and say no more on this issue."

49. In the case of **Pancham Chand and others Vs. State of Himachal Pradesh and others; (2008) 7 SCC 117**, a transport permit was granted on the recommendation of the Hon'ble Chief Minister. The Hon'ble Supreme Court held that such grant of permit was not valid one in as much as that the Chief Minister or any authority **other than the statutory authority** (emphasis supplied), could entertain an application for grant of permit nor could issue any order thereupon. In paragraphs 19, 22, 23, 24 and 26 by relying on various judgments including Constitution Bench judgment of Hon'ble Supreme Court, it has been held that a Statutory Functionary makes an order; it is to be passed on the material stipulated by a Statute and not otherwise. These paragraphs which are relevant for deciding the question in issue i.e. whether a report submitted with the participation of public servants not competent to act as Enquiry officer within the meaning of the term as defined in Rule 2 (c) of the Enquiry Rules could be made basis for ceasing the financial and administrative power of the petitioner as Pradhan under Rule 5 of the Enquiry Rules are quoted below:

*"**19.** Apart from the fact that nothing has been placed on record to show that the Chief Minister in his capacity even as a member of the Cabinet was authorized to deal with the matter of transport in his official capacity, he had even otherwise absolutely no business to interfere with the functioning of the Regional Transport Authority. The Regional Transport Authority being a statutory body is bound to act strictly in terms of the provisions thereof. It cannot act in derogation of the powers conferred upon it. While acting as a statutory authority it must act having regard to the procedures laid down in the Act. It cannot bypass or ignore the same.*

***22**. In the matter of grant of permit to individual applicants, the State has no say. The Chief Minister or any authority, other than the statutory authority, therefore, could not entertain an application for grant of permit nor could issue any order thereupon. Even any authority under the Act, including the appellate authority cannot issue any direction, except when the matter comes up before it under the statute.*

***23**. In Commr. Of Police Vs. Gordhandas Bhanji- this Court held: (AIR p 20, para 17)*

"17. It is clear to us from a perusal of these Rules that the only person vested with authority to grant or refuse a license for the erection of a building to be used for purposes of public amusement is the Commissioner of police. It is also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any license which has been granted under the Rules. But the power to do so is vested in him and not in

the State Government and can only be exercised by him at his discretion. No other person or authority can do it."

24. *Yet again in Mohinder Singh Gill Vs. Chief Election Commissioner (SCC p.417, Para 8)*

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji (AIR p.19, para 9).

''9.... public orders, publicly make, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom the are addressed and must be construed objectively with reference to the language used in the order itself.'

Orders are not like old wine becoming better as they grow older."

26. *Respondent 4 appears to be the owner of a fleet of buses. He had a political connection. Such political connection encouraged him to file an application for grant of permit before the Chief Minister directly. The Chief Minister could not have entertained the same nor usurp the function of the Regional Transport Authority."*

50. In the case of **Manohar Lal (dead) by Lrs. Vs. Ugrasen (dead) by Lrs. and others; (2010) 11 SCC 557** the Apex Court has gone to the extent of holding that no higher authority in the hierarchy or even Appellate or Revisional Authority can exercise the power of the original Statutory Authority nor can the Senior Authority mortgage its wisdom and direct statutory authority to act in a particular manner. The ratio of this case, as evident from Para 23 of the judgment, is that a statutory authority has to act in the manner prescribed. In paragraph 23 of this case the Apex Court has held as under:

*"**23.** Therefore, the law on the question can be summarized to the effect that no higher authority in the hierarchy or an appellate or revisional authority can exercise the power of the statutory authority nor can be superior authority mortgage its wisdom and direct the statutory authority to act in a particular manner. If the appellate or revisional authority takes upon itself the task of the statutory authority and passes an order, I t remains unenforceable for the reason that it cannot be termed to be an order passed under the Act."*

51. In a recent judgment reported in (**2011) 5 SCC 435; Joint Action Committee of Air Line Pilot's Association of India and others Vs. Director General of Civil Aviation and others** while relying upon the earlier decisions, some of which have been referred hereinabove, the Apex Court has

held that if any decision is taken by the Statutory authority at the behest **or on suggestion of a person who has no statutory role to play** (emphasis supplied), the same would be patently illegal.

52. In paragraph 26 of this judgment the Apex Court has held as under:

"Thus, if any decision is taken by a statutory authority at the behest or on suggestion of a person who has no statutory role to play, the same would be patently illegal" (emphasis supplied).

53. Thus, in view of the prescriptions made under Rules 2(c), 4 and 5 of the Enquiry Rules, there could be no escape from the conclusion that the enquiry has to be held by an Enquiry officer defined as such under Rule 2(c) and any enquiry held by a Committee with the participation of the public servants who could not be the Enquiry officer at all, should not be taken and regarded at all as an enquiry report envisaged under Rule 4 of the Enquiry Rules.

54. The principle that a thing should be done in the manner prescribed under a Statute or not to be done at all has been echoing the horizon of jurisprudence since very long time, not only this country but virtually in whole of the world wherever there is an establishment managed under a Constitution having theme of independent judiciary. As back as in the year 1936 in the case of **Nazir Ahmad Vs. King Emperor; AIR 1936 Privy Council 253,** the Privy Council had held that a thing required to be done in a particular way has to be done in that way or not at all. This principle consistently has been accepted and adopted by the Indian Courts including the Hon'ble Apex Court in a catena of decisions, such as, **State of U.P. Vs. Singara Singh; AIR 1964 SC 358 and Prabha Shanker Dubey Vs. State of M.P.; (2004) 2 SCC page 56, Para 11.**

55. A larger Bench of the Hon'ble Supreme Court comprising of three Hon'ble Judges, in the case of **Bhav Nagar University Vs. Pali Tana Sugar Mill Pvt. Ltd. & others; (2003) 2 SCC 111** has held that when a statutory authority required to do a thing in a particular manner, the same must be done in that manner. In this case, the Hon'ble Supreme Court in paragraph 40 has held as under:

"It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authority while acting under the said Act are only creator of Statute. They must act within the four-corners thereof."

56. In the back-drop of the aforesaid decisions of the Hon'ble Supreme Court, no legal sanctity could at all be attached to the constitution of three members Committee and any report submitted by such Committee could not be made the basis for action under Rule 5 of the Enquiry Rules for ceasing the financial and administrative powers of the petitioner as Pradhan.

57. Thus, the arguments raised on behalf of the opposite party no. 7 to the effect that since the District Panchayat Raj Officer was one of the three Members Committee, the report should be treated as

a report under Rule 4 deserve nothing, but a rejection.

58. As regards arguments that the inspection report dated 13.08.2012 submitted by the District Development Officer, Unnao, or the report dated 24.01.2013 submitted by the Joint Committee constituted by the Chief Development Officer can be taken as the basis for action under Rule 5 within the term, or "otherwise" occurring under Rule 5 is also hollow, superficial and fallacious one in as much as that this aspect of the matter has fully been considered by the Full Bench in the case of **Vivekanand Yadav (Supra)** where the question has been dealt with in paragraphs 80, 84, 85, 86, 87 88 and 89. The said paragraphs read as under:-

*"**80**. The counsel for the petitioner submitted that:*

The proviso to section 95 (1)(g) contemplates ceasing of financial and administrative powers only on a preliminary enquiry;

The preliminary enquiry cannot be conducted unless the enquiry officer is asked to do so;

Any other report would merely be a report under rule 3(6) of the Enquiry Rules and on its basis only preliminary enquiry under rule 4 can be ordered and not an order ceasing financial and administrative powers or a final enquiry;

The word "otherwise' in rule 5 is ultra vires the proviso to section 95 (1)(g) of the Panchayat Raj Act.

Some words in Rule 5 -Useless.

84.Rule 5 is titled as "Enquiry Officer". It provides that, on the basis of the report under rule 4(2) or otherwise, the DM may:

Constitute a committee as envisaged in the proviso to section 95 (1)(g) to exercise the financial and administrative powers of the Pradhan;

And ask an enquiry officer other than the one who had conducted the preliminary enquiry, to hold the final enquiry to consider the removal of the Pradhan. This final enquiry has to be conducted under rule 6.

85.The question is, what is the meaning of word "otherwise' in rule 5:

Can it include a report by anyone or information coming into hands of the DM;

Has the DM suo motu power to cease the power and refer the case for final enquiry?

86.The counsel for the respondents submitted that:

The word "otherwise' in rule 5 should be interpreted as widely as the word "otherwise' in rule 4;

The DM has right to refer the matter for the final enquiry without any preliminary report if he considered proper.

***87.** A word used in different parts of the rules or an enactment may have different meaning. It depends upon the context and manner of its use. Justice Homes explains {Towne v. Eisner 245 U.S. 418 (1918)},*

"A word is not crystal, transparent and unchanged. It is skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used'.

***88**. Under the proviso to section 95 (1)(g) right to exercise financial and administrative powers can only be ceased if the DM prima facie finds that the Pradhan was guilty financial and other irregularities in an enquiry (preliminary or fact finding) by such person and in the manner prescribed. It is only on such a*

report that might come within the purview of the word "otherwise' in rule 5 of the Rules. All kinds of reports or information may not be relied under rule 5 lest the rule may be hit by the statutory provision.

***89**. In our opinion, in view of proviso to section 95 (1)(g) it cannot be given as wide a meaning as we gave to the words "otherwise' in rule 4. It has to have restricted meaning. Let's consider, what kind of reports may be covered by the proviso to section 95 (1)(g) and the word "otherwise' in rule 5 of the Enquiry Rules."*

59. It having been held in the case of **Vivekanand Yadav (Supra)** the word "**otherwise**' occurring in Rule 5 is to be given a strict meaning and it could not include any material other than a preliminary enquiry report made by the Enquiry Officer defined under Rule 2(c) of the Enquiry Rules, the contention raised on behalf of opposite party no. 7 deserves an outright rejection.

60. The full Bench case of **Vivekanand Yadav (Supra)** has been relied upon in a recent decision of this Court as reported in **2013 (1) ADJ 228; Narendra Kumar Vs. State of U.P.** The relevant paragraphs 20, 21, 23 and 27 are quoted hereunder:

***"20.** The records indicate that a complaint dated 18th April, 2012 was submitted by one Mohd. Taufeeq before the Block Development officer regarding the illegalities committed by the Pradhan in the construction of the Rajiv Gandhi Sansadhan Sewa Kendra. The complaint was not submitted in the manner prescribed under sub-rules (2) to (4) of Rule 3 and nor was it submitted to the District Magistrate. If was addressed to the Block Development Officer who on his own constituted a three member committee to make an enquiry and submit a report and the report of the committee was merely forwarded by the Block Development Officer to the District Magistrate. This factual position has also been stated in the counter affidavit filed by the applicants and is also admitted to the learned Standing Counsel. This factual position is also stated in the show cause notice dated 30th May 2012 issued by the District Magistrate.*

***21**. The preliminary enquiry has to be conducted by an Enquiry officer contemplated under Rule 2(c) of the Rules namely either the District Panchayat Raj Officer or any other district level officer to be nominated by the District Magistrate. The District Magistrate, as noticed hereinabove, had not nominated the Enquiry officer and nor the members of the Committee were "district level officers'. The District Magistrate could form his prima facie satisfaction for holding a final enquiry only on the basis of the report submitted by the Enquiry Officer defined under Rule 2(c) of the Rules.*

***23**. The order passed by the District Magistrate does not convey the impression that the complaint was filed by Mohd. Taufeeq before the Block Development Officer who constituted a Committee to submit the report and the District Magistrate passed the order for ceasing the financial and administrative powers of the Gram Pradhan on the basis of the report submitted by the Committee. The order of the District Magistrate, on the other hand, gives an impression that on the complaint filed Mohd. Taufeeq, an enquiry was got conducted through the Block Development officer and the order was passed on the basis of the report*

submitted by the Block Development Officer. Learned Counsel for the petitioner is justified in asserting that the said statement was made in the impugned order to give an impression that the "district level officer' had conducted the preliminary enquiry whereas the factual position is otherwise. In fact, in the show cause notice dated 30th May, 2012 issued by the District Magistrate, it was correctly stated that the complaint was submitted to the Block Development officer who constituted a committee and the committee submitted a report which was forwarded to the District Magistrate by the Block Development Officer.

27.It has now to be examined whether even after setting aside the order dated 7th July, 2012, a direction can be given for holding a formal enquiry as contemplated under Rule 5 of the Rules.

61. This issue was examined by the Division Bench of the Court in **Smt. Kesari Devi (supra)** and it was also observed:

"115. Learned Counsel for the petitioner invited the attention of the Court to another feature of this case and submitted that once the basic procedure of preliminary enquiry fall through as being invalid, the consequential action taken by the State Government by holding a regular enquiry and passing the impugned order has also to necessarily be treated to be invalid.

116. There can be no dispute ..... the settled legal proposition that if an order is bad in its inception, it cannot be made good by efflux of time or by subsequent improvement. In the case Chandra Gogoi v. State of Assam & others, (1998) 3 SCC 381, the Hon'ble Court held that the writ Court should not validate an action which was not lawful at inception.

117. If the basic order falls as illegal, invalid or void the consequential order cannot be given effect to as it automatically becomes inoperative.

118. In Badrinath Vs. Government of Tamil Nadu and others, (2000) 8 SCC 395, the Court held as under:-

"This flows from the general principle applicable to "consequential orders". Once the basis of a proceeding is gone, may be at a later point of time by order of a superior authority, any intermediate action taken in the meantime-like the recommendation of the State any by the UPSC and the action taken thereon-would fall to the ground. This principle of consequential order which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders."

119. The Apex Court held that if the basic order stands vitiated the consequential order automatically falls."

62.. In another case of **Chunmun Vs. District Magistrate Sonbhadra and others; 1998(89) Revenue Digest 771,** this Court has clearly held that the cessation of the financial and administrative powers of a pradhan on the basis of report submitted by an officer/public servant who is not defined as an Enquiry Officer under Rule 2(c) cannot be the basis for exercise of power under Rule 5.

63. Reliance has been placed by Sri Heman Kumar Misra, learned Counsel appearing for the opposite party no. 7 on a Single Judge decision of this Court in the case of **Smt. Malti Devi Vs. State of U.P. and others; 2008 (1) CRC 714.**

This relevance at all in as much as that in this case the District Magistrate had appointed the District Basic Education Officer to hold a preliminary enquiry and undisputedly, District Basic Education Officer is a District level officer and, therefore, being a district level officer and having been nominated by the District Magistrate for holding the preliminary enquiry fully fall within the meaning of Enquiry Officer as defined under Rule 2(c) of the Enquiry Rules. In the case in **Devi (Supra)** had no relevance or nay bearing at all so far as the present case is concerned.

64. In view of above, I am of the considered view that the order impugned is not sustainable in the eyes of law.

65. The writ petition as such is ***allowed.*** The order impugned dated 04.03.2013 (Annexure No. 1) is hereby quashed. The District Magistrate may pass a fresh order in accordance with law

66. The parties shall bear their cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.04.2013

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

Service Bench No. 1815 of 2011

Dr. Anjana Parmar ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Yadav Warsi

Counsel for the Respondents:

hand there was no appointment of the Enquiry Officer by the District Magistrate and two members of the Enquiry Committee appointed by the Chief Development Officer who is not competent to appoint Enquiry Officer under 1997 Enquiry Rules, could not at all act as Enquiry Officer and any report with their participation in the Enquiry could not be taken as an Enquiry Report under Rule 4. Therefore, the case of **Smt Malti**

C.S.C., Sri Rajneesh Kumar

Constitution of India-Act-226- Termination of Services-on ground Petitioner does not belongs to S.C.-as the cost 'Bhotia' has been ousted by letter dated 09.05.2007-held-once by exercising Power under Art. 342-the Central Govt. by G.O. dated 09.05.2007-notified the cost of Bhotia as 'S.C.'-the letter dated. 09.05.2007 merely a request-can not overright the central Govt. notification-impugned order passed on unfounded ground-without application of mind-quashed.

Held: Para-5

We are of the view that till notification of the year 1967 is operative, it has got force of law and being constitutional mandate, there is no option on the part of the respondents except to obey and provide reservation under Bhotia, Jannsari and Raji communities. The impugned order seems to have been passed on unfounded ground. The U.P. Public Service Commission has incorrectly interpreted the letter dated 9.5.2007 (supra) sent by the State of U.P. to Government of India. It is only the request to accept or reject it. Since prayer of the State Government of U.P. is still under consideration, the impugned order has been passed on unfounded ground and without application of mind.

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

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

2. Instant writ petition under Article 226 of the Constitution of India, has been preferred against the impugned order dated 26.5.2011, passed by the U.P. Public Service Commission, Allahabad, rejecting petitioner's claim for benefit of reservation under the caste Bhotia, belonging to the category of scheduled tribe. The reason assigned therein is that in accordance with the Government order dated 9.5.2007, the caste Bhotia, does not fall within the category of scheduled tribe in the State of U.P. By assailing the impugned order, petitioner's counsel invited attention to the notification issued under Article 342 of the Constitution of India, in the year 1967 according to which, Bhotia caste, has been included under scheduled tribe. The notification as filed with the writ petition, is reproduced as under:-

"The Constitution (Scheduled Tribes) (Uttar Pradesh) Order, 1967

(C.O.78)

In exercise of the powers conferred by clause (1) of article 342 of the Constitution of India, the President, after consultation with the Governor of the State of Uttar Pradesh, is pleased to make the following Order, namely:-

1.The order may be called the Constitution (Scheduled Tribes) (Uttar Pradesh) Order, 1967

2.The tribes or tribal communities, or parts of, or groups within tribes or tribal communities specified in the Schedule to this Order, shall for the purposes of the Constitution of India, be deemed to be Scheduled Tribes in relation to the State of Uttar Pradesh so far as regard members resident in that State.

THE SCHEDULE

1.Bhotia
2.Buksa
3.Jannsari
4.Raji
5.Tharu

Published with the Ministry of Law Notice No.G.S.R. 960, dated the 24th June, 1967, Gazette of India, Extraordinary, 1967, Part II, Section (1), Page 311."

3. Aforesaid notification has got constitutional mandate and accordingly, Bhotia caste comes within scheduled tribe. Article 342 provides that the President with respect to any State, after consultation with the Governor, shall issue notification specifying the tribes or tribal communities or part of or groups within tribes or tribal communities which shall for the purposes of the Constitution be deemed to be Scheduled Tribes in relation to that State. Accordingly, the aforesaid proposition creates constitutional rights in favour of the petitioner to claim the benefit of Bhotia caste under the category of scheduled tribe.

4. Now, coming to the argument advanced by the respondents' counsel that in view of the order dated 9.5.2007, the petitioner is not entitled to claim benefit of reservation under scheduled tribe category, seems to be misconceived argument. The Government order dated 9.5.2007 (contained in Annexure No.2 to the writ petition) reveals that matter has

been referred to the Government of India to exclude Bhotia, Jannsari and Raji castes since they are not available in the State of U.P. No decision has been taken by the Government of India in this regard. Whether the petitioner resides in State of U.P. or not and belongs to Bhotia caste or not, is a question of fact which may be looked into by the respondents and it is not for the Court but so far as the right of persons belonging to Bhotia community is concerned, it is well protected by the notification of the year 1967 (supra) and they may claim reservation as guaranteed (supra) belonging to scheduled tribes category. The letter dated 9.5.2007 is reproduced as under:-

"संख्या--15/19/2001-- का--4--2007

प्रेषक,

सुरेश चन्द्र यादव,

विशेष कार्याधिकारी,

उत्तर प्रदेश शासन।

सेवा में,

सचिव,

लोक सेवा आयोग,

उत्तर प्रदेश, इलाहाबाद।

अनुभाग--4 लखनऊःदिनांकः 09 मई, 2007

विषयः- उत्तर प्रदेश की अनुसूचित जनजातियों के संबंध में ।

महोदय,

उपर्युक्त विषयक, समसंख्यक पत्र दिनांक 03 जून, 2002 के क्रम में आपको यह अवगत कराने का मुझे निदेश हुआ है कि समसंख्यक पत्र दिनांक 26.7.2004 के द्वारा भारत सरकार से यह अनुरोध किया गया था कि भेटिया, बुक्सा, जौनसारी, राजी एवं थारू जनजातियों में से मात्र बुक्सा और थारू जनजातियों के कतिया सदस्य उत्तर प्रदेश राज्य के कतिपय क्षेत्रों मे निवास करते हैं, भोटिया, जानसारी तथा राजी जनजातियों के सदस्य उत्तर प्रदेश राज्य में नहीं हैं, अतः संविधान के अनुच्छेद-342(1) के द्वारा प्रदत्त शक्तियों के आधार पर प्रख्यापित 'संविधान (अनुसूचितनजातियां) (उत्तर प्रदेश) 1967' को संशोधित करते हुए, भोटिया, जौनसारी एवं राजी जनजातियों को उक्त आदेश से विलोपित करने का कष्ट करें।

2. भारत सरकार द्वारा उत्तर प्रदेश राज्य के उक्त प्रस्ताव के संबंध में कतिपय संवीक्षायें की गयी हैं जिनका उत्तर समाज कल्याण विभाग के दिनांक 09 मई, 2007 के द्वारा भारत सरकार को प्रेषित करते हुए, पूर्व प्रेषित प्रस्ताव के आधार पर कार्यवाही करने का अनुरोध किया गया है।

3. उपर्युक्त से यह स्पष्ट है कि सम्प्रति प्रकरण भारत सरकार के विचाराधीन है। भारत सरकार द्वारा लिये जाने वाले निर्णय से यथासमय आयोग को अवगत कराया जायेगा।

भवदीय,

(सुरेश चन्द्र यादव)

विशेष कार्याधिकारी।

संख्या--15/19/2001(1)-- का--4--2007 तद्दिनांक।

प्रतिलिपि, निम्नलिखित के सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित

1. समाज कल्याण अनुभाग- 3 को उनके पत्र संख्या-1719/26-3-2007-3 (11)/2006, दिनांक09 मई, 2007 के संदर्भ में।

2. कार्मिक अनुभाग-2

आज्ञा से,

(सुरेश चन्द्र यादव)

विशेष कार्याधिकारी।"

5. We are of the view that till notification of the year 1967 is operative, it has got force of law and being constitutional mandate, there is no option on the part of the respondents except to obey and provide reservation under Bhotia, Jannsari and Raji communities. The impugned order seems to have been passed on unfounded ground. The U.P. Public Service Commission has incorrectly interpreted the letter dated 9.5.2007 (supra) sent by the State of U.P. to Government of India. It is only the request to accept or reject it. Since prayer of the State Government of U.P. is still under consideration, the impugned order has been passed on unfounded ground and without application of mind.

6. In view of the above, the writ petition deserves to be allowed.

7. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 26.5.2011 contained in Annexure No.1 to the writ petition with all consequential benefit. Respondents shall reconsider the petitioner's case for selection and appointment against available vacancies in accordance with Rules under ST category expeditiously say, within four months.

8. No orders as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.04.2013

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

Service Bench No.1885 of 2011

Nupur Verma ...Petitioner
Versus
Central Ware Housing Corporation ...Respondent

Counsel for the Petitioner:
Sri Rajesh Singh Chauhan, Sri Vikramaditya Gupta

Counsel for the Respondent:
Sri Anish Srivastava "Lal", Sri Hari Prasad Gupta
Sri S.M. Royekwar, Sri Shishir Jain

Constitution of India, Art. 226- Termination of Service-post of Management Trainee(General)-advertised with minimum requisite qualification M.B.A. (marketing)-Petitioner being M.B.A. from B.H.U.-online application wrongly describer her qualification as M.B.A.(M)-after written test-interview-undergone training-on verification of record faul game of petitioner seen the light of day-order passed after following the principle of Natural justice-contention of petitioner that M.B.A. being equivalent to M.B.A. fully eligible to be appointed-held-when no equivalent qualification prescribed in advertisement-

no benefit can be derived by mis representation of facts-petition dismissed.

Held: Para-23
In the instant case, the candidate did not possess the requisite qualification and continuously she wrongly declared her qualification as MBA (Marketing), which was never possessing by her. The equivalent qualification can be admitted when the rules permit the same. In the instant case, no rule has been brought to the notice for the equivalent qualification. Though, we have sympathy with the candidate, but fact remains that her services were terminated when she was likely to complete her training i.e. within seven months and after providing proper opportunity where her entire submissions have been considered as mentioned in the termination order. Initially, her testimonials were verified by an out source agency i.e. AIMA. When the misrepresentation was deducted by the employer i.e. Central Warehousing Corporation, her services were rightly terminated.

Case Law discussed:
1999 (1) SCC 246; 2010 (2) SCC 169; (1995) 1 SCC 138; (2009) 4 SCC 555; (2009) 4 SCC 563; (1996) 7 SCC 118; (2007) 4 SCC 54; (2006) 2 SCC 315; (2006) 9 SCC 564; (1995) 1 SCC 138; (2004) 6 SCC 325; (2003) 8 SCC 319; (1889) 14 AC 337; (1886-90) All ER Rep 1: 58 LJ Ch 864:61 LT 265 (HL); (2010) 5 SCC 349; (2009) 4 SCC 555;(1996) 7 SCC 118; (2007) 4 SCC 54; (2006) 3 SCC 315

(Delivered by Hon'ble Dr. Satish Chandra, J)

1. By this petition, the petitioner has assailed the termination order dated 28.09.2011 (Annexure-1) passed by the opposite party no. 2.

2. The brief facts of the case are that the petitioner obtained a Degree known as "Master of International Business Administration Degree" (in short, 'MIBA'). She submitted on-line her application for the post of Management Trainee (General) for the Central Warehousing Corporation, by mentioning her qualification as MBA (Marketing). After qualifying the written test and interview, she was selected on the post and had undergone for the training. When she was likely to complete training, her services were terminated by the impugned order dated 28th September, 2011 by mentioning that the petitioner is not possessing the MBA (Marketing) i.e. essential qualification. Being aggrieved, the petitioner has filed the present writ petition.

3. With this background, Sri Rajesh Singh Chauhan, learned counsel for the petitioner submits that the qualification for the Management Trainees (G) is MBA (Marketing). The petitioner has mentioned in on-line application, her qualification as MBA (Marketing). He submits that the MIBA Degree is at par with MBA Degree as per the clarification dated 01.04.2008, issued by the Banaras Hindu University, Varanasi (in short, 'BHU'), from where the petitioner obtained the MIBA Degree. He further submits that the syllabus/curriculum and eligibility criteria are identical to the MIBA and MBA Degrees. He further submits that the recruitment for the post in question will have to be made under the Regulation 20(i) of the Central Warehousing Corporation (Staff Regulations), 1986. So, all the rules applicable to the Government Servant will apply in the present case.

4. It is also a submission of the learned counsel that interview was held on 25.10.2010 and before the aforesaid interview, her complete documents were

verified by the competent authority and she was selected. In the call letter, it was clearly mentioned that the "**candidate will not be permitted to appear for interview, in case you do not possess requisite criteria pursuant to the qualification, age, etc.**" After the interview, the offer was made to the petitioner vide OM dated 14.01.2011, and the petitioner has joined at Central Warehousing Corporation, Shahjahanpur (U.P.). However, the petitioner was serving in the Regional Office, Lucknow at the time of issuance of the impugned termination order. He again submitted that before joining the service, the petitioner submitted all the original documents before the competent authority, but nowhere she was prevented to join her duties. He relied on the ratio laid down on the following cases :-

(i) Commissioner of Police Delhi and another vs. Dhaval Singh, 1999 (1) SCC 246; and

(ii) Kamal Nayan Mishra vs. State of M.P., 2010 (2) SCC 169.

5. Learned counsel has drawn the attention to the letter of the BHU from where the petitioner has obtained the Degree of MIBA. In the said letter, it is clearly mentioned that the students of MIBA are eligible for financial and marketing jobs and the same is at par with MBA Degree. Moreover, in the academic session 2010-11, the MIBA course was renamed as MBA (IB) (Annexure-7). So, the MIBA and MBA are the same specially when both have identical syllabus and course. Thus, the petitioner is fulfilling all the minimum qualification prescribed for the post. The documents of the petitioner were duly scrutinized/verified twice and were found in order as per the verification made by the BHU. There is no misconduct on the part of the petitioner. The termination order dated 28.09.2011 is not only illegal, arbitrary, discriminatory and violative of Articles 12, 16 and 21 of the Constitution but also violative of relevant provisions of Regulation, 1986. So, he made a request that the impugned termination order (Annexure-1) may kindly be set aside.

6. On the other hand, Sri Shishir Jain, learned counsel for the Central Warehousing Corporation justified the impugned order. He submits that the petitioner had submitted self-attested documents at the time of interview as well as joining report and a certificate from the Assistant Registrar, Faculty of Management Study, to claim that the MIBA is at par with MBA. He further submits that on-line application, the petitioner has wrongly mentioned her qualification as MBA (Marketing), which she never possessed. In the Bio-data also she has shown her qualification as MBA Marketing (BHU). In fact, the petitioner possesses MIBA Degree which may be equivalent to MBA but certainly not MBA. The post in question i.e. Management Training was published by AIMA on behalf of Central Warehousing Corporation. The AIMA, after making inquires to their satisfaction as per the eligibility requirement, MBA Marketing Degree was laid down by the Corporation. The AIMA in consultation with the interview Board, cleared her candidature to proceed for the interview.

7. Learned counsel further submits that proper opportunity was provided to the petitioner to represent her case before passing the impugned termination order. The Assistant Registrar, BHU vide letter dated 19.04.2011 as stated that MIBA

Course now re-named as MBA(IB) from Academic Session 2010-11. But during the academic session (2006-08), when the Degree was awarded to the petitioner, the MIBA was not MBA.

8. Learned counsel further submits that neither the Central Warehousing (Staff) Regulations, 1986 nor in the advertisement it was mentioned that the candidates having equivalent or at par qualification will be eligible for appointment. Thus, the candidates who possessed the qualification of management other than MBA and specialization other than as prescribed in the aforesaid Regulations were not eligible for appointment.

9. It is also a submission of the learned counsel that in view of the false information supplied by the petitioner, she was called for written test/interview. The petitioner also submitted bio-data along with a check list on 24.10.2010 and in both the documents, the petitioner mentioned her qualification as MBA and not MIBA. After issuance of appointment letter as Management Trainee (General), she submitted her joining report on 01.02.2011 at Central Warehouse, Shahjanpur and, in the joining report also the petitioner has mentioned her educational qualification as MBA. The petitioner has also enclosed attestation form, wherein also she mentioned her qualification as MBA. It has been clearly mentioned in the documents like online application that in the event of any information being found false or incorrect at any point of time, her candidature/appointment may be cancelled/terminated. So, the services of the petitioner were rightly terminated. For this purpose, he has relied the ratio laid down in the following cases :-

(i) Ravinder Sharma (Smt.) and another vs. State of Punjab and others; (1995) 1 SCC 138;

(ii) Mohd. Sohrab Khan vs. Aligarh Muslim University and others; (2009) 4 SCC 555;

(iii) State of Kerala vs. Zoom Developers Private Limited; (2009) 4 SCC 563;

(iv) State of M.P. And others vs. Shyama Pardhi and others; (1996) 7 SCC 118;

(v) Ashok Kumar Sonkars vs. Union of India and others; (2007) 4 SCC 54;

(vi) Mohd. Sartaj and others vs. State of U.P. and others; (2006) 2 SCC 315; and

(vii) State of Rajasthan and another vs. Kulwant Kaur; (2006) 9 SCC 564.

10. Learned counsel further submits that the petitioner is not holding the MBA Degree, which is the essential qualification as per the recruitment rules prescribed in the Central Warehousing Corporation (Staff Regulations), 1986 and amended vide notification dated 18.07.2008 in the Gazette of India. The essential qualification is Degree with 1st Class MBA, specialization in Personnel Management or Human Resource or Industrial Relation or Marketing Management or Supply Chain Management from recognized University/Institution. The recruitment rules do not mention essential qualification equivalent to MBA. So, she is not having the requisite qualification of being MBA and, therefore, the petitioner

is not eligible for the Management Training (G) in the Corporation.

11. Learned counsel further submits that this Hon'ble Court has passed interim orders dated 04.11.2011 and 23.01.2012, where the impugned termination order was stayed, but the said interim orders passed by this Hon'ble Court were vacated by the Hon'ble Apex Court in Civil Appeal No. 4138 of 2012 vide order dated 30.04.2012. So, presently, no order exists in favour of the petitioner.

12. Learned counsel also relied on the ratio laid down in the case of **Ravinder Sharma (Smt.) and another vs. State of Punjab and others; (1995) 1 SCC 138**. Lastly, he justified the impugned termination order.

13. After hearing both the parties and on perusal of the record, it appears that the petitioner obtained a Degree of MIBA in the Academic Session 2006-08. At that time, the MIBA was not recognized as MBA. This is only in the Academic Session 2010-11, the Degree of MIBA was renamed by the BHU as MBA. So, the petitioner was possessing the MIBA Degree which may be equivalent to the MBA but certainly not MBA. The essential qualification for the post in question was MBA (Marketing). There was no provision mentioned for the equivalent Degree. When the petitioner submitted her application, she specifically mentioned her qualification as MBA (Marketing). She claimed that MIBA is equivalent to MBA (Marketing), but fact remains that she has concealed her MIBA Degree in the application.

14. The Hon'ble Apex Court, in the case of **Vice-Chairman, Kendriya Vidhalaya Sangathan and another; (2004) 6 SCC 325** held as under :-

"That in terms of Section 58 of the Evidence Act, 1872, facts admitted need not be proved. Furthermore, the respondent herein has been found guilty of an act of misrepresentation. In our opinion, no further opportunity of hearing is necessary to be afforded to him".

15. It is not necessary to dwell into the matter any further as, in the case of **Ram Chandra Singh vs. Savitri Devi; (2003) 8 SCC 319. In Derry vs. Peek; (1889) 14 AC 337: (1886-90) All ER Rep 1 : 58 LJ Ch 864 : 61 LT 265 (HL)**, it was held that :-

"... a false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit".

16. Further, the Hon'ble Apex Court in the case of **Union of India and others vs. Alok Kumar; (2010) 5 SCC 349** held that :-

"Whether the de facto prejudice was a condition precedent for grant of relief and if so, whether respondents had discharged their onus.

In the submission of the appellants, there is no violation of any statutory rule or provision of the Act. Departmental inquiry has been conducted in accordance with the Rules and in consonance with the principles of natural justice. The respondents have not suffered any

prejudice, much less prejudice de facto, either on account of retired employees of the railway department being appointed as inquiry officers in terms of the Rule 9(2) of the Rules or in the case of Alok Kumar, because of alleged non furnishing of CVC report. The contention is that the prejudice is a sine qua non for vitiation of any disciplinary order. However, according to the respondents, they have suffered prejudice ipso facto on both these accounts as there are violation of statutory rules as well as the principles of natural justice. In such cases, by virtue of operation of law, prejudice should be presumed and judgment of the Tribunal and the High Court call for no interference.

17. In the instant case, it appears that the recruitment of the trainees for the post in question, the Central Warehousing Corporation has hired the services AIMA. On the basis of information supplied by the petitioner, she was called for written test as well as for interview. The agency selected the candidates. On 14.01.2011 offere for appointment was issued in her favour. She has joined her training on 01.02.2011 in the Central Warehouse Corporation at Shahjahanpur. Later, she was shifted at Regional Headquarter, Lucknow of the Central Warehouse Corporation. Only when she joined her services at Lucknow, the misrepresentation made by her was deducted and on 28.09.2011, her services were terminated after following due procedure. Thus, services were terminated within a short period of seven months. When the period is too short than the benefit of the equity cannot be extended.

18. Further, it may be mentioned that for the post in question, the qualification was MBA and there was no provision for the equivalent qualification. The petitioner in her application, bio-data and attestation form in triplicate, has shown her qualification as MBA (Marketing), which was never possessed by her. Thus, the petitioner is guilty of furnishing of false information in the attestation form where it was clearly mentioned that "the furnishing of the false information or suppression of any factual information in the Attestation Form would be disqualification, and is likely to render the candidate unfit for employment as Management Trainee under the Corporation".

19. In the instant case, false information was submitted by the petitioner initially in her online application and she repeated the same. Her services were terminated after giving a show-cause notice dated 30.08.2011. Her reply dated 06.09.2011 was also considered and then only then the termination order was passed on 28.09.2011.

20. In the case of **Mohd. Soharab Khan vs. Aligarh Muslim University and others; (2009) 4 SCC 555**, the Hon'ble Apex Court observed that unless it is specifically mentioned in the advertisement that the persons having equivalent or other qualification is also eligible for appointment, the post could not be filled up by the persons having equivalent/other qualification.

21. Further, in the case of **State of M.P. and others vs. Shyama Pardhi and others; (1996) 7 SCC 118**, the Hon'ble Apex Court has held that where the rules provides for qualification as condition for appointment on the post and prescribed

qualification has not been satisfied, the initial selection to under go training is perse illegal.

22. In the case of **Ashok Kumar Sonkar vs. Union of India and others; (2007) 4 SCC 54**, the Hon'ble Apex Court has held that possession of requisite qualification is mandatory. A person not holding requisite qualification is not eligible for the post. Similar views were expressed in the case of **Mohd. Sartaj and another vs. State of U.P. and others; (2006) 3 SCC 315**, where the Hon'ble Apex Court observed that when there is basic lack of qualification, the candidate could not have been appointment nor he could have been continued and the candidate could not hold any right over the post.

23. In the instant case, the candidate did not possess the requisite qualification and continuously she wrongly declared her qualification as MBA (Marketing), which was never possessing by her. The equivalent qualification can be admitted when the rules permit the same. In the instant case, no rule has been brought to the notice for the equivalent qualification. Though, we have sympathy with the candidate, but fact remains that her services were terminated when she was likely to complete her training i.e. within seven months and after providing proper opportunity where her entire submissions have been considered as mentioned in the termination order. Initially, her testimonials were verified by an out source agency i.e. AIMA. When the misrepresentation was deducted by the employer i.e. Central Warehousing Corporation, her services were rightly terminated.

24. In view of above, the impugned termination order suffers no illegality and the same is hereby sustained along with the reasons mentioned therein.

25. In the result, the writ petition filed by the petitioner is dismissed. No cost.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.04.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 1954 of 2010

Kuldeep Singh Tomar . ..Revisionist
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Revisionist:
Sri K.S. Chauhan

Counsel for the Opposite Parties:
A.G.A., Sri Manoj Kumar Srivastava
Sri Rajeev Kumar Saini, Mrs. Archana Sing Jadon

Code of Criminal Procedure-Section 319.-
Summoning of Revisionist-who are brother and sister of the husband of complainant-general allegation of demand of dowry-admittedly the revisionist got education in Rajasthan working there since long-living separately from the family of the husband of complainant-no role specified in statement of witness held-Court below exceeded its jurisdiction-order quashed.

Held: Para-20 & 21
20: The present matter is also regarding matrimonial dispute in which the revisionist who is brother-in-law of the deceased, has been dragged to face prosecution without any specific allegations.

21. For the aforesaid reasons and in view of guide lines laid down in para 16(v) of Sarojben Ashwinkumar Shah (supra) I come to the conclusion that learned Court below has exceeded in its jurisdiction in summoning the revisionist under Section 319 Cr.P.C.

Case Law discussed:
2011 (105) AIC 36(SC); 2012(7) ADJ 502; 2009 Criminal Law Journal 3978; (1983) 1 SCC 1; 2009 (65) ACC 768

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the revisionist and learned AGA.

2. This criminal revision has been filed against order dated 20.4.2010 passed by Special Judge, Court No.7, District Aligarh, by which the revisionist has been summoned under Section 319 Cr.P.C. to face the trial.

3. Learned counsel for the revisionist has submitted that revisionist does not resides with the family of other accused persons and he is residing in village Maulasar Tehsil Didwana District Nagaur of Rajasthan regarding which the certificate has been filed. It has also been submitted that he had received his education in Rajasthan and is also working in Shri Ramabai Senior Secondary School, Manglana Road, Makrana, Rajasthan since 1.7.2006. This certificate has been alleged to have issued on 25.3.2010.

4. It has also been submitted that the allegations regarding revisionist are of general nature and no specific role has been assigned to him. It has also been submitted that during the investigation, the involvement of revisionist was not found in the alleged suicidal death of the deceased and it has also not been proved that the deceased was given poison by the revisionist. It has also been submitted that another accused Braj Kumari who is the mother-in-law of the deceased has not been summoned on the ground that she is a lady of unsound mind.

5. Learned AGA has defended the impugned order.

6. After recording the evidence of Brijendra Singh PW.1 and Munni Devi PW.2, the prosecution had moved an application under Section 319 Cr.P.C. to summon Kuldeep and Braj Kumari. Witness Brijendra Singh in his statement has alleged that present revisionist was also indulged in demanding extra dowry from the deceased. Munni Devi has also stated in her statement that her daughter was being tortured by present revisionist due to insufficient dowry and she was administered poison by present revisionist along with other accused persons. Learned Court below after hearing both the parties, has summoned the present revisionist to face the trial for the offence punishable under Section 306 IPC.

7. In ***Sarojben Ashwinkumar Shah and others Vs. State of Gujarat and another, 2011 (105) AIC 36(SC)***, the Hon'ble Apex Court after taking note of several pronouncements laid guidelines for exercise of power under section 319 **Cr.P.C**. These guidelines have been provided in paragraph 16 of its judgment, which reads as follows:-

"16. The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this :

(i) The Court can exercise the power conferred on it under Section 319 of the Code suo motu or on an application by someone.

(ii) The power conferred under Section 319(1) applies to all courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police under Section 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the court.

(iv) The power to proceed against any person, not being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word `evidence' in Section 319 contemplates the evidence of witnesses given in court in the inquiry or trial. The court cannot add persons as accused on the basis of materials available in the charge- sheet or the case diary but must be based on the evidence adduced before it. In other words, the court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the court to the constraints imposed in Section 319 (4) that proceedings in respect of newly - added persons shall be commenced afresh from the beginning of the trial.

(viii) The court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion."

8. This Court in **Smt. Zeenat Parveen and another Vs. State of U.P. and another, 2012 (7) ADJ 502**, has held that the summoning order cannot be set-aside on the ground that the statement of the witnesses relied upon by the court for passing the summoning order have not been subjected to cross-examination.

9. In **Sarabjit Singh and another Vs. State of Punjab and another, 2009 Criminal Law Journal 3978**, the Apex Court has held that the provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in **Municipal Corporation of Delhi Vs. Ram Kishan Rastogi, (1983) 1 SCC 1,** been satisfied is the question? Indisputably, before an

additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly.

10. In **Hardeep Singh Vs. State of Punjab and others, 2009 (65) ACC 768,** Hon'ble the Apex Court has considered the definition of word "Evidence" appearing in Section 319(1) Cr.P.C. and has held that it is difficult to accept the contention of learned counsel for the appellants that the term "Evidence" used in sub-section (1) of Section 319 Cr.P.C. would mean evidence which is tested by cross-examination. It has further been held that the word "Evidence" occurring in sub-section 1 of Section 319 is used in comprehensive and broad sense which would also include the material collected by the Investigating Officer and the evidence which comes before the Court and from which the Court is satisfied that person not arraigned before it is involved in the commission of the crime.

11. Hon'ble the Apex Court in the aforesaid case has considered the matter from another angle also and has held as follows:-

"The matter can still be looked at from another angle. The Code has taken care by sufficiently protecting and safeguarding the interest of such added accused. Sub-section (4) of section 319 expressly provides that where the Court exercises power under sub-section (1) and proceeds against a person not arrayed as an accused, "the proceedings in respect of such person shall be commenced afresh, and witnesses reheard". Thus, after exercise of power by the Court under section 319(1), such added accused would be placed in the same position as other accused and will get all rights an accused can get under the Code. The proceedings against the added accused shall be commenced afresh and witnesses will be reheard. Their evidence, prior to addition of the accused cannot be used against the accused who was not there earlier. The question of prejudice, hence, does not arise at all."

12 In the present case, the revisionist is the elder son of the father-in-law of the deceased. The incident is said to have taken place on 22.10.2006 and learned counsel for the revisionist has submitted that the revisionist is permanent resident of Rajasthan from where he had received his all education and is working at Rajasthan therefore, there was no occasion to demand or torture for any dowry from the deceased. Moreover, he was not the beneficiary of the alleged dowry.

13. Learned counsel for the revisionist has relied upon Sarabjit Singh Vs. State of Punjab, AIR 2009 SC-2792 in which, the Hon'ble Apex Court has held as under :-

"The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in Municipal Corporation of Delhi (supra) been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such

which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly. We may notice that in Y. Saraba Reddy v. Puthur Rami Reddy and Anr. [JT 2007 (6) SC 460], this Court opined: "?Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court?" An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned."

14. Learned counsel for the revisionist has further relied upon Geeta Mehrotra and another Vs. State of U.P. and another, 2012 (10) ADJ 464 (SC) in which, Hon'ble the Apex Court has held as under :-

"In the case at hand, when the brother and unmarried sister of the principal accused Shyamji Mehrotra approached the High Court for quashing the proceedings against them, inter-alia, on the ground of lack of territorial jurisdiction as also on the ground that no case was made out against them under Sections 498A,/323/504/506 including Sections 3/4 of the Dowry Prohibition Act, it was the legal duty of the High Court to examine whether there were prima facie material against the appellants so that they could be directed to undergo the trial, besides the question of territorial jurisdiction. The High Court seems to have overlooked all the pleas that were raised and rejected the petition on the solitary ground of territorial jurisdiction giving liberty to the appellants to approach the trial court.

15. The High Court in our considered opinion appear to have missed that assuming the trial court had territorial jurisdiction, it was still left to be decided whether it was a fit case to send the appellants for trial when the FIR failed to make out a prima facie case against them regarding the allegation of inflicting physical and mental torture to the complainant demanding dowry from the complainant. Since the High Court has failed to consider all these aspects, this Court as already stated hereinbefore, could have remitted the matter to the High Court to consider whether a case was made out against the appellants to proceed against them. But as the contents of the FIR does not disclose specific allegation against the brother and sister of the complainant's husband except casual reference of their names, it would not be just to direct them to go through protracted procedure by remanding for consideration of the matter all over again by the High Court and make the unmarried sister of the main accused and

his elder brother to suffer the ordeal of a criminal case pending against them specially when the FIR does not disclose ingredients of offence under Sections 498A/323/504/506, IPC and Sections 3/4 of the Dowry Prohibition Act.

16. We, therefore, deem it just and legally appropriate to quash the proceedings initiated against the appellants Geeta Mehrotra and Ramji Mehrotra as the FIR does not disclose any material which could be held to be constituting any offence against these two appellants. Merely by making a general allegation that they were also involved in physical and mental torture of the complainant-respondent No.2 without mentioning even a single incident against them as also the fact as to how they could be motivated to demand dowry when they are only related as brother and sister of the complainant's husband, we are pleased to quash and set aside the criminal proceedings in so far as these appellants are concerned and consequently the order passed by the High Court shall stand overruled.
The appeal accordingly is allowed."

17. The present case also relates to matrimonial dispute in which the first information report was lodged against the present revisionist. In the first information report, there were general allegations regarding all the accused persons and those allegations were based on the information received by the complainant from someone else. It has not been disclosed in the first information report that by whom the complainant got the information that present revisionist who is elder son of the father-in-law of the deceased was also engaged in demanding additional dowry and administering poison to her. The complainant Brijendra Singh in his statement on oath, has also not stated clearly that the deceased was tortured for the demand of dowry by the present revisionist but has only said that he was also involved in demand of dowry. Munni Devi PW.2 has further developed her statement alleging that she was tortured by present revisionist.

18. The incident has taken place within four months of marriage. It is the specific case of the revisionist that he is residing and working in Rajasthan. The alleged allegation of causing physical and mental torture to the deceased for demand of dowry have not been made against the revisionist. Moreover, the revisionist cannot be said to be a beneficiary of alleged dowry. In matrimonial dispute, it is a common feature now a days that first information report is lodged against all the relatives and near relatives ignoring the possibility whether actually they are involved in the alleged crime or not.

19. In Geeta Mehrotra (supra) it has been further held that :-

"However, we deem it appropriate to add by way of caution that we may not be misunderstood so at to incur that even if there are allegation of overt act indicating the complicity of the members of the family named in the FIR in a given case, cognizance would be unjustified but what we wish to emphasize by highlighting is that, if the FIR as it stands does not disclose specific allegation against accused more so against the co-accused specially in a matter arising out of matrimonial bickering, it would be clear abuse of the legal and judicial process to mechanically send the named accused in the FIR to undergo the trial unless of

course the FIR discloses specific allegations which would persuade the Court to take cognizance of the offence alleged against the relatives of the main accused who are prima facie not found to have indulged in physical and mental torture of the complainant-wife. It is the well settled principle laid down in cases too numerous to mention, that if the FIR did not disclose the commission of an offence, the Court would be justified in quashing the proceedings preventing the abuse of the process of law. Simultaneously, the Courts are expected to adopt a cautious approach in matters of quashing specially in cases of matrimonial dispute whether the FIR in fact discloses commission of an offence by the relatives of the principal accused or the FIR prima facie discloses a case of over-implication by involving the entire family of the accused at the instance of the complainant, who is out to settle her scores arising out of the teething problem or skirmish of domestic bickering while settling down in her new matrimonial surrounding."

20. The present matter is also regarding matrimonial dispute in which the revisionist who is brother-in-law of the deceased, has been dragged to face prosecution without any specific allegations.

21. For the aforesaid reasons and in view of guide lines laid down in para 16(v) of Sarojben Ashwinkumar Shah (supra) I come to the conclusion that learned Court below has exceeded in its jurisdiction in summoning the revisionist under Section 319 Cr.P.C.

22. The revision is allowed. The impugned order dated 20.4.2010 is set aside.

23. It is made clear that observations made herein shall not affect the merits of the trial against other accused persons.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.04.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Misc. Single No. 1956 of 2006.

Sadanand Mishra ...Petitioner
Versus
Regional Conciliation Officer & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Verma, Sri Misra Dr. Dhirendraq Kumar

Counsel for the Respondents:
C.S.C., Sri R.P. Awasthi, Sri Ravi Prakash

U.P. Industrial Dispute Act 1947.- Section 4, 12- Power of Conciliation officer-only to arrange and negotiate the difference between employer and employee-rejection of conciliation on ground of laches-held-without jurisdiction.

Held: Para-13
Thus, under the U.P. Industrial Disputes Act, 1947 and the Rules framed thereunder there is no time limit prescribed for initiating the conciliation proceedings and the Conciliation Officer is vested with the power to mediate and to bring about a settlement and with no other authority. The said power inherently includes the power to record a failure but it does not confer any power upon the Conciliation Officer to reject the conciliation proceedings.

(Delivered by Hon'ble Pankaj Mithal, J)

1. Heard Sri Satya Prakash Pandey, learned counsel for the petitioner, learned Standing Counsel for respondents No.1 and2 and Sri Ravi Prakash, learned counsel for respondents No.3 and 4.

2. The services of the petitioner with respondent No.4 were dispensed with. Therefore, according to him, an industrial dispute had arisen. Accordingly, he made an application to the Conciliation Officer/Assistant Labour Commissioner for resolving the said dispute.

3. The Conciliation Officer/Assistant Labour Commissioner by the impugned order dated 15.2.2006 has rejected the conciliation proceedings as barred by time.

4. The submission is that the Conciliation Officer or the Assistant Labour Commissioner exercising the power of the Conciliation Officer has no jurisdiction to reject the claim raised by the petitioner, much-less on the ground of delay or laches. shall hold conciliation proceedings in the prescribed manner and if a settlement is arrived at in the course of conciliation proceedings, he shall send a report to the appropriate Government along with the settlement signed by the parties to the dispute and in case it is not possible to arrive at a settlement, he will close the investigation and submit a report in that regard to the appropriate Government setting forth the steps taken by him for resolving the disputes and the reasons on account of which the settlement could not be reached.

5. It may be noted that the services of the petitioner were dispensed with on 1.7.1999. He had applied for conciliation of the matter on 10.11.2004 i.e. after four years four months and nine days. The delay in initiating the conciliation proceedings is not material but the moot question is whether the Conciliation Officer has the power to reject the conciliation proceedings on any ground or on the ground of delay.

6. The aforesaid conciliation proceedings were initiated under the Provisions of the U.P. Industrial Disputes Act, 1947 which is para materia with that of the Industrial Disputes Act, 1947. The Scheme of both the aforesaid Acts envisages for the settlement of an Industrial Disputes by the Labour Court, Industrial Tribunal, National Industrial Tribunal as the case may be and for conciliation of the dispute by the Conciliation Officer/Conciliation Board or through arbitration.

7. Section 12 of the Industrial Disputes Act provides that where any industrial dispute exists or is apprehended, other than relating to public utility service, the Conciliation Officer

8. There is no provision prescribing any time limit for initiation of conciliation proceedings and the Conciliation Officer has not been empowered under the aforesaid Act to reject the conciliation proceedings on any ground.

9. Section 4-F of the U.P.Industrial Disputes Act, 1947 provides for appointment of a Conciliation Officer for the purposes of mediating and promoting the settlement of Industrial Disputes in the manner prescribed and the powers of Conciliation Officer in this regard have been described under Section 5-D of the said Act.

10. Section 23 of the said Act empowers the State Government to make rules regarding the subjects specified therein and clause (d) of Section 23 includes "the procedure to be followed in conciliation proceedings". Thus, the State Government is vested with the power to make rules pertaining to the procedure which is to be followed in the conciliation proceedings.

11. In pursuance to the above rule making power contained in Section 23 of the Act, U.P. Industrial Disputes Rules, 1957 have been framed and enforced. The said rules vide Rule 4 provides for powers, procedure and duties of Conciliation Officer. The aforesaid Rule 4 for the sake of convenience is reproduced herein below:

"4. Powers, procedure and duties of Conciliation Officers. - (1) On receipt of information about an existing or apprehended industrial dispute, the Conciliation Officer may, if he considers necessary, forthwith arrange to interview both the employers and the workmen concerned with the dispute at such place and time as he may deem fit and endeavour to bring about a settlement about the dispute in question.

(2) The Conciliation Officer may hold a meeting of the representatives of the parties jointly or of each party separately.

(3) The Conciliation Officer shall conduct the proceedings expeditiously and in such manner as he may deem fit.

(4) Where a reference has been made by the State Government in the matter of a dispute under Section 4-K of the Act to the Tribunal or Labour Court or the Adjudicator, the Conciliation Officer concerned shall forthwith forward to the Tribunal or the Labour Court or the Adjudicator concerned, the file of the Conciliation Board relating to that matter, immediately after the application in Form I is filed by the Union."

12. The aforesaid Rule contemplates that where Conciliation Officer receives information about the existence of an industrial dispute or that such a dispute is apprehended, he he obliged to arrange interview of both the employer and the workman concerned and to make endeavour to bring about a settlement expeditiously and in the manner as may be deemed fit. In case the settlement is arrived it shall be recorded in the prescribed proforma and got signed and shall be sent to the State Government along with the report.

13. Thus, under the U.P. Industrial Disputes Act, 1947 and the Rules framed thereunder there is no time limit prescribed for initiating the conciliation proceedings and the Conciliation Officer is vested with the power to mediate and to bring about a settlement and with no other authority. The said power inherently includes the power to record a failure but it does not confer any power upon the Conciliation Officer to reject the conciliation proceedings.

14. Learned counsel appearing for the respondents were at a loss to justify the authority of the Conciliation Officer to dismiss the conciliation proceedings as barred by time as under the scheme of the Act no time limit has been prescribed for initiating the conciliation proceedings.

15. In view of the aforesaid facts and circumstances, I find that the conciliation officer/Assistant Labour Commissioner exceeded its jurisdiction in dismissing the conciliation proceedings as barred by time. Therefore, the impugned order dated 15.2.2006 passed in C.P. Case No.Nil/2004 contained in annexure - 1 to the petitioner is held to be without jurisdiction. Accordingly, a writ of certiorari is issued quashing the same with the direction to the Conciliation Officer/Assistant Labour Commissioner, Faizabad to proceed with the conciliation proceedings and to take appropriate steps in accordance with law most expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.04.2013

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Writ Petition No. 2155 Of 2013
keeping in view the observations made by the Apex Court and giving due weight to the irreconcilable conflict of the age shown in High School certificate with the age given in medical examination referred to above, I think that the continuation of Sonal's detention in Nari Niketan is not justified. I therefore, direct that she be set at liberty with immediate affect.

Case Law discussed:
1991 Laws (S.C.) 930

(Delivered by Hon'ble Karuna Nand Bajpayee,J)

1. This Criminal Writ Petition has been filed on behalf of the petitioners seeking the direction in the nature of certiorari for quashing the impugned order dated 1.2.2013 and 4.2.2013 in application no.12 of 2013 and also the subsequent order dated 6.2.2013 passed by the learned Judicial Magistrate Chandauli in case Crime No. 02 of 2013 State Vs. Vivek and also praying for a direction to the respondent no.5 to hand over the girl Sonal petitioner no.2 to petitioner no.1 who claims himself to be the husband of girl Sonal.

2. In brief the facts giving rise to the present controversy are like this:-

Vivek Chandra Bhaskar and another ...Petitioners

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Santosh Singh

Counsel for the Respondents:
A.G.A., Sri A.K.Maurya

Constitution of India, Art.-226-Habeous Corpus petition by impugned order-Judicial Magistrate-placing reliance upon High School Certificate-found the girl minor-ordered for detention in Nari Niketan-while from Radiologist report-Doctor found above 18 yrs-girl expressed her extreme desire to join the company of her husband-as already enjoying matrimonial life-Magistrate wrongly relied upon High School certificate-liberty given to join the company of her desire-petition allowed.

Held: Para-14
In view of the statement of the Girl given before the J.M. refuting all the allegations of coercion exercised by the petitioner no.1, showing her complete willingness and approval to her marital status with the petitioner no.1 which according to her she has already been enjoying, considering her blatant refusal to go along with her father, and also

3. An FIR was lodged against the petitioner Vivek along with some other co-accused u/s 363 and 366 IPC. It was alleged in the FIR that one girl Km. Sonal had been enticed away by the petitioner no.1 of this case. It seems that the petitioner approached this court in order to get the FIR quashed. The Division Bench after hearing the matter passed an order on 17.1.2013. A number of directions were given vide this order. It was also directed that the girl Sonal shall be produced before the concerned Judicial Magistrate who shall get her medically examined in order to ascertain her age. It was further ordered that depending upon the findings arrived regarding her age some other consequential orders including appropriate orders regarding her custody shall be passed by the J.M. It appears that as a follow up action , the concerned J.M. heard the matter and got Sonal medically examined according to which her age was found to be about 19 years and above 18 years. It transpires from the record that during the proceedings that took place before the J.M. the father of the girl produced the high school certificate of the girl indicating her date of birth to be 25.5.96. Reckoning her age on the basis of the high school certificate she was estimated to be a minor by the J.M.

4. The J.M. has also recorded her statement in which she expressed her un-willingness to go along with her father. In fact she informed the court to have willingly contracted marriage with petitioner no.1 and denied all the allegations of coercion exercised against her. In the light of the finding of minority arrived at by the J.M. and in view of her complete disinclination to go along with her father, the J.M. concerned thought it fit to send her to Nari Niketan.

5. The respondent no.4 who is father of the girl is being represented by his counsel and has also filed his counter affidavit asserting the minority of the girl and also justifying the preference given to the certificate by the lower court. According to him he is the lawful guardian of his minor daughter and as such she ought to have been given back to him.

6. I have heard both the sides and perused the record.

7. It has been emphasized by the counsel for the petitioner that though the assessment through medical examination is necessarily a flexible estimation of age & the medical science has not perfected itself to the extent that it may determine the age of any one with precise certitude. But when there is an estimate of age done by radiological examination it includes a maximum margin of error or margin of flexibility both ways. In different cases the Hon'ble Apex Court as well as this court has accepted this margin of error. At times it has been accepted as six months both ways and at times one year both ways. Two year margin of error is the maximum that can be attributed to the age determined by the Doctor through medical examination. According to the counsel if the age of the victim is assessed to be 19 years according to the medical examination, she could be 18 and a half years old or 19 and half years old. This shall be so when we take the margin of flexibility to be six months both ways. Similarly if we take the margin of one year then she could be 18 years or 20 years of age or any where in between the two. According to the counsel even if we

take the highest margin of flexibility both ways it cannot go beyond two years on the lower side and two years on the higher side. On that reckoning the maximum that can be said is that the girl Sonal was not younger than 17 and not older than 21 years of age according to the medical examination. According to the counsel the medical science can certainly predict as to which age-group the person belongs. But in order to find out as to what is exact age within that age group as suggested by the medical science one can look for relevant documents or some other oral evidence. According to the counsel even if we accept the highest margin of error or flexibility this girl cannot be less than 17 years of age. In other words this medical report which shows Sonal to be about 19 years old at least proves one thing definitely that any evidence oral or documentary which attempts to indicate her age to be less than 17 is necessarily a false evidence. The falsity of oral or documentary evidence regarding age can be proved by medical science in many cases. According to the counsel though it is true that within the age group as suggested by medical science the age of a person can fall anywhere in between the two outer limits of any age group, and in such a case there will be no incompatibility between the radiologically determined age and the age suggested by other oral or documentary means, but the medical science can always disprove the falsely alleged age suggested by any one if the suggested age falls outside the maximum flexibility bracket. According to him even if we construe the medical report with the maximum margin of error on the lower side then too this high school certificate is a proved false document because it suggests the age of the girl on the relevant point of time to be even less than 17. According to the counsel this is not unknown in our society that the parents have a tendency to get the age of their offsprings recorded on the lower side. However, reprehensible the practice be, according to the counsel it is a reality of the society. The counsel contends that the J.M. concerned has wholly ignored this aspect of medical science and seems to have attributed a divine status to the high school certificate. According to the counsel even if in certain contexts the high school certificate be given a preferential status it shall not mean that it is an infallible document. It's truthfulness could always be proved or disproved through evidence. According to him in the present case the medical examination has completely falsified the suggested age of girl Sonal showing her to be less than 17 years of age.

8. I have carefully cogitated upon all the submissions made by rival sides.

9. The contention raised by the petitioner's counsel seems to have substance. In fact a careful perusal of the radiological opinion would show that the doctor has categorically opined that the girl Sonal is above 18 years of age. After giving this radiological finding , the doctor has further considered her body growth, development and G-examination. Thereafter the age has been estimated to be about 19 years. In such a situation the margin of flexibility or the margin of error can not be lowered any further below 18 years. There is a marked difference between ' about 18 years' and ' above 18 years' of age. Where the doctor has observed that the girl is above 18 years, that obviously means that the girl is not less than 18 years of age. Such an observation indicates the lower most outer

limit of the flexibility bracket. Such kind of observation is made by the doctors on the basis of the fusion of certain bones of the body which can not be completed before a person attains a particular age. If a fusion has already been completed which cannot be completed before attaining a particular age then it can safely be predicted by the radiological examination that a particular person has crossed certain age or is above that age. In fact the margin of error is accepted by the radiological experts because of the individual variations which have been observed depending upon the geographical areas and the health conditions and nutrition of various individuals placed in different conditions and places. It is after enormous researches that the experts have concluded that a particular fusion of particular bone does not start before attaining a certain age any where by any one. Similarly a certain fusion can not be completed before attaining a certain age. The individual age variations of a particular fusion are not and can not be stretched beyond certain limits. There can not be a limit less variation. It is only after considering all these factors that the doctor gives his opinion that a particular person has attained a particular age or not. A categorical opinion of the doctor that the girl Sonal is above 18 years of age concludes this issue completely & belies the contradictory age shown in the High School certificate.

10. The Court's opinion is also supported by the observations made by Apex Court in the case **Daya Chand Vs. Sahib Singh 1991 Laws(S.C.) AIR(SC) 930** where the certificate of age was disbelieved for the reason of the same being in conflict with the medical evidence. The relevant portion of the citation may be quoted as thus:

??.....In a case like this, the conflicting evidence of the record from the two schools is not safe to rely on, particularly when the medical opinion, based on radiological examination and other physical characteristics, is available for determining the age of Sahib Singh more accurately. The data available as a result of the medical examination, apart from the opinion of the doctors based on the medical examination, with reference to Modi's Medical Jurisprudence, 21st Ed., shows that Sahib Singh's age on 16.3.1989, the date of medical examination, must have been definitely above 19 years since the fusion of some of the bones which was found on that date, could not occur below the age of 19 years at the minimum. This would mean that on the date of the offence, he must have been definitely above the age of 18 years at least.....

?.....The tendency of many to have lesser age recorded in school ls well-known and, therefore, the date of birth being recorded as 1.1.1973 in the other school, can be easily appreciated but cannot be accepted, because the same is clearly in conflict with the medical evidence. In this state of evidence, there was no justification for the High Court to have interfered with the concurrent finding of the Metropolitan Magistrate and the Additional Sessions Judge, that the age of Sahib Singh on 26.7.1988, the date of offence, was above 16 years on account of which he was not a juvenile.?

11. The learned lower court seems to have completely missed to gauge and appreciate all the above discussed

crucially relevant facets of the matter in blissful ignorance of the hard core realities of the society. It simply did not attempt to enquire and test whether the age indicated in the certificate could at all be possible or be correct on the touchstone of the scientific medical data available or not.

12. If in a given case the falsity of the age indicated in the high school certificate is apparent on the face of record or is demonstrably repugnant to the conclusive radiological findings there is no reason why it should be ignored. It is doctor on the ground that the division bench might not have directed the medical examination of the girl in case her high school certificate had been produced before that court. This contention can not be accepted for many reasons. Firstly it is very difficult to hazard the opinion as what the court might have done in a given situation. After all it is not unknown that many a time the court in its wisdom thinks it expedient to direct the medical examination even when the documents regarding the age are very much available. It is often so when the physical appearance of the person concerned looks demonstrably incompatible with the age suggested by the documents. No document including a high school certificate, can be deemed to have precluded the court from making further enquiry about its correctness or genuineness or truthfulness. How can the court be divested of its powers to direct medical examination of anybody including the girl, just because a high school certificate has been produced! At any rate, instead of anticipating and dwelling upon such non events, this court does not see any good reason to blind itself to the radiological and medical not always that a conclusive medical report is available. More than often the medical report is inconclusive and admits of a wide flexibility bracket on both the sides. But if there is irreconcilable incompatibility, as is apparently present in this matter, it ought to have been duly considered and adjudged by the lower court.

13. In the last. the respondents counsel has made a faint half hearted attempt to persuade this court to ignore the radiological findings given by the

examination of the girl which is already on record. There is nothing on record, nor has been even suggested by the respondent's counsel , that the doctor who did the medical examination of the girl could have had any motive to falsely prepare such a report or that the findings recorded by him are not correct. All the legal and logical implications of the medical report must be allowed to follow it.

14. In view of the statement of the Girl given before the J.M. refuting all the allegations of coercion exercised by the petitioner no.1, showing her complete willingness and approval to her marital status with the petitioner no.1 which according to her she has already been enjoying, considering her blatant refusal to go along with her father, and also keeping in view the observations made by the Apex Court and giving due weight to the irreconcilable conflict of the age shown in High School certificate with the age given in medical examination referred to above, I think that the continuation of Sonal's detention in Nari Niketan is not justified. I therefore, direct that she be set at liberty with immediate affect.

15. The impugned orders of the lower court concerned are quashed.

16. Petition succeeds.

17. Let a copy of this order be sent to the court concerned forthwith for necessary compliance by the quickest mode available.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.04.2013

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition 2439 (Ceiling) of 1978

Kamla Kant and another ...Petitioners
Versus
III Additional District Judge and others ...Opp. Parties

Counsel for the Petitioners:
Sri A.R. Khan, Sri Amrendra Nath Tripathi
Sri Shiv Kumar Pandey

Counsel for the Opposite Parties:
Sri Ram Krishan Pandey
Sri S K Mehrotra

Code of Civil Procedure- Section-11-Principle of "Res-judicata"- applicability-in Ceiling proceeding-once ceiling proceeding of same plots finalized-impugned notice u/s 10 for the same subject matter-held-barred by principle of "Resjudicata.

Held: Para-8-

Upon perusal of the orders impugned in comparison to the order passed by the Prescribed Authority as well as the appellate authority in the earlier proceeding I find that the same very land was subjected under the proceedings of declaration of surplus land and also find that the order, passed by the Prescribed Authority is based on re appreciation of evidence which is not permissible under the eye of law as has been held in the judgments quoted above. This fact is not disputed that the earlier proceeding was on the same subject in which the issue had already been determined between the parties by the Court of competent jurisdiction. Therefore, I am of the view that the proceeding in question was barred by principle of res judicata. That being so the orders impugned passed in such proceeding are nullity.

Case Law discussed:
(1999) 1 Supreme Court Cases 71; (2003)(94) RD 527; (2009) (27) LCD 71; 2002 (20) LCD 1408

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr Amrendra Nath Tripathi, learned counsel for the petitioners as well as learned Standing Counsel.

2. Through the instant writ petition, the petitioners have challenged the order dated 13.1.1978, passed by the Prescribed Authority, Kunda, Pratpgarh in Ceiling Case No. 99 of 1974 as well as the order dated 5.7.1978, passed by the II Additional District Judge, Pratapgarh in Revenue Ceiling Appeal No. 3 of 1978 and other connected appeals.

3. The petitioners are lease holders of the land declared as surplus land of respondent no. 4. Therefore, after declaration the land as surplus they filed objection before the Prescribed Authority, claiming their right available there on the basis of registered lease executed in their favour. The Prescribed Authority considered their objection and decided the case by judgment and order dated 25.1.1975 and declared total 24 Bigha 7

Biswa 10 biswansi land as surplus. The State Government filed Revenue Civil Appeal No. 98 of 1975 before the District Judge, Pratapgarh against the order of Prescribed Authority which was dismissed by the judgment and order dated 29.4.1976. The order, passed in appeal, attained the finality as it was not challenged in the higher forum. Thus, the things took at rest but the Prescribed Authority again issued a notice under Section 10 (2) of the U.P. Imposition of Ceiling on Land Holdings Act (herein after referred to as Ceiling Act) against the opposite party no. 4.

4. The opposite party no. 4 as well as the petitioners filed their objection challenging the maintainability of the proceedings being barred by res judicata. They asserted that the Prescribed Authority had adjudicated upon the issue by means of order dated 25.1.1975 which has been upheld in appeal. They claimed that pursuant to the registered deed dated 13.8.1949 the name of Smt. Shiv Kali was mutated in revenue record by means of order dated 5.2.1955 passed by Tehsildar Kunda but due to inadvertent mistake the petitioners' names were left from being entered into the revenue record. They further stated that they had filed one case under Section 229 (B) of the U.P. Zamindari Abolition and Land Reforms Act,1950 for declaration of their right over the land in dispute which was decreed vide judgment and order dated 30.3.1973. These facts were placed before the Prescribed Authority but the Prescribed Authority did not acknowledge it on the basis of statement of Jagan Nath and held that the order passed in the declaratory suit was nullity as it was passed against the dead person. Thus, the Prescribed Authority rejected petitioners' preliminary objection by means of order dated 13.1.1978 and held that 55 Bigha 13 Biswa and 6 Biswansi irrigated land and 56 Bigha 5 Biswa and 8 Biswansi unirrigated land are surplus. Against which the petitioners filed Ceiling Appeal No. 6 of 1978 before the III Addl. District Judge, Pratapgarh, who dismissed the same by means of order dated 5 th July, 1978.

5. The learned counsel for the petitioners submits that the facts of the case reveal that the dispute was finally adjudicated upon earlier by the Prescribed Authority by means of judgment and order dated 25.1.1975 between the parties. Therefore, it was not permitted for the respondents to re-open the proceedings. Thus, he claims that the proceeding was barred by principle of res judicata. He supports his submission with the decision of Hon'ble the Supreme Court rendered in the case of **Devendra Singh Vs. Civil judge, Basti and others (1999) 1 Supreme Court Cases 71**. Relevant paragraph 3 of which is extracted below:

"3.Having examined the provisions of Section 13-A and Section 38-B of the Act, we are of the considered opinion that under Section 13-A, the prescribed authority has the power to reopen the matter within two years from the date of the notification under sub-section (4) of Section 14 to rectify any apparent mistake which was there on the face of the record. That power will certainly not include the power to entertain fresh evidence and re-examine the question as to whether the two sons, namely, Hamendra and Shailendra were major or not. The power under Section 38-B merely indicates that if any finding or decision was there by any ancillary forum prior to the

commencement of the said section in respect of a matter which is governed by the Ceiling Act then such finding will not operate as res judicata in a proceeding under the Act. That would not cover the case where findings have already reached their finality in the very case under the Act. In this view of the matter, we have no hesitation to come to the conclusion that the prescribed authority had no jurisdiction to reopen the question of the majority of the two sons in purported exercise of the power under Section 13-A. If the authority had no jurisdiction, question of waiver of jurisdiction does not arise, as contended by learned counsel for the respondent."

6. In support of his submission he further cited (1) **Karan Singh Vs. State of U.P. and others (2003)(94) RD 527.** Relevant paragraph 8 of which is reproduced hereunder:-

"8. A reading of the aforesaid, section reveals that the Prescribed Authority may at any time within a period of two years from the date of the notification under sub-section (4) of section 14, rectify any mistake apparent on the face of the record. As stated above in the present case there was no error apparent on the face of the record and what the State Government attempted to do by means of an application under section 13-A of the Act was to take up a new case, "and that too after the orders passed by the authorities below have become final, which is legally not permissible. The order passed by the Appellate Authority dated 12.1.1977 operates as res-judicata between the parties as the provisions of section 13-A of the Act have got no application in the present case.

(ii) **State of U.P. through Collector Mirzapur Vs. Commissioner (J) Varanasi Division** (2009) (27) LCD 71. Paragraph 7 of which is reproduced hereunder;

"7. I have considered the submissions made on behalf of the parties and have perused the record. Admittedly from the record it clearly appears that the proceedings between the parties have become final by order dated 30.3.1977 in the appeal filed by the State. From the record it is also clear that the State petitioner has not filed any writ petition against that order. In the earlier proceedings it has been decided that the property which was clubbed in the holding of respondent no. 3 is a charitable Trust property in the name of Thakur Laxmia Narain Ji and Mahavir Ji. Therefore, the Prescribed Authority as well as the appellate authority has rightly held that second notice is not maintainable and is barred by re judicata. This Court in judgments mentioned above has also taken the same view."

(iii) **State of U.P. Vs. Dev karan and others 2002 (20) LCD 1408.**

7. He further submitted that the Prescribed Authority has got no power to reappreciate evidence in the successive proceedings when earlier proceeding was finalized by declaring the some land of opposite party no. 4 as surplus. The order passed by the Prescribed Authority was approved by the Court of Appeal filed by the State Government. Therefore, the learned counsel for the petitioners submits that on this very ground the writ petition deserves to be dismissed.

8. Upon perusal of the orders impugned in comparison to the order

passed by the Prescribed Authority as well as the appellate authority in the earlier proceeding I find that the same very land was subjected under the proceedings of declaration of surplus land and also find that the order, passed by the Prescribed Authority is based on re appreciation of evidence which is not permissible under the eye of law as has been held in the judgments quoted above. This fact is not disputed that the earlier proceeding was on the same subject in which the issue had already been determined between the parties by the Court of competent jurisdiction. Therefore, I am of the view that the proceeding in question was barred by principle of res judicata. That being so the orders impugned passed in such proceeding are nullity.

9. Therefore, the orders impugned dated 13.1.1978 and 5.7.1978 are hereby quashed.

10. In the result the writ petition is allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 29.04.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 2751 Of 2010.

Prithvi Pal Singh & another...Revisionists
Versus
State of U.P. and others ...Opp. Parties.

Counsel for the Revisionists:
Sri Indra Mani Tripathi

Counsel for the Respondents:
A.G.A., Sri R.P.Singh Parihar
Sri Santosh Kr. Singh

Code Of Criminal Procedure-Section 397/401- offence under Section 419, 420, 467, 468, 471 IPC- summoning order-on application under section 156(3) FIR lodged-after investigation chargesheet submitted-on allegation exceeding his share-sale deed executed to harm the complaint-much prior to move application civil suit pending-non disclosure of this fact-direction issued-in view of law laid down by Apex Court in Indian oil Corporation-any effort to settle dispute-not involve any criminal offence-criminal prosecution should be deprecated-held-clearly an abuse of process-impugned order set-a-side.

Held: Para-23
In view of the above, the present dispute is purely of civil nature and opposite party no.2 has already instituted a civil suit for cancellation of the sale deed, therefore, initiation of criminal proceedings by the opposite party against the revisionists is clearly an abuse of process of the Court.

Held: Para-25
For the aforesaid reasons, I am of the opinion that the civil dispute between the parties has been given a criminal colour and the fact of pendnecy of civil suit has also been concealed in the application under Section 156(3) Cr.P.C. given on 9.10.2009 while the civil suit has already been filed on 3.7.2009 i.e. much prior to the aforesaid application under Section 156(3) Cr.P.C. The pendency of the civil suit has also not been brought to the notice of the court which has passed the summoning order.

Case Law discussed:
AIR 1960 SC 866; 1992 SCC (Cr) 426; 1992 SCC (Cr) 192; 2005 SCC (Cr) 283; (2012) 11 SCC 465; 2005 Cr.L.J. 1952; 2001 (43) ACC 50 (All) (FB); 1978(1) SCR 749; 1980 SCC (Cri.) 72 ; 2009 (67) ACC 886;2008 (60) ACC 1; 2009 (66) ACC 28; (2011) 3 SCC 351; (2006) 6 SCC 736; (2009) 8 SCC 751

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the revisionists, learned counsel appearing for opposite party no.3, learned A.G.A. and perused the record.

2. All these petitions relate to the same controversy between the same parties, hence they are taken together for decision.

3. This criminal revision has been filed against orders dated 4.3.2010 and 9.7.2010 passed by A.C.J.M.-II, Jaunpur in Case No.854 of 2010 "State Vs. Ram Singh" arising out of Crime No.1163 of 2009, whereby the revisionists have been summoned to face the trial for the offences punishable under Sections 419, 420, 467, 468, 471 I.P.C. and non-bailable warrant has been issued against the revisionists.

4. Criminal Misc. Application u/s 482 Cr.P.C. No.15075 of 2010 has been filed with the prayer to quash the charge-sheet under Sections 419, 420, 467, 468 and 471 I.P.C. in Case Crime No.1163 of 2009 and Case No.854 of 2010 pending in the Court of A.C.J.M.-II, Jaunpur.

5. Criminal Misc. Application u/s 482 Cr.P.C. No.39256 of 2012 has been filed with the prayer to stay the proceedings of Case No.5427 of 2010 by which non-bailable warrant has been issued in Case Crime No.1163 of 2009, under Sections 419, 420, 467, 468 and 471 I.P.C.

6. Learned counsel for the revisionists has submitted that it is a dispute of civil nature and the complainant has not disclosed his share in the alleged application under Section 156(3) Cr.P.C. It has also been submitted that learned A.C.J.M. has no jurisdiction to decide the share of the parties in the property in dispute. It has also been submitted that in counter affidavit the opposite party no.3 has admitted that revisionists have 2/6 share which were virtually comes to 1/3 share and the revisionists have not sold the land exceeding 1/3 share. It has also been submitted that suit for cancellation of sale deed as well as partition is also pending before the Civil Judge (J.D.), Janpur in which 1/3 share of Mahaveer, Shripal and Ganesh Singh has been admitted.

7. Learned counsel for the opposite parties has submitted that with intention to cause wrongful loss to the opposite party no.3, the revisionists have executed sale deed of property of which they are not absolute owners. It has further been submitted that in the counter affidavit 2/6 has been mentioned wrongly while it should be 1/6.

8. An application under Section 156(3) Cr.P.C. was moved by the opposite party no.3 alleging that the accused persons had only 1/6 share but with intention to cause wrongful loss to the complainant, they have executed a sale deed on 9.6.2009, therefore, the matter should be investigated by the police. This application was moved on 9.10.2009 upon which a case at Crime No.1163 of 2009, under Sections 419, 420, 467, 468, 471 I.P.C. was registered at Police Station Machli Shahar, District Jaunpur in which the charge-sheet has been filed after investigation. The revisionists have challenged the summoning order and order by which

non-bailable warrant has been issued against the revisionists.

9. At this stage only a prima facie case is to be seen in the light of the law laid down by the Supreme Court in cases of **R.P. Kapur versus State of Punjab**, AIR 1960 SC 866, **State of Hariyana versus Bhajan Lal**, 1992 SCC (Cr) 426, **State of Bihar versus P.P. Sharma**, 1992 SCC (Cr) 192, and lastly **Zandu Pharmaceutical Works Ltd. Versus Mohd. Saraful Haqe and another** (Para 10), 2005 SCC (Cr) 283 and lastly (2012) 11 SCC 465. Detailed reasoned order at the stage of issuance of process is not required under the provisions of Code of Criminal Procedure.

10. In (2012) 11 SCC 465, it has been further held that defences may be taken into consideration only if defence(s) raised by accused are factually unassailable and incontrovertible and demolish foundation of prosecution case.

11. From perusal of the F.I.R., it appears that there is a bonafide civil dispute between the parties. As per complaint, the revisionists have 1/6 share in the property in dispute while the revisionists have executed the sale deed of 1/3 share of the property in dispute. Admittedly a Civil Suit No.739 of 2009 "Ajab Singh Vs. Ram Singh and others" is pending before the Civil Judge (J.D.), Jaunpur regarding cancellation of sale deed. The opposite party-complainant has also not been granted any injunction order regarding the same property in dispute which is alleged to have been transferred fraudulently. The complainant alleges that Bisun Singh had transferred his 1/6 share in his favour as well as in favour of Ram Bahadur thereby he became the owner of 5/6 share of certain plots.

12. It has been alleged that the alleged sale deed has been executed with a view to provide wrongful gain to Dharma Devi and Suman Devi. What was the conspiracy or forgery, has not been disclosed in the F.I.R. From perusal of the contents of F.I.R., it appears to be a purely civil dispute regarding the share of respective parties which can neither be decided by this court in exercise of its revisional jurisdiction nor can be decided by a criminal court, therefore, I do not wish to enter into the dispute of alleged share of respective parties.

13 . Learned counsel for the revisionists has relied upon **Arvind Kumar Tiwari Vs. State of U.P., 2005 Cr.L.J. 1952**, in which the question of maintainability of criminal revision against interlocutory order has been decided.

14 . Learned counsel for the revisionists has further relied upon **Ram Babu Gupta Vs. State of U.P. and others, 2001 (43) ACC 50 (All)(FB**), in which the powers of the court under Section 156(3) Cr.P.C. have been discussed.

15. Learned counsel for the revisionists has further relied upon **Madhu Limaye Vs. State of Maharashtra, 1978 (1) SCR 749, Rajinder Prasad Vs. Bashir, AIR 2001 SC 3524 and Raj Kapoor Vs. State, 1980 SCC (Cri.) 72**. All these rulings relates to the interpretation of Section 482 and 397 Cr.P.C.

16. In **Devendra and others Vs. State of U.P. and another 2009 (67) ACC 886**, Hon'ble the Apex Court has considered the civil wrong and criminal wrong and has held as under:-

"We may, however, notice that the said decision has been considered recently by this Court in Mahesh Choudhary v. State of Rajasthan & another, 2009 (4) SCC 66 wherein it was noticed:

"Recently in R. Kalyani v. Janak C. Mehta and Ors. JT 2008 (12) SC 279 this Court laid down the law in the following terms:

9. Propositions of law which emerge from the said decisions are:

(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a First Information Report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

(2) For the said purpose, the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue.

10. It is furthermore well known that no hard and fast rule can be laid down. Each case has to be considered on its own merits. The Court, while exercising its inherent jurisdiction, although would not interfere with a genuine complaint keeping in view the purport and object for which the 15 provisions of Sections 482 and 483 of the Code of Criminal Procedure had been introduced by the Parliament but would not hesitate to exercise its jurisdiction in appropriate cases. One of the paramount duties of the Superior Courts is to see that a person who is apparently innocent is not subjected to persecution and humiliation on the basis of a false and wholly untenable complaint.

16. The charge-sheet, in our opinion, prima facie discloses commission of offences. A fair investigation was carried out by the Investigating Officer. The charge-sheet is a detailed one. If an order of cognizance has been passed relying on or on the basis thereof by the learned Magistrate, in our opinion, no exception thereto can be taken.

We, therefore, do not find any legal infirmity in the impugned orders."

17. In **Inder Mohan Goswami and another Vs. State of Uttaranchal and others 2008 (60) ACC 1** Hon'ble the Apex Court has held as under::-

"The veracity of the facts alleged by the appellants and the respondents can only be ascertained on the basis of evidence and documents by a Civil Court of competent jurisdiction. The dispute in question is purely of civil nature and respondent No. 3 has already instituted a civil suit in the court of Civil Judge. In the facts and circumstances of this case, initiating criminal proceedings by the respondents against the appellants is

clearly an abuse of the process of the Court."

18. In **Hira Lal and others Vs. State of U.P. and others 2009 (66) ACC 28** Hon. the Apex Court has held :-

"The question as to whether the transactions are genuine or not would fall for consideration before the Civil Court as indisputably the respondent No. 3 has filed a civil suit in the Court of Civil Judge, Gautam Budh Nagar wherein allegedly an interim injunction has been granted. What was the share of the respective co-sharers is a question which is purely a civil dispute; a criminal court cannot determine the same."

19. In **Harshendra Kumar D. Vs. Rebatilata Kolley and others (2011) 3 SCC 351,** Hon'ble the Supreme Court has held that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstances, can be looked into by the High Court In exercise of its jurisdiction under section 482 or for that matter in exercise of revisional jurisdiction under section 397 of the Code.

20. Hon'ble Apex Court has further held that it is clearly settled that while exercising inherent jurisdiction u/s 482 or revisional jurisdiction under section 397 of the Code in a criminal case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations.

21. In **Indian Oil Corporation Vs. NEPC India Ltd. and others (2006) 6 SCC 736**, Hon'ble the Apex Court considering the judgment of Hridaya Ranjan Prasad Verma has observed as follows:-

In Hridaya Ranjan Prasad Verma, this Court held :

"On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest.

In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he

had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

22. In **Mohd. Ibrahim and others Vs. State of Bihar and another (2009) 8 SCC 751**, the Hon'ble Apex Court has held that if what is executed is not a false document, there is no forgery. If there is no forgery, then neither Section 467 nor Section 471 of the Code are attracted.

23. In view of the above, the present dispute is purely of civil nature and opposite party no.2 has already instituted a civil suit for cancellation of the sale deed, therefore, initiation of criminal proceedings by the opposite party against the revisionists is clearly an abuse of process of the Court.

24. It is yet to be decided that whether the revisionists have sold their share or have exceeded their share without any sufficient ground. The share of the parties can be decided by the court of competent jurisdiction and the sale deed at this stage cannot be said to be a false document or a document executed with the intention to commit forgery. Respective parties shall have the full opportunity to prove their share before the civil court and at this stage, it cannot be said that what amount of share the respective parties have in the property in disputed.

25. For the aforesaid reasons, I am of the opinion that the civil dispute between the parties has been given a criminal colour and the fact of pendnecy of civil suit has also been concealed in the application under Section 156(3) Cr.P.C. given on 9.10.2009 while the civil suit has already been filed on 3.7.2009 i.e. much prior to the aforesaid application under Section 156(3) Cr.P.C. The pendency of the civil suit has also not been brought to the notice of the court which has passed the summoning order.

26. Hon'ble the Apex Court in Indian Oil Corporation Vs. NEPC India Ltd. and others (supra) has further held that any effort to settle the dispute and claim which do not involve any criminal offence by applying pressure through criminal prosecution, should be deprecated and discouraged.

27. In view of Devendra and others Vs. State of U.P. and another (supra), if somebody is aggrieved by the false assertion made in the said sale deed, he would be the vendees and not the co-sharers.

28. For the facts and circumstances mentioned above, the revision is allowed and the orders dated 4.3.2010 and 9.7.2010 passed by A.C.J.M.-II, Jaunpur in Case No.854 of 2010 "State Vs. Ram Singh" arising out of Crime No.1163 of 2009 are hereby set-aside.

29. In view of the above, Criminal Misc. Application U/s 482 Cr.P.C. No.15075 of 2010 and Criminal Misc. Application U/s 482 Cr.P.C. No.39256 of 2012 regarding the same Crime No.1163 of 2009 are also disposed of accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.04.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 3421 Of 2010

Shiv Chand ...Revisionist
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Revisionist:
Dr. S.B. Singh

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure- Section 125(3)-Execution of maintenance order-by impugned order the Magistrate by composite order imposed punishment - maintenance, then separate execution proceedings are not required to be launched but they may continue in the same execution application. But as far as the imprisonment in default of payment of maintenance is concerned, that may extend to one month or until payment if sooner made. It is also clear from the language of the provisions of Section 125(3) Cr.P.C. that for every breach of order, a warrant can be issued. In view of the pronouncement of the Hon'ble the Apex Court in Shahada Khatoon Vs. Amjad Ali (supra), the powers of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month. For breach or non compliance of the order of Magistrate the wife can approach the Magistrate again for similar relief. The Magistrate is not empowered to impose composite sentence for more than one month.

Case Law discussed:
(1999) 5 SCC, 672

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Heard learned counsel for the revisionist and the learned AGA.

one year. R.I.-arrear of maintenance more than 60 month-held-Magistrate can impose punishment one month R.I. or till payment of Maintenance amount-order impugned not sustainable quashed-with liberty to the wife to approach before the Magistrate to issue fresh warrant for recovery of unpaid amount.

Held: Para-10
The provisions of Section 125(3) Cr.P.C. are clear that an application for recovery of maintenance amount can be moved for arrears of 12 months. It is also settled position of law that once the execution application has been filed and the husband is in default of payment of

2. This criminal revision has been filed against order dated 26.7.2010 passed by Judicial Magistrate, Mau, in case no.4001 of 2006 Pyari Vs. Shiv Chand by which the revisionist has been directed to be detained in jail for one year rigorous imprisonment for default of payment of amount of maintenance.

3. Learned counsel for the revisionist has submitted that under the provisions that Section 125(3) of the Cr.P.C., a Magistrate has no jurisdiction to impose punishment for a term which may extend to one month or until payment if sooner is made. It has also been submitted that a Magistrate cannot impose a composite sentence for the default and he is obliged to pass separate orders for separate defaults.

4. Learned AGA has defended the impugned order.

5. The Execution Case No.4001 of 2006 Pyari Vs. Shiv Chand was pending before the Court of Judicial Magistrate, Mau in which the application was submitted on behalf of the applicant that the opposite party was directed to pay a

sum of Rs.500/- and Rs.300/- to the applicant nos.1 and 2 as maintenance which was modified to Rs.600/- per month. In compliance of the order of the Court, the revisionist has paid on 26.10.2006 Rs.600/- as maintenance and after that no maintenance has been paid. Therefore, there were dues against revisionist from 22.11.2005 to 22.11.2010. It was also stated that on 11.8.2008 the revisionist-opposite party has been released from jail after a period of one month but still a sum of Rs.48,000/- is due against him. Regarding which he was again detained into custody since 30.6.2010. Learned Magistrate after considering all the facts and circumstances has directed that the revisionist-opposite party shall undergo one year rigorous imprisonment and whatever amount shall be received by the work done by the revisionist, shall be paid to the applicant.

6. Learned counsel for the revisionist has relied upon Iftekhar Husain Vs. Smt. Hameeda Begum 1980 Cri.L.J., 1212 in which, this Court has held that Section 125(3) Cr.P.C. limits the power of the Magistrate to sentence the defaulter for the whole or any part of each months allowance remaining unpaid, after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment, if made sooner.

7. Learned counsel for the revisionist has further relied upon Dilip Kumar Vs. Family Court, Gorakhpur, 2000 Cri.L.J. 3893 in which, this Court has considered the scope of Section 125(3) Cr.P.C., has held as under :-

"From these it is clearly available that the person can be kept under confinement for each months default and the confinement can be only for period of a month. The subsequent part "until payment if sooner made" further clarifies the situation to the extent that such a husband can be confined to a period of one month even if the default is of more than a month and he can be allowed to come out of jail if the payment is made within this period on any date his confinement will come to an end. The purpose behind this enactment of provision for confinement is to put an end to the sufferings of the wife by compelling the husband to pay the maintenance amount."

8. Learned counsel for the revisionist has further relied upon Shahada Khatoon Vs. Amjad Ali (1999) 5, SCC, 672 in which, Hon'ble the Apex Court has held as under:-

"The short question that arises for consideration is whether the Learned Single Judge of the Patna High Court correctly interpreted Ss (3 of Section 125 of Criminal Procedure Code by directing that the Magistrate can only sentence for a period of one month or until payment, if sooner made. The learned counsel counsel for the appellants contends that the liability of the husband arising out of an order passed under section 125 to make payment of maintenance is a continuing one and on account of non payment there has been a breach of the order and therefore the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made. We are unable to accept this contention of the learned counsel for the appellants. The language of Ss 3 of

section 125 is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, is sooner made. This power of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month. For breach or non compliance with the order of the Magistrate the wife can approach the Magistrate again for similar relief. By no stretch of imagination can the Magistrate be permitted to impose sentence for more than one month. In that view of the matter the High Court was fully justified in passing the impugned order and we see no infirmity in the said order to be interfered with by this Court. The appeal accordingly fails and is dismissed."

9. In the present case, the Judicial Magistrate, Mau has passed a composite order of one year rigorous imprisonment for the default of payment of maintenance of Rs.48,000/- relating to 60 months.

10. The provisions of Section 125(3) Cr.P.C. are clear that an application for recovery of maintenance amount can be moved for arrears of 12 months. It is also settled position of law that once the execution application has been filed and the husband is in default of payment of maintenance, then separate execution proceedings are not required to be launched but they may continue in the same execution application. But as far as the imprisonment in default of payment of maintenance is concerned, that may extend to one month or until payment if sooner made. It is also clear from the language of the provisions of Section 125(3) Cr.P.C. that for every breach of order, a warrant can be issued. In view of the pronouncement of the Hon'ble the Apex Court in Shahada Khatoon Vs. Amjad Ali (supra), the powers of the Magistrate cannot be enlarged and therefore, the only remedy would be after expiry of one month. For breach or non compliance of the order of Magistrate the wife can approach the Magistrate again for similar relief. The Magistrate is not empowered to impose composite sentence for more than one month.

11. In the present case, the composite sentence of one year has been awarded which can not be sustained in view of the clear provisions of Section 125(3) Cr.P.C. and the law laid down by Hon'ble the Supreme Court in Shahada Khatoon Vs. Amjad Ali (supra) therefore, the impugned order dated 26.7.2010 is liable to be set aside.

12. However, the wife-opposite party no.2 shall be at liberty to move application for recovery of remaining amount of maintenance and can pray the Court to issue a warrant in accordance with law.

13. For the facts and circumstances mentioned above, the revision is accordingly allowed and orders dated 26.7.2010 is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.04.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Service Single No. 5665 Of 1994.

Shiv Ram Verma ...Petitioner
Versus
U.P.Coop. Union Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.C. Mishra, Sri K.C. Mishra
Mrs. Seema Srivastava
Sri P.N. Bajpai, Sri Rakesh Kr. Srivastava

Counsel for the Respondents:
Sri Rakesh Kumar

Constitution Of India-Art.-226-Service Law- continuation of disciplinary proceeding-even after retirement-without permission of competent authority to do so-contention that as per term of direction of Court-enquiry continued-held-conferment of jurisdiction a creation of legislature-it can not be either by consent of parties or by direction of Superior Court-impugned order quashed-petition allowed.

Held: Para-28 & 29
28. The law is well settled that conferment of jurisdiction is a legislative function and it cannot be conferred either with the consent of the parties or by the superior court. The court cannot derive jurisdiction to act in a particular manner from any other source apart from the statute.

29. Thus in the absence of any statutory provision providing for initiation or continuation of the departmental inquiry on the retirement of an employee the same cannot be conferred by a fiat of the court issued in oblivion of the statutory rules.

Case Law discussed:
(1999) 3 SCC 666; 2004 (22) LCD 659; 2007 (7) SCC 81;1903 All England Reporter 1.

(Delivered by Hon'ble Pankaj Mithal, J)

1. Heard Sri Rakesh Kumar Srivastava, learned counsel for the petitioner and Sri Rakesh Kumar, learned counsel for the respondents.

2. The petitioner has challenged the punishment order dated 11.2.1994 and the appellate order thereto dated 8.8.1994 by means of this writ petition.

3. The petitioner was appointed as Cooperative Supervisor and his services stood absorbed in Cooperative Federal Authority. He retired there from on 31.7.1991.

4. Before the retirement petitioner was put under suspension on 26.2.1990.

5. It appears that even before the suspension order was passed a disciplinary inquiry was initiated against him and a charge sheet dated 9.11.1989 was submitted to him. The date of the charge sheet is disputed and according to the petitioner as per annexure-3 it is 8th January, 1990.

6. The date of charge sheet either 9.11.1989 or 8.1.1990 makes no difference in so far as the present writ petition is concerned as in either case it happens to be prior to the retirement of the petitioner.

7. The suspension order passed against the petitioner was challenged by him by filing writ petition No. 4542 of 1990, Shiv Ram Verma Vs. U.P. Cooperative Union Ltd. And others. The said writ petition was disposed of vide judgment and order dated 17.9.1991 with certain observations which included direction to conclude inquiry within three months from the date of furnishing copies of the documents to the petitioner and in case the inquiry is not concluded within the aforesaid period, the suspension shall stand revoked but the inquiry shall continue.

8. Ultimately, an order of punishment was passed on 11.12.1994 directing not to pay any salary to the petitioner for the period of suspension other than subsistence allowance and to recover a sum of Rs.21,838/- with 16% interest as a loss caused to the department by the action of the petitioner.

9. The departmental appeal against it was dismissed on 8.8.1994.

10. Challenging the above two orders, the primary submission of learned counsel for the petitioner is that as there is no provision under the U.P. Cooperative Federal Authority (Business) Regulations, 1976 for initiating or continuing a departmental inquiry on the retirement of an employee. The order of punishment is therefore, without jurisdiction. In support of the above argument learned counsel for the petitioner has relied upon a decision of the Supreme Court in **Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and others (1999) 3 SCC 666** and a Division Bench decision of this court in **S.S.L. Verma Vs. U.P. Corporation Bank Ltd. and others 2004 (22) LCD 659.**

11. The aforesaid argument has been countered by Rakesh Kumar, learned counsel for the respondents on the basis of a decision of the Supreme Court in the case of **U.P. Cooperative Federation Ltd. And others Vs. L.P. Rai 2007 AIR SCW 5224** and a division Bench of this court dated 18.12.2009 passed in **writ petition No.1919 of 2009 Dev Prakash Tewari Vs. U.P. Cooperative Institutional Service Board**. He contends that as in the writ petition arising out of the suspension order a direction was issued on 17.9.1991 to complete the inquiry within three months with the further observation that in case the inquiry is not completed within three months the suspension will stand revoked but inquiry will continue, the authorities were impliedly permitted to proceed with the inquiry even if the petitioner has retired in the meantime.

12. In addition to the above rival submissions advanced by the learned counsel for the parties, learned counsel for the petitioner has tried to assail the impugned orders on various other grounds namely that the impugned order is not reasoned, petitioner was not supplied with the documents referred to in the charge sheet even after a demand was raised and that the charge sheet was not issued signed and approved by the competent authority.

13. An ancillary argument on the basis of Fundamental Rule 54 B of the Financial Hand Book Vol. II part II to IV was raised that as before stopping part of the salary opportunity of representation was not given, the order in so far as it directs for payment of only subsistence allowance during the period of suspension and no other part of the salary, stand vitiated.

14. The first point as to whether a departmental inquiry can be instituted after the retirement of an employee or if instituted earlier could not be continued on his retirement clinches the issue and is sufficient for deciding the present petition. Therefore, I refrain my self in dealing the other points.

15. Admittedly, the departmental inquiry against the petitioner was instituted prior to his retirement on

31.7.1991 but the order of punishment was passed on 11.2.1994.

16. Learned counsel for the parties are unanimous that U.P. Cooperative Federation Authority, (Business) Regulation, 1976 governs the services of the petitioner and that the aforesaid regulations do not provide for initiation or continuation of any inquiry after the retirement of the employee.

17. I have also considered the above regulations and find that they are completely silent as regards the continuation of any departmental inquiry after the retirement of the employee.

18. A retired employee who is no longer in service cannot be inflicted any punishment of dismissal or removal from service, reversion or reduction in rank and stoppage of increments etc. It is only by virtue of specific rule permitting imposition of punishment after retirement that the appointing authority can do so and if necessary after taking leave of the authority concern. This logically means that when a retired employee cannot be punished as aforesaid there is no point in continuing a departmental enquiry against him once he has been superannuated.

19. In the case of **Bhagirathi Jena Vs. Board of Directors, O.S.F.C. and others (1999) 3 SCC 666** their lordships while faced with a similar situation in respect of an employee governed by the Orissa Financial State Corporation Staff Regulations, 1975 held that in the absence of any specific provision in the regulations for continuing of departmental inquiry after superannuation, the corporation was vested with no legal authority to continue the departmental inquiry even for the purposes imposing any punishment of reduction in retirel benefits admissible to the delinquent employee and that the inquiry lapses with the retirement.

20. The aforesaid decision has been followed by a Division Bench of this court in **2004 (22) LCD 659 S.S.L Verma Vs. U.P. Cooperative Bank Ltd. and others** and it has been held by their lordships that in the absence of any statutory provision or rule, no inquiry can be initiated or continued after an employee has retired and consequently no punishment can be inflicted upon a retired employee.

21. The reliance placed upon 2**007(7) SCC 81 U.P. Cooperative Federation Ltd. and others Vs. L.P. Rai** wherein the Supreme Court permitted continuation of the departmental inquiry even after retirement looking to the seriousness of the charges does not come to the rescue of the respondents. In that case the High Court had quashed the punishment orders on the ground of irregularity in holding the inquiry and had directed for extending all benefits to the employee. In setting aside the said order of the High Court, the Supreme Court observed that as the order of punishment was set aside on the ground of irregularity the better course was to direct the disciplinary authority to pass a fresh order and it was not proper for the High Court to have foreclosed such a fresh inquiry even if the employee has retired from service. The court in deciding the above case was not called upon to deal with the question as to whether in the absence of statutory provision, a departmental inquiry could be continued after retirement. The said aspect of the matter

was not raised and considered in the above decision.

22. The Division Bench of this High Court in the unreported decision dated 18.12.2009 passed in Writ Petition No.1919 of 2009 Dev Prakash Tewari Vs. U.P. Cooperative Institutional Service Board simply followed the above decision of the Apex Court without considering that in the above case of L.P. Rai (Supra) Supreme Court was not called upon to decide the above controversy and it was not even dealt with and as such it was not an authority on the proposition regarding continuation of departmental inquiry after retirement when the rules do not specifically permit it.

23. More than a century ago Lord Halsbury in **Quinn Vs. Leathem 1900-1903 All England Reporters 1** propounded that a case is only an authority for what it actually decides. It cannot be quoted for a proposition that may seem to follow logically from it.

24. Applying the above principle it has been settled by the courts of this country that the judgment is precedent on what it actually decides and not what can logically be inferred from it. Therefore, since the above two decisions do not decide about the continuity of departmental proceedings on the retirement when the statutes do not specifically provide for its continuity, they are of no assistance to the respondents.

25. The argument that the departmental inquiry could have been continued even after retirement as there was direction from the High Court is also not sustainable.

26. This court while deciding the Writ Petition No.4242 of 1990 of the petitioner which related to the suspension instead of interfering with the suspension order directed for the completion of the inquiry expeditiously but in ignorance of the fact that the petitioner was due to retire and that the departmental inquiry cannot be continued against him after his retirement in the absence of statutory rules in that regard. Therefore, continuation and completion of departmental inquiry provided therein was by way of casual observation and not as if laying down any absolute authority in that connection.

27. Additionally, the above direction inherently includes a direction to decide the matter in accordance with law which necessarily means only if the authority under the relevant provision has the jurisdiction to do so and not otherwise.

28. The law is well settled that conferment of jurisdiction is a legislative function and it cannot be conferred either with the consent of the parties or by the superior court. The court cannot derive jurisdiction to act in a particular manner from any other source apart from the statute.

29. Thus in the absence of any statutory provision providing for initiation or continuation of the departmental inquiry on the retirement of an employee the same cannot be conferred by a fiat of the court issued in oblivion of the statutory rules.

30. In this view of the matter also the aforesaid order of the High Court cannot be taken to be conferring

jurisdiction upon the authorities to continue with the departmental inquiry even on the retirement of the petitioner.

31. Accordingly, in the aforesaid facts and circumstances and the legal position, the impugned orders dated 8.8.1994 and 11.2.1994 are not tenable in law and are hereby quashed.

32. The writ petition is allowed and the petitioner is held entitle to all consequential benefits.
