ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2014

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Service Single No. 29 of 2004
alongwith Service Single No. 7749 of 2008

Savitri Devi... Petitioner
Versus
State of U.P. & Ors.. Respondents

Counsel for the Petitioner:
Sri R.B. Singh, Sri B.R. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-311-Service law-dismissal on ground of conviction in criminal case-after considering the role of petitioner-argument that criminal appeal pending and conviction suspended-can not be dismissed-held-misconceived-unless conviction set-a-side-no interference by Writ Court.

Held: Para-13 & 14

13. Thus as summed up by the Hon'ble Supreme Court it is abvious that pendency of appeal has no effect over the punishment unless the order of conviction is set aside. .

14. On a keen scrutiny of the judgements referred as above as well as facts of the case, I am of the view that there is no violation of Article 311(2)(a) of the Constitution of India in passing the order of dismissal. Therefore the writ petition is dismissed.

Case Law discussed:
1989(2)UPLBEC 418; AIR 1985 SC 1416; 1996(14) LCD 126; [1985] 2 S.C.C. 358:(AIR 1985 SC 772); 1995(3) SCC 377; 1985 (2) SCR 358; AIR 1995 SC 623.

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

1. Heard Mr. B.R. Singh, learned counsel for the petitioner as well as learned Standing Counsel and perused the record.

2. Through the instant writ petition the petitoner has assailed the order dated 03. Octorber.2003 passed by the Prescribed Authority/ Chief Medical Officer, Sitapur whereby the petitioner has been dismissed from service. The petitioner was placed under suspension due to her implimentation in a Criminal Caes registered as Case Crime No. 528 of 1999 under section 304-B, 498-A read with section 34 of the Indian Penal Code. Ultimately the petitioner had been convicted in the aforesaid case under section 302 read with section 34 of the I.P.C. by means of order dated 05.12.2002. Therefore in the light of the Departmental Rules notified on 30.07.1997 the petitioner had been dismissed from service w.e.f. 31.05.2003.

3. Learned counsel for the petitioner submits that since the petitioner had been dismissed due to conviction in a Criminal case, admittedly no departmental inquiry was conducted. However the disciplinary authority was under obligation to discuss the conduct of the petitioner as to what role was played by the petitioner in commission of offence which led her convication in Criminal Case. He drew attention of the Hon'ble Court towards Article 311 of the Constitution of India which is extracted below:

Article 311. "Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State:-

(1)No person who is a member of a civil service of the Union or an all- India

service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by a authority subordinate to that by which he was appointed .

(2)No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges

[Provided that where it is proposed after such inquiry, to impose upon him any such penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry and it shall not be necessary to give such person any opportunity of making representation on the penalty proposed:

Provided further that this clause shall not apply -]

(a) where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where the authority empowered to dismiss or remove a person or to reduce him in rank ins satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry; or

(c) where the President or the Governor, as the case may be, is satisfied that in the interest of the security of the State, it is not expedient to hold such inquiry.

(d) If, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such inquiry as is referred to in clause (2), the decision thereon of the authority empowered to dismiss or remove such person or to reduce him in rank shall be final."

4. Insupport of his submission he cited a case decided by a Division Bench of this Court i.e. Shyam Narain Shukla and another Vs. State of U.P. and others 1989(2) UPLBEC 418 . In this matter relying upon a decision of the Constitution Bench of the Hon'ble Supreme Cour rendered in the case of Union of India and another Vs. Tulsi Ram Patel AIR 1985 SC 1416 a Division Bench of this Cour held as under:-

"7. Civil servants, that is, persons who are members of a civil service of the Union of India or an all-India Service or a civil service of a State or who hold a civil post under the Union or a State, occupy in law a special position. The ordinary law of master and servant does not apply to them. Under that law, whether the contract of service is for a fixed period or not. If it contains a provision for its termination by notice, it can be so terminated. If there is no provision for giving a notice and the contract is not for a fixed period, the law implies an obligation to give a reasonable notice. Where no notice in the first case or no reasonable notice in the second case is given, the contract is wrongfully terminated and such wrongful termination will given rise to a claim for damages. This is subject to what may otherwise be provided in industrial and labour laws where such laws are applicable. The position of civil servants both in England and in India is, however, vastly different.

The Civil Service in England"

5. Vijaya Shanker Tewari Va. State of U.P. 1996 (14) LCD 126, in this Case furhter another Division Bench of this Court followed the aforesaid judgment.

6. The relevant paragraph No. 127 of Union of India Vs. Tulsi Ram Patel (supra) which has been relied upon by a Division Bench of this Court in the aforesaid case is also quoted here under:-

"127. Not much remains to be said about clause (a) of the second proviso to Article 311(2). To recapitulate briefly, where a disciplinary authority comes to know that a government servant has been convicted on a criminal charge, it must consider whether his conduct which has led to his conviction was such as warrants the imposition of a penalty and, if so, what that penalty should be. For that purpose it will have to peruse the judgment of the criminal court and consider all the facts and circumstances of the case and the various factors set out in Challappan's case. This, however, has to be done by it ex parte and by itself. Once the disciplinary authority reaches the conclusion that the government servant's conduct was such as to require his dismissal or removal from service or reduction in rank he must decide which of these three penalties should be imposed on him. This too it has to do by itself and without hearing the concerned government servant by reason of the exclusionary effect of the second proviso. The disciplinary authority must, however, bear in mind that a conviction on a criminal charge does not automatically entail dismissal, removal or reduction in rank of the concerned government servant. Having decided which of these three penalties is required to be imposed, he has to pass the requisite order. A government servant who is aggrieved by the penalty imposed can agitate in appeal, revision or review, as the case may be, that the penalty was too severe or excessive and not warranted by the facts and circumstances of the case. If it is his case that he is not the government servant who has been in fact convicted, he can also agitate this question in appeal, revision or review. If he fails in all the departmental remedies and still wants to pursue the matter, he can invoke the court's power of judicial review subject to the court permitting it. If the court finds that he was not in fact the person convicted, it will strike down the impugned order and order him to be reinstated in service. Where the court finds that the penalty imposed by the impugned order is arbitrary or grossly excessive or out of all proportion to the offence committed or not warranted by the facts and circumstances of the case or the requirements of that particular government service the court will also strike down the impugned order. Thus, in Shankar Dass v. Union of India and another, [1985] 2 S.C.C. 358,: (AIR 1985 SC 772) this Court set aside the impugned order of penalty on the ground that the penalty of dismissal from service imposed upon the appellant was whimsical and ordered his reinstatement in service with full back wages. It is, however, not necessary that the Court should always order reinstatement. The Court can instead substitute a penalty which in its opinion would be just and proper in the circumstances of the case".

7. Learned Counsel for the petitioner further cited a decision on Deputy Director of Colligiate Education (Administration), Madras Vs. S. Nagoor Meera 1955 (3) SCC 377 on the same point. In this case Hon'ble Supreme Court considered its another decision i.e. Shankardas Vs. Union of India 1985 (2) SCR 358 the relevant part of the judgment is reproduced herein under:-

"Clause (a) of the second proviso to Article 311(2) of the Constitution confers on the government the power to dismiss a person from services "on the ground of conduct which has led to his conviction on a criminal charge." But that power like every other power has to be exercised fairly, justly and reasonably. Surely, the Constitution does not contemplate that a government servant who is convicted for parking his scooter in a no-parking area should be dismissed from service. He may perhaps not be entitled to be heard on the question of penalty since clause (a) of the second proviso to Article 311(2) makes the provisions of that article inapplicable when a penalty is to be imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge. But the right to impose a penalty carries with it the duty to act justly."

8. On its conclusion the Hon'ble Supreme Court held that what is relevant factor for consideration is the conduct of the Government Servant which has led his conviction for Criminal Charge. However since in this case also like the case on hand the respondent was convicted having been found guilty by a Crimial Court, the Hon'ble Supreme Court held that untill it has been decided that it may not be advisable to retain such person in service.

9. Learned counsel for the petitioner submits that petitioner has died on 19th September 2011. Had she been alive, she would have attained the age of superannuation some time in 2006. This Court by means of interim order dated 08.01.2004 stayed the order of dismissal with the observation that petitoiners shall be continued in service subject to final orders of this Case. Therefore the learned counsel for the petitioner submits that the substituted petitioners who are the sons of the deceased are entitled to get the arrears of salary, gratuity, Provident Fund and the amount of pension for about 42 months which was stopped.

10. Learned counsel for the petitioner further submit that judgement of the Session Court has been appealed before this Court by the co-accused. Therefore the order passed by the Session Judge may not be treated as a final one.

11. The judgment passed by the Sessions Judge is on record. A bare perusal of it shows that the role of the deceased Savitri Devi in commission of offence was discussed and considering her involvement in commission of offence and the Session Court convicted her with sentence to undergo rigorouos imprisonment for life under section 302 read with section 34 I.P.C.

12. Therefore I am of the view that Clause (a) of Article 311 (2) has been followed well. So far as the effect of pencency of appeal is concerned, The Hon'ble Supreme Court has considered it S. Nagoor Meera (supra) case and held that merely because the sentence is suspended and/or the accused is released on Bail, the conviction does not cease to be operative. The Hon'ble Supreme Court has observed that the provisions of 389(1) I.P.C. held that "it may be noted, speaks on suspending "the execution of the sentence or order", it does not expressly speaks of suspension of convication. The Hon'ble Supreme Court on this issue also discussed its another judgment given in the case of Ram Narayan Vs. Ramesh Narayan AIR 1995, SC 623, the relevant portion is extracted below:

"Section 389(1) empowers the Appellate Court to order that the execution of the sentence or ordcr appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in Section 389(1) empowers the Appellate Court to order that the execution of the sentence or order appealed against be suspended pending the appeal. What can be suspended under this provision is the execution of the sentence or the execution of the order. Does 'Order' in-Section 389(1) mean order of conviction or an order similar to the one under Sections 357 or 360 or the Code? Obviously, the order re- ferred to in Section 389(1) must be an order capable in execution. An order of conviction by itself is not capable of execution under the Code. It is the order of sentence or an order awarding compensation or imposing fine or release on probation which are capable of execution and which if not suspended, would be required to be executed by the authorities..... In certain situations the order of conviction can be executable, in the sense, it may incur a disqualification as in the instant case. In such a case the power under Section 389(1) of the Code would be invoked. in such situations, the attention of the Appellate Court must be specifically invited to die consequence that is likely to fall to enable it to apply its mind to the issue since under Section 389(1) it is under an obligation to support its order for reasons to be recorded by it in writing. If the attention of the Court is not invited to this specific consequence which is likely to fall upon conviction how can it be expected to assign reasons relevant thereto?..... If such, a precise request was made to the Court pointing out the consequences likely to fall on the continuance of the conviction order, the Court would have applied its mind to the specific question and if it thought that case was made out for grant of interim stay of the conviction order, with or without conditions attached thereto, it may have granted an order to that effect. "

13. Thus as summed up by the Hon'ble Supreme Court it is abvious that pendency of appeal has no effect over the punishment unless the order of conviction is set aside. .

14. On a keen scrutiny of the judgements referred as above as well as facts of the case, I am of the view that there is no violation of Article 311(2)(a) of the Constitution of India in passing the order of dismissal. Therefore the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2014

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

Special Appeal (D) No. 110 of 2014

Smt. Parmi Maurya..... Petitioner
Versus
State of U.P. and Ors..... Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri M.A. Ausaf

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Writ Jurisdiction scope of interference-appellant was appointed as health worker on 04.01.90-on 29.10.10-required to submit her original certificate-on verification nothing found adverse to appellant-terminations based upon report

of medical faculty without supplying copy-without charge sheet-without disciplinary proceeding-bad-learned single judge-can not inter into genuineness of document and record finding of facts-order passed by authority as well as Single Judge quashed-with liberty to hold fresh departmental enquiry-if desired-Appeal allowed.

Held: Para-9 & 10-

9. The facts of the present case are, therefore, clearly distinguishable. The charge of misconduct has to be duly established. Since no disciplinary inquiry was held, the charge was never proved.

10. In this view of the matter, we are of the view that the judgement and order of the learned Single Judge is unsustainable and the special appeal would have to be allowed. We, accordingly, allow the special appeal in terms of the following directions:

Case Law discussed:
AIR 2004 SC 1469; AIR 1995 SC 94.

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

1. This special appeal arises from a judgement of the learned Single Judge dated 24 September 2013.

2. The appellant applied for and was appointed on 4 January 1990 on the post of Health Worker (Female). The appellant claims to have completed the A.N.M. course at the A.N.M. Training Centre, Azamgarh in 1989. According to the appellant, the mark sheets were issued in the year 1989 and a training certificate was issued by the Secretary, U.P. State Medical Health and Family Welfare Faculty on 9 August 1993. A notice to show cause was issued to the appellant on 29 October 2010 intimating her that the documents which were submitted by the appellant had been examined by the Medical Faculty and were found to be fabricated. The appellant was called upon to submit documentary evidence for verification within a period of three days. The appellant has averred that in pursuance of the notice to show cause, she appeared before the Chief Medical Officer, Chitrakoot (second respondent) and produced the original certificate/training certificate which were scrutinized by the second respondent. On 30 November 2010, an order of termination was passed by the second respondent. The order of termination was challenged by the appellant in the writ proceedings before the learned Single Judge under Article 226 of the Constitution. The principal ground of challenge was that the order of termination which constituted a major penalty was passed without any inquiry and in breach of the principles of natural justice as no charge sheet was issued and no reasonable opportunity of defending the charge was furnished to the appellant.

3. The learned Single Judge noted the submission of the appellant that a copy of the report on the basis of which the order of termination was passed was not supplied to the appellant nor was she afforded an opportunity of defence as no departmental inquiry was conducted. The learned Single Judge held that normally a petition on such a submission would succeed but where the Court, after perusing the record, could itself arrive at a particular conclusion that would support the ultimate decision, writ jurisdiction under Article 226 of the Constitution should not be exercised since substantial justice has been done. On this basis, the learned Single Judge examined the records on which reliance was placed by the appellant and having found that there was discrepancy, declined to interfere with the order of termination. The learned Single Judge has also relied upon the judgement of the Supreme Court in R. Vishwanatha Pillai Vs. State of Kerla1

4. The principal challenge of the appellant is that since the order of termination was passed without issuing a charge sheet and without conducting a disciplinary proceeding, the principles of natural justice had been violated. Learned counsel for the appellant has submitted that the learned Single Judge was not justified in enquiring into the evidence for the first time in exercise of the writ jurisdiction under Article 226 of the Constitution. Moreover, it was submitted that the judgement of the Supreme Court in R.Vishwanatha Pillai (supra) is squarely not applicable to the situation in the present case where an order of termination has been passed against a permanent employee without even convening a disciplinary inquiry on a substantive charge of misconduct.

5. A counter affidavit was filed on behalf of the State before the learned Single Judge in which it was stated that a letter dated 26 April 2004 was written by the Special Secretary, Government of U.P., in response to the letter of the Principal Secretary dated 18 March 2004 instructing all the Chief Medical Officers / Superintendents of the Districts through the Director, Medical and Health Services, U.P., Lucknow to conduct a verification of the appointments made and to make available the information within fifteen days of the receipt of the letter. The Superintendent of Police, Vigilance Department had written a letter to the Chief Medical Officer, Chitrakoot to issue instructions to Health Workers working under him to be present at the Sector Office on 23 July 2004 in respect of an inquiry / investigation being done by the concerned Inspector. Moreover, it was stated that the Registrar, Uttar Pradesh Nurses and Midwives Council, Lucknow had also issued a letter dated 23 February 2010 to the Chief Medical Officer, Chitrakoot informing him, in response to a letter dated 10 February 2010, that the registration certificate and the mark sheets relating to the appellant are fabricated.

6. The admitted position before the Court is that the appellant worked as a Health Worker (Female) right from the date of her appointment on 4 January 1990 until the order of termination which was passed on 30 November 2010. Prior to that, on 29 October 2010, a notice to show cause was issued to the appellant calling upon her to produce documentary evidence for verification of the documents within three days. Pursuant thereto, the appellant appeared before the second respondent and produced the documentary material on which she placed reliance. No charges were framed. No disciplinary proceedings were held. The order of termination dated 30 November 2010 states that the documents which were submitted by the appellant in relation to her training as an A.N.M. were got verified from the U.P. State Medical Health and Family Welfare Faculty pursuant to a letter dated 10 February 2010. The Medical Faculty, as the letter of termination states, had opined that the documents which were found to have been submitted by the appellant were fabricated. No copy of the report of the Medical Faculty was furnished to the appellant nor she was given notice of such finding before the order of termination was passed.

7. On these facts, the learned Single Judge, in our view, was clearly in error in arrogating to the Court the task of determining whether the certificate and mark sheets submitted by the appellant were

genuine or otherwise. This, with respect, was no part of the jurisdiction of the writ Court under Article 226 of the Constitution. When a substantive charge of misconduct is levied against an employee of the State, the misconduct has to be proved in the course of a disciplinary inquiry. This is not one of those cases where a departmental inquiry was dispensed with or that the ground for dispensing with such an inquiry was made out. The U.P. Government Servants (Discipline and Appeal) Rules, 1999 lays down a detailed procedure in Rule 7 for imposing a major penalty. Admittedly, no procedure of that kind was followed since no disciplinary inquiry was convened or held.

8. The learned Single Judge has relied upon a judgement of the Supreme Court in R.Vishwanatha Pillai (supra). In that case, the appellant was appointed to the Indian Police Service on the basis of a scheduled caste certificate. A full-fledged inquiry was conducted by the Scrutiny Committee. The order of the Scrutiny Committee invalidating the caste claim was upheld both before the High Court and the Supreme Court. Due opportunity was given to the appellant by the Scrutiny Committee to put forth his defence. It was, in this background that the Supreme Court held that issuance of fresh notice under the Rules was not necessary as the genuineness of the certificate had already been examined by an independent body constituted under the direction of the Supreme Court in Kumar Madhuri Patil vs. Additional Commissioner2. The observation of the Supreme Court in paragraph 13 are as follows:

"We do not find any substance in this submission. The misconduct alleged against the appellant is that he entered the service against reserved post meant for the Scheduled Caste/Scheduled Tribe on the basis of a false caste certificate. While appointing the appellant as Deputy Superintendent of Police in the year 1977, he was considered as belonging to the Scheduled Caste. This was found to be wrong and his appointment is to be treated as cancelled. This action has been taken not for any misconduct of the appellant during his tenure as civil servant but on the finding that he does not belong to the Scheduled Caste as claimed by him before his appointment to the post. As to whether the certificate produced by him was genuine or not was examined in detail by the KIRTADS and the Scrutiny Committee constituted under the orders of this Court. Appellant was given due opportunity to defend himself. The order passed by the Scrutiny Committee was upheld by the High Court and later on by this Court. On close scrutiny of facts we find that the safeguards provided in Article 311 of the Constitution that the Government servant should not be dismissed or removed or reduced in rank without holding an inquiry in which he has been given an opportunity to defend himself stands complied with. Instead of departmental inquiry the inquiry has been conducted by the Scrutiny Committee consisting of three officers, namely, (I) an Additional or Joint Secretary or any officer higher in rank of the Director of the department concerned, (II) The Director, Social Welfare / Tribal Welfare / Backward Class Welfare, as the case may be, and (III) in the case of Scheduled Castes another officer having intimate knowledge in the verification and issuance of the social status certifies, who were better equipped to examine the question regarding the validity or otherwise of the caste certificate. Due opportunity was given to the appellant to put-forth his point of view and defend himself. The issuance of a fresh notice under the

Rules for proving the same misconduct which has already been examined by an independent body constituted under the direction of this Court, the decision of which has already been upheld up to this Court would be repetitive as well as futile. The second safeguard in Article 311 that the order of dismissal, removal and reduction in rank should not be passed by an authority subordinate to that by which he was appointed has also been met with. The impugned order terminating the services of the appellant has been passed by his appointing authority."

9. The facts of the present case are, therefore, clearly distinguishable. The charge of misconduct has to be duly established. Since no disciplinary inquiry was held, the charge was never proved.

10. In this view of the matter, we are of the view that the judgement and order of the learned Single Judge is unsustainable and the special appeal would have to be allowed. We, accordingly, allow the special appeal in terms of the following directions:

(i) The judgement of the learned Single Judge dated 24 September 2013 is quashed and set aside;

(ii) In consequence, the order of termination dated 30 November 2010 shall stand quashed and;

(iii) The respondents shall be at liberty to hold a departmental inquiry in respect of the allegation of misconduct and take necessary action thereafter as may be warranted in accordance with law.

11. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2014

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

Special Appeal (D) No. 115 of 2014

State of U.P..... Appellant
Versus
Chandra Bose and Ors.... Respondents

Counsel for the Petitioner:
Sri Ramesh Upadhyaya, C.S.C.

Counsel for the Respondents:
Sri Y.S. Saxena

U.P. Government Servant(Discipline and Appeal Rules, 1999-Rule-4(c)-suspension-in contravention of statutory provision-at dictation of concern minister-as was absent in program of minister-without considering the cause of absence as he was not relieved by its superior-entrusted with task of distribution of laptop-not a deliberate act or dereliction of duty-Learned Single Judge rightly quashed-suspension order-observation for not giving duty of his status wholly uncalled far-as such order of Single Judge modified-accordingly amount of cost payable from appellant shall be from state exchequer-appeal disposed of.

Held: Para-10
We are cognisant of the fact that in matters of suspension pending a disciplinary inquiry, the intervention of the Court, particularly under Article 226 of the Constitution, must be rare. However, this is one of those exceptional cases where the intervention of the learned Single Judge was manifestly required to prevent what would otherwise have been a complete miscarriage of justice. The order of suspension was plainly in violation of Rule 4(1) of the Rules. The authority which passed the order of suspension acted at

the dictates of the Minister and did not apply its mind independently as to whether an order of suspension was necessary. Ex-facie, the requirement of the proviso to Rule 4(1) was not fulfilled.

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

1. The Special Appeal by the State arises from the judgment and order of the learned Single Judge dated 17 December 2013.

2. The first respondent was posted as the District Youth Welfare Officer, Budaun. On 22 August 2013, the Director General, Provincial Rakshak Dal addressed a communication to all the District Collectors stating that on 26 August 2013 a review meeting had been convened by the Minister for Youth Welfare and Sports Affairs, Government of U.P. at Lucknow for conducting a review of welfare activities. The meeting was to be attended by all the District Youth Welfare Officers. On 24 August 2013, the Chief Development Officer, Budaun addressed a letter to the Director General stating that the first respondent would not be able to attend the meeting on 26 August 2013 since during the period between 20 August to 26 August 2013, he had been assigned duties in connection with the distribution of laptops by the State Government. In his place, Gopal Ram, Physical Instructor was assigned the duty of attending the meeting at Lucknow. The meeting at Lucknow was attended by Gopal Ram on 26 August 2013. At the meeting, Gopal Ram was not able to satisfactorily explain the progress of the programme undertaken at Budaun. The first respondent was suspended from service on 27 August 2013. The order of suspension stated that the first respondent had deliberately and willfully failed to remain present in the meeting on 26 August 2013 chaired by the Minister and that the person who had been deputed to attend the meeting had not been provided with adequate information to make a presentation at the meeting. A charge sheet has since been served on 26 September 2013 whereby the first article of charge is the absence of the first respondent at the meeting on 26 August 2013.

3. On these facts the first respondent filed a writ petition challenging the order of suspension. When the petition came up before the learned Single Judge, an interim order was passed on 6 December 2013 wherein the submission of the first respondent was recorded that he had been assigned the duty of attending the distribution of laptops by the Chief Minister on 26 August 2013 and he was not relieved by his superior officers to attend the meeting at Lucknow which fact was duly communicated to the Director General in spite of which he was suspended from the service. At that stage, time was granted to file a counter affidavit and the Director General was directed to appear in Court to explain how the first respondent could have left the Head Quarter at Budaun when he was not relieved by his superior officers on the ground that he has been assigned duties in connection with the distribution of laptops by the Chief Minister. An affidavit was, accordingly, filed before the learned Single Judge by the Director General, Ram Singh. In paragraph 6 of the affidavit, it was specifically stated that the order for suspending the first respondent was issued on the directions of the Minister. Since the Director General was present, he informed the Court that he had issued the order of suspension under the directions of the Minister.

4. Learned Single Judge has held that though an order of suspension does not constitute a punishment per se under Rule 4(1) of U.P. Government Servant (Discipline and Appeal) Rules, 1999, an independent application of mind by the Director General was required. The Director General had merely acted at the behest of the Minister and instead of following the rule of law had taken action against the first respondent. In the circumstances, the order of suspension was set aside and while allowing the petition costs of Rs.25,000/- were imposed on the State with liberty to recover them from the concerned appointing authority who ignored the statutory duty. Moreover, a direction was also issued to the effect that Ram Singh, Director General should not be assigned duties of such an important office. The State Government was directed to take an appropriate action within 15 days.

5. The State is in appeal.

6. Learned Standing Counsel appearing on behalf of the appellant submits that the order of suspension against the first respondent was not passed merely on the ground of his absence from the meeting on 26 August 2013 which was to be chaired by the Minister but also as a result of failure of the first respondent to depute a person, who would have vital information of the progress of the activities in the district. The person who was deputed was unable to provide a satisfactory explanation of the activities in the district. The decision to suspend the first respondent was taken in the meeting which was chaired by the Minister but which was also attended by senior officers. Hence, it was submitted that it would be unfair to attribute the order of suspension to have been passed merely on the direction of the Minister concerned.

7. The primary basis of the order of suspension in the present case, as the order itself would disclose, is that the first respondent had wilfully remained absent at the meeting on 26 August 2013 which had been convened to be chaired by the Minister for Youth Welfare and Sports. Now, the record indicates that the Chief Development Officer had informed the Director General, upon receipt of a communication dated 22 August 2013, by a letter dated 24 August 2013 that the first respondent would be unable to attend the meeting since he had been deputed to attend the distribution of laptops between 20 August to 27 August 2013. Admittedly, this was an event at which the Chief Minister of the State was to participate. Therefore, it is evident that the absence of first respondent from the meeting at Lucknow on 26 August 2013 was not a deliberate act on his part nor was there any dereliction of duty. On the contrary, the superior officers of the first respondent had assigned to him the duty of remaining present at the distribution of the laptops and had also communicated to the Director General that for this reason the first respondent would not be able to attend the meeting at Lucknow on 26 August 2013.

8. Thus, ex-facie, the primary basis of the order of suspension has no foundation. The first respondent has thus been victimised for his absence at the meeting on 26 August 2013 though that absence was duly explained and was only in compliance of a lawful order of the superior officers requiring him to be present during the course of the distribution of the laptops. The record before the Court also indicates that the

order of suspension was passed by the Director General at the behest of the Minister. The Director General admitted this fact in the affidavit which he filed before the learned Single Judge in response to the interim directions. In paragraph 6 of the affidavit, he categorically admitted to the order of suspension being passed at the behest of the Minister. Besides, such was also his statement to the Court when he remained personally present in response to the notice issued by the Court. That the officer who was deputed was unable to provide satisfactory answers in regard to the progress of the activities in the district is a subsidiary matter altogether for which the first respondent cannot be victimised.

9. On these facts, the learned Single Judge was justified in coming to the conclusion that the Director General had abdicated his duty of independently applying his mind to the issue as to whether the order of suspension was necessary. An angry Minister by himself cannot provide justification for toying with the lives of the employees and officers of the State. All public power is conferred on the foundation that it is held in trust and not on the assumption that it would be wielded for extraneous reasons. Rule 4(1) of the Rules contemplates the placement of a government servant under suspension against whom an inquiry is contemplated or is proceeding. The proviso to Rule 4(1), however, stipulates that the suspension should not be resorted to unless the allegations against the government servant "are so serious that in the event of their being established may ordinarily warrant major penalty". There has been a total non-application of mind to this aspect also. No reasonable person or body of persons could possibly come to the conclusion that the facts of the present case are such as would prima facie suggest that a major penalty would be imposed if the charge is found to be true. In a situation as the present, where the first respondent was unable to remain present at the meeting convened by the Minister because he was associated with the function of the distribution of the laptops on the directions of his superiors, the said respondent would not be guilty of misconduct. The absence of the first respondent was duly explained.

10. We are cognisant of the fact that in matters of suspension pending a disciplinary inquiry, the intervention of the Court, particularly under Article 226 of the Constitution, must be rare. However, this is one of those exceptional cases where the intervention of the learned Single Judge was manifestly required to prevent what would otherwise have been a complete miscarriage of justice. The order of suspension was plainly in violation of Rule 4(1) of the Rules. The authority which passed the order of suspension acted at the dictates of the Minister and did not apply its mind independently as to whether an order of suspension was necessary. Ex-facie, the requirement of the proviso to Rule 4(1) was not fulfilled.

11. In the circumstances, no case for interference with the order of the learned Single Judge setting aside the order of suspension is made out. The imposition of costs was wholly justified in the facts of this case. However, in the concluding part of the judgment the learned Single Judge has issued a direction to the effect that Ram Singh, Director General should not be assigned such an important office and should be posted in an office where an

independent exercise of power is not required to be performed by him. These observations of the learned Single Judge are really not necessary for a decision of the writ petition and consequently we consider it appropriate and proper to set aside the directions contained to that effect in paragraph 20 of the judgment and order. We also clarify that the costs in the present case shall be borne by the State Government.

12. The Special Appeal is, accordingly, disposed of in the aforesaid terms and the impugned judgment stands modified to that extent. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2014

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

Special Appeal Defective No. 123 of 2014

Smt. Arti Verma... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Shambhu Nath, Sri Adeel Ahmad Khan

Counsel for the Respondents:
C.S.C., Sri Nisheeth Yadav.

Constitution of India, Art.-226-Service law-cancellation of candidature-appellant applied on lines application-claiming benefit of dependant of fighter of freedom-subsequent application to change the application form -held-once declaration given-that any information found wrong-candidature shall be cancelled-held-learned Single Judge rightly declined to interfere.

Held: Para-4

No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed. Moreover, in the present case, the appointment was of a contractual nature for a period of eleven months. Hence, considering the matter from any perspective, the learned Single Judge was not in error in dismissing the petition under Article 226 of the Constitution.

Case Law discussed:
Spl. Appeal 834 of 2013; Spl. Appeal 75 of 2013.

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

1. The appellant made an on-line application for engagement as Shiksha Anudeshak (Arts) for 2012-13 on a contract basis. In the application, the appellant claimed to have belonged to the Freedom Fighters' category, which was admittedly not the category to which the appellant could have claimed. The name of the appellant was shown in the select list of candidates belonging to the Freedom Fighters' Category. The Secretary to the State Government rejected the representation filed by the appellant for correcting the error in the on line application. The learned Single Judge dismissed the petition filed by the appellant under Article 226 of the Constitution for setting aside the order passed by the Secretary noting that under the declaration given by the appellant while filling up the application, it was

stated that the candidature could be rejected if any discrepancy was found. The learned Single Judge has also relied upon a judgment of the Division Bench rendered in Ram Manohar Yadav Vs. State of U.P. & three Ors., (Special Appeal-834 of 2013).

2. In the judgment of the Division Bench in Ram Manohar Yadav (supra) it was observed that where an applicant has shown his incompetence or negligence in not not even correctly filling up a simple on line application form for employment, interference of the High Court under Article 226 of the Constitution was not warranted.

3. However, learned counsel appearing on behalf of the appellant relied upon a judgment of a Division Bench in Puspraj Singh Vs. State of U.P. & Ors., (Special Appeal-75 of 2013). That is a case where the appellant had wrongly described himself as a female candidate. On these facts, the Division Bench accepted the contention that human error had caused an incorrect on line entry, since there was no reason for the appellant to make such a declaration and that he did not stand to gain anything by making such an incorrect entry.

4. In the present case, the appellant claimed the benefit of Freedom Fighters category. The contention that this was as a result of an error committed by the Computer Operator cannot simply be accepted for the reason that the appellant would necessarily be responsible for any statement which he made on line. If the Courts were to accept such a plea of the appellant, that would result in a situation where the appellant would get the benefit of a wrong category if the wrong claim went unnoticed and if noticed, the appellant could always turn around and claim that this was as a result of human error. Each candidate necessarily must bear the consequences of his failure to fill up the application form correctly. No fault can, therefore, be found in rejecting the application for correction when the candidate himself has failed to make a proper disclosure or where, as in the present case, the application is submitted under a wrong category. Interference of the High Court under Article 226 of the Constitution is clearly not warranted in such matters as it creates grave uncertainty since the selection process cannot be finally completed. Moreover, in the present case, the appointment was of a contractual nature for a period of eleven months. Hence, considering the matter from any perspective, the learned Single Judge was not in error in dismissing the petition under Article 226 of the Constitution.

5. The Special Appeal is, accordingly, dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2014

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

Special Appeal (D) No. 130 of 2014
alongwith Special Appeal No. 131 of 2014

Harsh Kumar & Anr.... Petitioners
Versus
The State of U.P. and Ors.....Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha, Sri Satyendra Chandra Tripathi

Counsel for the Respondents:
C.S.C., Sri R.P. Singh

High Court Rules-Chapter VIII Rule-V-Special appeal against judgment by Single Judge-dismissing petition-as the appellant, do not possess requisite qualification for Asst. teacher in primary school as per terms of advertisement-rightly not considered-appeal on ground when-appellant possesses diploma in special education and cleared TET as per requirement of Right of children to free and compulsory education Act, 2009-state government can not put condition contrary to that-held-not open to the state government to exclude from zone of eligibility-otherwise qualified in term of notification.

Held: Para-12&13

12. The qualifications, which have been prescribed by the NCTE in the notification dated 29 July 2011 include Senior Secondary with at least 50% marks together with a 2-year Diploma in Education (Special Education). Once, these qualifications have been prescribed by the NCTE, this would necessarily be binding and it is not open to the State Government to exclude (from the zone of eligibility) the persons who are otherwise qualified in terms of the notification dated 23 August 2010 as amended on 29 July 2011.

13. In this view of the matter, we are of the opinion that the learned Single Judge was in error in coming to the conclusion that since the recruitment was in pursuance of a special drive, the Government was justified in confining the eligibility qualifications only to those who held the BTC qualifications for the reason that such candidates could not be adjusted earlier for want of TET qualification. The passing of the TET was introduced as a mandatory requirement by the notification dated 23 August 2010 issued by the NCTE. Persons who did not fulfill the eligibility conditions prescribed in the notification dated 23 August 2010, as amended on 29 July 2011, were not qualified for consideration for appointment as primary school teachers. Hence, there was no occasion for the State to contend or for that matter the learned Single Judge to accept the submission that in order to adjust such BTC qualified candidates, the present advertisement had been issued. The learned Single Judge held that the appellants could not claim equivalence with those candidates who possess BTC qualification. This, in our view, begs the question because once the Diploma in Education (Special Education) is held to be a qualification which is recognised for appointment of Assistant Teachers for teaching Classes I to V, it would be impermissible for the State Government to exclude them from being considered for appointment. In a special drive or otherwise, it is not open to the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE. Any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court.

Case Law discussed:
[2013(6)ADJ 310 (FB)]; (2008) 3 SCC 432; Special Appeal No. 1234 of 2013.

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

1. Both these special appeals arise from a judgment and order of the learned Single Judge dated 14 November 2013 by which the petitions filed by the appellants under Article 226 of the Constitution have been dismissed.

2. The appellants claim that all of them have acquired the qualification of a Diploma in Education (Special Education)

(DEd) and have successfully cleared the Teachers Eligibility Test (TET) and are eligible for appointment to the post of Assistant Teachers in primary schools. On 15 October 2013, the State Government issued a Government Order in regard to the selection/appointment of Assistant Teachers in the Primary Schools run by the Basic Shiksha Parishad as part of a special drive for the recruitment of ten thousand teachers. The minimum educational qualifications prescribed in the Government Order for the appointment of Assistant Teachers in Primary Schools, are:

(i) A Bachelor's Degree from a University established by law in India;

(ii) A two years BTC Training or a two years BTC Training (Urdu) or a Special BTC Training; and

(iii) The passing of any Teacher Eligibility Test to be conducted by the State Government or by the Central Government.

3. The appellants challenged the Government Order dated 15 October 2013 as well as an advertisement that was issued by the District Basic Education Officer in terms of the said Government Order and sought a mandamus permitting them to apply for appointment on the post of Assistant Teachers in primary schools.

4. The contention of the appellants was that in view of notifications that were issued by the National Council for Teacher Education (NCTE) on 23 August 2010 and 29 July 2011, the minimum qualifications have been prescribed by the NCTE for appointment of Assistant Teachers in primary schools for Classes I to V. Consequently, it was submitted that in view of the notifications which have been issued by the NCTE under the legislation enacted by Parliament, the qualifications, as prescribed therein must prevail and, hence, it was not open to the State Government to exclude persons, such as the appellants who hold the Diploma in Education (Special Education), which is otherwise recognized as an eligible qualification for appointment as Assistant Teachers in primary schools for teaching Classes I to V. In this regard, reliance was placed on a judgment of a Full Bench of this Court in Shiv Kumar Sharma Vs. State of U.P. & Ors.1, in which it was held that the notification dated 23 August 2010 of the NCTE would have an overriding effect and could not have been ignored.

5. The learned Single Judge declined to accept the contention and by the judgment which is called in question in this appeal, held that the advertisement in question was in pursuance of a special drive that was initiated by the State Government for the recruitment of BTC qualified teachers who could not be given appointments as Assistant Teachers despite having completed the training, whether before or after 23 August 2010, on account of the fact that after the enactment of the Right of Children to Free and Compulsory Education Act, 2009 (in short 'the Act of 2009'), and the qualifications prescribed by the NCTE in its notification dated 23 August 2010 it was mandatory to pass the TET. Hence, according to the learned Single Judge, since a special drive was initiated for filling up the ten thousand vacant posts with a view to adjust such BTC qualified candidates who could not be recruited for want of TET qualification, the appellants

could have no legitimate grievance. According to the learned Single Judge, the appellants could not be treated at par with candidates who are BTC qualified and for whom the special drive was initiated and there was no unreasonableness on the part of the Government in prescribing the qualification as set out in the Government Order which was challenged.

6. Assailing the judgment of the learned Single Judge, it has been urged on behalf of the appellants that upon the enactment of the National Council for Teacher Education (Amendment) Act, 2011 which came into force on 1 June 2012, the minimum educational qualifications prescribed for the recruitment of Assistant Teachers in primary schools in the notifications dated 23 August 2010 and 29 July 2011 issued by the NCTE are binding and persons who hold a qualification, which is recognized under the said notifications issued by the NCTE, cannot be excluded from consideration even if the recruitment is in pursuance of a special drive. It has, therefore, been submitted that confining the zone of eligibility only to the BTC qualified candidates would be clearly contrary to the notifications which have been issued by the NCTE and the learned Single Judge was in error in ignoring the judgment of the Full Bench of this Court in Shiv Kumar Sharma (supra).

7. On the other hand, it has been urged on behalf of the respondents that in the State of Uttar Pradesh, Rule 8 (ii) of the Uttar Pradesh Basic Education (Teachers) Service Rules, 1981 prescribes the essential qualifications of candidates for appointment as Assistant Teachers in Junior Basic School (which means a Basic School where instructions are imparted from Class I to V) and there was no challenge to the validity of Rule 8. Moreover, it was submitted that in the present case, a special drive was conducted by the State Government since those BTC qualified candidates who had completed the training, whether before or after 23 August 2010, were unable to be appointed. Finally, it was urged that the DEd qualification cannot be regarded as a qualification which is at par with the BTC qualification.

8. On 23 August 2010, the NCTE prescribed the minimum qualifications for a person to be eligible for appointment as a teacher for Classes I to VIII in a school referred to in Section 2 (n) of the Act of 2009 with effect from the date of notification. This notification was amended by the notification dated 29 July 2011. As per the amended notification, the minimum qualifications which have been prescribed for appointment of an Assistant Teacher for teaching students from Classes I to V are now as follows:

"(i) Classes I-V.

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure) Regulations, 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

OR

Graduate and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose."

9. At this stage, it may also be necessary to note that the Parliament enacted the National Council for Teacher Education (Amendment) Act, 2011 to provide that the Act shall apply, inter-alia, to schools imparting pre-primary, primary, upper primary, secondary or senior secondary education and to colleges providing senior secondary or intermediate education and to teachers of such schools and colleges. Similarly, the expression 'school' was defined in Section 2(ka) to mean any recognised school imparting pre-primary, primary, upper primary, secondary or senior secondary education, or a college imparting senior secondary education. Section 12A was inserted into the principal legislation to empower the NCTE to determine the qualifications of persons to be recruited as teachers in any pre-primary, primary, upper primary, secondary, senior secondary or intermediate school or college, by whatever name called, established, run, aided or recognised by the Central Government or by a State Government or a local or other authority. The provisions of the Act and Regulations have been held to be binding by a Full Bench of this Court in Shiv Kumar Sharma (supra). Prior to the enforcement of the amending Act, the Supreme Court had referred for consideration by a larger Bench of three Hon'ble Judges, an earlier view taken in Basic Education Board, U.P. Vs. Upendra Rai & Ors.2 in which it had been held that the NCTE Act does not deal with ordinary educational institutions like primary schools, high schools, intermediate colleges or universities and would, consequently, not override the U.P. Basic Education Act and the Rules made thereunder. In view of the amending Act, a Bench of three learned Judges of the Supreme Court, while deciding the reference on the correctness of the view in Upendra Rai (supra), observed that during the pendency of the appeals, the Amending Act had rendered the issues for consideration referred to the larger Bench as academic. These developments have been taken due note of in a recent judgment of a Full Bench of this Court in Ram Surat Yadav & Ors. Vs. State of U.P. & Ors.3

10. Thus, the point to be noted is that after the enforcement of the Act of 2009 and the issuance of the notification of 23 August 2010, the qualifications which have been prescribed for appointment of primary teachers must necessarily be those that are stipulated in the notification dated 23 August 2010, as amended by the notification dated 27 August 2011.

11. Undoubtedly, the Rules of 1981 do prescribe the essential qualification for appointment of Assistant Teachers in Junior Basic Schools where education is imparted from Classes I to V. The relevant qualifications which are prescribed in Rule 8 are as follows:

"(ii) Assistant Master and Assistant Mistress of Junior Basic School

A Bachelor's Degree from a University established by law in India or a

Degree recognised by the Government as equivalent thereto together with the training qualification consisting of a Basic Teacher's Certificate, Vishist Basic Teachers Certificate (B.T.C.) two years BTC Urdu Special Training Course, Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other training training course recognised by the Government as equivalent there:

Provided that the essential qualification for a candidate who has passed the required training course shall be the same which was prescribed for admission to the said training course."

12. The qualifications, which have been prescribed by the NCTE in the notification dated 29 July 2011 include Senior Secondary with at least 50% marks together with a 2-year Diploma in Education (Special Education). Once, these qualifications have been prescribed by the NCTE, this would necessarily be binding and it is not open to the State Government to exclude (from the zone of eligibility) the persons who are otherwise qualified in terms of the notification dated 23 August 2010 as amended on 29 July 2011.

13. In this view of the matter, we are of the opinion that the learned Single Judge was in error in coming to the conclusion that since the recruitment was in pursuance of a special drive, the Government was justified in confining the eligibility qualifications only to those who held the BTC qualifications for the reason that such candidates could not be adjusted earlier for want of TET qualification. The passing of the TET was introduced as a mandatory requirement by the notification dated 23 August 2010 issued by the NCTE. Persons who did not fulfill the eligibility conditions prescribed in the notification dated 23 August 2010, as amended on 29 July 2011, were not qualified for consideration for appointment as primary school teachers. Hence, there was no occasion for the State to contend or for that matter the learned Single Judge to accept the submission that in order to adjust such BTC qualified candidates, the present advertisement had been issued. The learned Single Judge held that the appellants could not claim equivalence with those candidates who possess BTC qualification. This, in our view, begs the question because once the Diploma in Education (Special Education) is held to be a qualification which is recognised for appointment of Assistant Teachers for teaching Classes I to V, it would be impermissible for the State Government to exclude them from being considered for appointment. In a special drive or otherwise, it is not open to the State Government to exclude one class of teachers who fulfill the qualifications for eligibility prescribed by the NCTE. Any such action would be impermissible for the simple reason that the exclusive power to prescribe eligibility qualifications for such teachers is vested in the NCTE. Once the NCTE has spoken on the subject, as it has through its notification, those qualifications must govern the eligibility requirement. Jurisdiction and power of the NCTE to do so is now settled beyond any doubt, as noted by the Supreme Court.

14. In the circumstances, the special appeals would have to be allowed and are, accordingly, allowed. The impugned judgment and order of the learned Single Judge dated 14 November 2013 is set

aside. A mandamus would, accordingly, issue directing the State to permit the appellants and such other persons who claim to be holding the qualifications which are within the purview of the notification issued by the NCTE on 23 August 2010, as amended on 29 July 2011, to apply for the post of Assistant Teachers for Classes I to V which was the subject matter of the advertisement in question.

15. Since the Court is informed that the process of counseling is still to commence, we direct the State Government to act in accordance with the aforesaid direction in processing and completing the selection process.

16. We clarify that the issue as to whether the appellants hold the qualifications strictly in accordance with the notification issued by the NCTE has not been decided by us since that is a matter of verification by the authority concerned.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHOK PAL SINGH, J.

First Appeal from Order (D) No. 172 of 2009

Oriental Insurance Comp. Ltd. Lko..Appellant
Versus
Smt. Urmila Singh.... Respondent

Counsel for the Petitioner:
Sri T.K. Misra

Counsel for the Respondents:
Sri B.R. Singh

(A)Motor Vehicle Act 1988-Section 173-Appeal against-award of accident claim tribunal-on ground of contributory negligence-as deceased was driving motor cycle under influence of intoxication-held-body of deceased crushed under the tyre of truck-deceased were going to attained Tehsil Diwas-where so many district level higher authorities participated-hence theory of consuming liquor-not acceptable-more over in postmortem report do not support the story of intoxication-in absence of direct or corroborative evidence-no inference of contributory negligence can be drawn.

Held: Para-7
Now, coming to the second limb of argument of learned counsel for the appellant that the deceased and the driver of the motorcycle were in intoxicated state of mind also seems to be not sustainable. Admittedly, they both were going to attend Tehsil Diwas in the Tehsil concerned, and it will be difficult to believe that a government employee would go to discharge his duty during the Tehsil Divas which is also ordinarily attended by Higher Authorities in an inebriated state. Apart from this it is also not borne out from the post-mortem report of the deceased that he had consumed liquor. In the absence of any material evidence and keeping in view the surrounding facts and circumstances of the case, argument advanced by the learned counsel for appellant seems to be not sustainable.

(B)Award of Penal interest- Tribunal awarded 6% interest within specified period-in case of default penal interest enhance 9% retrospectively-held-in case of default-enhanced amount of interest of 9% payable from the date of default prospectively-accordingly award modified.

Held: Para-13
In view of above to the extent discussed hereinabove, the impugned award requires modification. Accordingly, the appeal is allowed partly. The impugned award dated 27.9.2008 is modified to the extent that

respondent shall be entitled for 9% interest after expiry of stipulated period provided by the tribunal for deposit of compensation amount. For earlier period ,i.e., from the date of application till the stipulated period provided in the impugned award, the interest shall remain 6%.

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

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

2. This appeal under Section 173 of the Motor Vehicles Act has been preferred against the judgement and award dated 27.9.2008 passed by the Motor Accident Claims Tribunal / Addl. District Judge/FTC 5th, Court No. 14, Sultanpur in M.A.C.P. No. 294 of 2007.

3. The brief facts giving rise to present appeal are that on 25.9.2007 the deceased Ram Chandra Singh was going with his Supervisor to participate in Tehsil Diwas function on his motorcycle bearing No. UP 40 D 4597 as a pillion rider. A Tata 407 bearing no. U.P. 42 2635 which was being driven rashly and negligently caused the accident in question by hitting their motorcycle and sped away. The deceased having been crushed succumbed to his injuries on the spot.

4. Learned counsel for the appellant has assailed the impugned award on the grounds that firstly it is a case of contributory negligence and secondly no penal interest could have been awarded by the tribunal. Accordingly, the questions, which are required to be considered by this court are firstly as to whether it is case of contributory negligence and secondly as to whether awarding of penal interest was legally justified.

5. As regards contributory negligence submission of appellant counsel is that at the time of the accident motorcycle was being driven rashly and negligently and that the deceased as well as the driver of the motorcycle both were in intoxicated state of mind. The motorcycle had collided with the truck while it was parked on the road side. As such the insurer/owner of the motorcycle shall be equally responsible for the payment of compensation.

6. While deciding issue no. 2 alongwith issue no. 6 the Tribunal has recorded the finding about truck having hit the motorcycle and causing the accident. After perusal of record a finding has also been recorded by it that the body of the deceased was crushed under the tyre of truck. Accordingly, the tribunal was of the view that the case set up by respondent's counsel was not believable. In case the truck was stationary and parked adjoining to the road then the nature of injuries which the deceased had suffered (crush head and body) would not have been caused. It could have happened only in case of accident having occurred by a moving truck. Finding recorded by tribunal seems to be well considered and correct appreciation of evidence on record. The nature of injury, i.e., crush head and body could not have been received by the deceased in case contention of the appellant's counsel that the truck was parked adjoining the road, is accepted.

7. Now, coming to the second limb of argument of learned counsel for the appellant that the deceased and the driver of the motorcycle were in intoxicated state of mind also seems to be not sustainable. Admittedly, they both were going to attend Tehsil Diwas in the Tehsil

concerned, and it will be difficult to believe that a government employee would go to discharge his duty during the Tehsil Divas which is also ordinarily attended by Higher Authorities in an inebriated state. Apart from this it is also not borne out from the post-mortem report of the deceased that he had consumed liquor. In the absence of any material evidence and keeping in view the surrounding facts and circumstances of the case, argument advanced by the learned counsel for appellant seems to be not sustainable.

8. Admittedly, the appellant has not adduced any evidence before the tribunal to substantiate its case of contributory negligence. The burden was on the appellant to establish the factum with regard to alleged contributory negligence.

9. In a case reported in 2013 Vol. 9 SCC 166 Jiju Kuruvila and others Vs. Kunjujamma Mohan and others while considering the plea with regard to contributory negligence their Lordships of Hon'ble Supreme Court held that merely on the basis of postmortem report indicating that the victim had consumed liquor and the allegations of head on collision, it cannot be presumed that it was a case of contributory negligence. Their Lordships further held that in the absence of any direct or corroborative evidence, no inference can be drawn about the negligence on the part of victim merely on the basis of position of vehicles shown in "scene mahazar" . Relevant Portion of the aforesaid judgement of Hon'ble Supreme Court is reproduced as under :- 2o.5, 20.6.

"20.5. The mere position of the vehicles after accident, as shown in a scene mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot given any specific finding about negligence on the part of any individual.

20.6. The post-mortem report, Ext. A-5 whows the condition of the deceased at the time of death. The said report reflects that the deceased had already taken meal as his stomach was half-full and contained rice, vegetables and meat pieces in a fluid with strong smell of spirit. The aforesaid evidence, Ext. A-5 clearly suggests that the deceased had taken liquor but on the basis of the same, no definite finding can be given that the deceased was driving the car rashly and negligently at the time of accident. The mere suspicion based on Ext. B-2 "scene mahazar" and Ext. A-5 post-mortem report cannot take the place of evidence, particularly, when the direct evidence like PW.3 (independent eyewitness), Ext. A-1 (FIR), Ext. A-4 (charge-sheet) and Ext. B-1 (FI statement) are on record.

21. In view of the aforesaid, we, therefore, hold that the Tribunal and the High Court erred in concluding that the said accident occurred due to the negligence on the part of the deceased as

well, as the said conclusion was not based on evidence but based on mere presumption and surmises."

10. Coming to the second question involved the argument advanced by the learned counsel for the appellant that penal interest could not have been awarded by the tribunal, he has relied upon a case reported in 2004(2) T.A.C.1 (S.C) National Insurance Co. Ltd. Vs. Keshav Bahadur and others. Attention has been invited by him towards para 12 of the said judgement, which is reproduced as under:-

12. Though Section 110-CC of the Act (corresponding to Section 171 of the New Act) confers a discretion on the Tribunal to award interest, the same is meant to be exercised in cases where the claimant can claim the same as a matter of right. In the above background, it is to be judged whether a stipulation for higher rate of interest in case of default can be imposed by the Tribunal. Once the discretion has been exercised by the Tribunal to award simple interest on the amount of compensation to be awarded at a particular rate and from a particular date, there is no scope for retrospective enhancement for default in payment of compensation. No express or implied power in this regard can be culled out from Section 110-CC of the Act or Section 171 of the new Act. Such a direction in the award for retrospective enhancement of interest for default in payment of the compensation together with interest payable thereon virtually amounts to imposition of penalty which is not statutorily envisaged and prescribed. It is, therefore, directed that the rate of interest as awarded by the High Court shall alone be applicable till payment, without the stipulation for higher rate of interest being enforced, in the manner directed by the Tribunal.

11. A perusal of the aforesaid judgement of Hon'ble Supreme Court reveals that no penal interest can be awarded on account of default of payment which may amount retrospective enhancement of the interest. In the present case the tribunal had directed to pay compensation in terms of award alongwith 6 % interest within a specified period. However, in the event of default of payment within the specified period, the tribunal has enhanced the compensation from 6 % to 9 %.

12. In view of the aforesaid judgement of Supreme court, the tribunal could not have enhanced the interest retrospectively. Of course, in case the Insurance Company failed to deposit the compensation within specified period, some additional interest could have been directed to be paid by the insurance company prospectively, i.e., from the date of default of payment of outstanding dues.

13. In view of above to the extent discussed hereinabove, the impugned award requires modification. Accordingly, the appeal is allowed partly. The impugned award dated 27.9.2008 is modified to the extent that respondent shall be entitled for 9% interest after expiry of stipulated period provided by the tribunal for deposit of compensation amount. For earlier period ,i.e., from the date of application till the stipulated period provided in the impugned award, the interest shall remain 6%.

14. The impugned award stands modified accordingly. No order as to costs.

15. The amount deposited by the appellant insurance company in this court shall be remitted to the tribunal and the

tribunal shall release the compensation awarded within a period of three months from the date of receipt of a certified copy of the present order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition (Tax) No. 187 of 2012

Ajay Chaudhary.... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Satya Prakash Shukla
Sri Anil Kumar Tripathi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Cancellation of license of Tari Shop-on ground of pendancy of criminal case-in proforma-G-28-admittedly no conviction against petitioner passed as yet-absence of requirement to disclose the pendancy of criminal case-petitioner can not be guilty for suppression of facts-held-cancellation wholly illegal-quashed.

Held: Para-8 & 9

8. Once the respondents themselves do not require any information regarding pendency of criminal case, petitioner cannot be saddled with the responsibility that he must disclose it and failing to do so would justify an inference of concealment of a relevant information that a criminal case is pending against him.

9. Even otherwise, mere pendency of criminal case has no connection with the terms and conditions, which has to be stated/disclosed by applicant in the affidavit. Therefore, in my view, respondents have acted wholly illegally and the impugned orders cannot sustain.

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

1. The writ petition having been restored vide order of date passed on Restoration Application, as requested by learned counsels for parties, I proceed to decide this matter finally at this stage.

2. Heard Sri Satya Prakash Shukla, counsel for petitioner and learned Standing Counsel for respondents.

3. Petitioner was granted licence for Tari shop on 26.3.2010. Thereafter some complaint appears to be made against petitioner that Criminal Case No. 31 of 1998 under Sections 323, 324, 504 and 506 I.P.C. Police Station Jaitpura, District Varanasi is pending in the Court of First Additional Chief Judicial Magistrate, Varanasi, whereupon a show cause notice was issued on 5.5.2010, which he replied stating that in terms of Para 4 of Proforma G-28, he is not a person convicted under the statutes stated therein and therefore, there is nothing wrong in grant of licence to him.

4. Though respondent no. 3 held that the grant of licence in favour of petitioner in just and valid, but in appeal Excise Commissioner passed an order on 21.9.2011 cancelling licence. Thereagainst petitioner preferred Revision No. 30 of 2011 which has been dismissed by State Government by impugned order dated 6.1.2012.

5. The short question argued by learned counsel for petitioner is that there is no requirement that petitioner has to disclose pendency of criminal case and,

therefore, the question of concealment of any fact by him does not arise.

6. Para 4 of G-28, which relates to information regarding some criminal case reads as under:

"4– क्या आवेदक कभी किसी आबकारी अफीम या चरस ड्रक्स कानून के अन्तर्गत या किसी गैर जमानती दस्तान्दाजी जुर्म में या 1889 के मर्चन्डाइज एक्ट या दफा 382, 489 भा0 द0 सं0 में दण्डनीय किसी जुर्म में सजा पा चुका है।"

English translation by the Court:

4- Whether applicant has ever been convicted under any Excise Act or under Anti-drugs Act involving opium or Charas or for any non-bailable cognizable offence or under the Merchandise Act, 1989 or for any offence punishable u/s 382, 489 of I.P.C."

7. There is no requirement in the aforesaid Format that an applicant for the aforesaid licence must disclose about a criminal case pending against him under any provision of I.P.C. other than what is mentioned in para 4. Admittedly, petitioner has not been convicted under any statute. The respondents themselves admits that merely a case is pending against petitioner under Sections 323, 324, 504 and 506 I.P.C. but that cannot be a ground to cancel licence since it cannot be said that petitioner has concealed some information, which he was supposed to disclose, but has not disclosed. Learned Standing Counsel, having gone through the aforesaid condition, could not seriously dispute that whatever information is required therein, does not include information regarding pendency of criminal case.

8. Once the respondents themselves do not require any information regarding pendency of criminal case, petitioner cannot be saddled with the responsibility that he must disclose it and failing to do so would justify an inference of concealment of a relevant information that a criminal case is pending against him.

9. Even otherwise, mere pendency of criminal case has no connection with the terms and conditions, which has to be stated/disclosed by applicant in the affidavit. Therefore, in my view, respondents have acted wholly illegally and the impugned orders cannot sustain.

10. In the result, writ petition is allowed. Impugned orders dated 21.9.2011 and 6.1.2012 are hereby quashed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 27.01.2014

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Appeal No. 348 of 2013

Santosh Kumar Shukla (In Jail)...
Appellant/Accused
Versus
State of U.P.... Respondent/Prosecution

Counsel for the Petitioner:
Sri Arun Sinha

Counsel for the Respondents:
Sri M.Y. Ansari, A.G.A.

Cr.P.C.-Section 374(2)- Criminal Appeal-against conviction under section 326 I.P.C.-appeal on ground-if prosecution case admitted as it is-no offence under section 326 IPC made out-as non of the contingencies specified in Section 320 made out-at most can be offence under section 324 IPC punishable with 3 years. R.I held-weapon used for assult an

instrument of picking grains from gunny bags no repeation of attack-no criminal history-conviction reduced to already undergone-with fine of Rs. 10,000/- appeal partly allowed.

Held: Para-19

From the evidence available on record, it appears that hurt has been caused voluntarily by a dangerous weapon which could may be used as an instrument of stabbing. Hence the offence shall squarely falls within the ambit of Section 324 IPC and consequently, I express my concurrence with the submission of learned counsel for the appellant that no offence under Section 326 IPC is made out and only offence under Section 324 IPC is made out against the appellant.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. This Criminal Appeal under section 374(2) Code of Criminal Procedure (in short 'CrPC') has been preferred against the judgement and order dated 20.02.2013 passed by Additional District and Sessions Judge/TECP-2, Lucknow in Sessions Trial No.968 of 2002 having Case Crime No.291 of 2000, under Section 326 Indian Penal Code (in short 'IPC') and Section 3(2)(5) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (in short 'SC/ST Act'), P.S. Wazirganj, District Lucknow, whereby the appellant has been convicted and sentenced under Section 326 IPC to undergo rigorous imprisonment for 10 years and fine of Rs.50,000/- and in default of payment of fine one and a half year additional rigorous imprisonment.

2. The facts in brief for deciding this appeal are that Ram Avatar (PW 2) was working as 'Palledar' at the 'Aarhat' of Ranjeetmal Agrawal situated in Pandeyganj grains market, Lucknow. On 14.08.2000 at about 10 pm (night), accused appellant Santosh Kumar Shukla, working as accountant (Munim) in the aforesaid Aarhat asked Ram Avatar to provide wine for him. Ram Avatar (PW 2) refused to provide the same. Thereafter in the intervening night of 14/15.08.2000 when Ram Avatar was sleeping at the campus of Aarhat, the appellant having animus of not providing the wine came in the mid night and assaulted Ram Avatar with a pointed weapon, namely, 'Parkhi' (an instrument use for picking out the contents from close gunny bags for inspection) in the stomach of Ram Avatar and on account of that injury Ram Avatar cried. The incident was witnessed by Dhani Ram and Ramesh, who were also sleeping in the same Aarhat. The accused appellant managed to escape from the place of occurrence. The witnesses admitted Ram Avatar at Balrampur Hospital where he was medically examined and thereafter the incident was reported to the police of Police Station Wazirganj by the brother of injured Ram Avatar, namely, Ramchandra along with medical examination report by a written report (Ext. Ka-1) on 16.08.2000.

3. On the basis of aforesaid written report, a chick report was prepared at 9.15 pm (Ext.5) and the case was registered against the appellant in General Diary (Ext. Ka-6) by the police of P.S. Wazirganj at Case Crime No.291 of 2000, under Section 326 IPC and Section 3(2)(5) SC/ST Act. The injured Ram Avatar was medically examined on 14.08.2000 at 2.50 am in Balrampur Hospital by Dr.H.I. Rizvi, Senior Medical Officer, who found following injuries on the person of the injured as mentioned in medication examination report (Ex.Ka-2):

"Punctured wound 0.8 cm x 0.8 cm x depth not proved on right side of

abdomen. 7 cm above umbilicus at 11 O'clock position. Crepitation present around the wound suggestive of surgical emphysema."

4. The injured was admitted in emergency ward and advised for x-ray of stomach. According to Dr. H.I. Rizvi (PW 3), the injury was fresh and the same may be caused by some pointed weapon and likely to be caused at 12.00 O'clock in intervening night of 14/15.08.2000.

5. Investigation of this case was conducted by Jang Bahadur Singh (PW 4) who prepared the site plan (Ext. Ka-3) and submitted the charge sheet (Ext Ka-4). The court below took cognizance and after committal of the case to the court of sessions charges were framed under Section 326 IPC and Section 3(2)(5) SC/ST Act against the appellant. The appellant denied the charges levelled against him and claimed for trial.

6. The prosecution examined the informant Ramchandra (PW 1) who proved the written report submitted by him and supported the prosecution story as narrated in FIR. During trial, PW-1 Ramchandra in examination-in-chief admitted that he is not an eyewitness of this case and what he stated is on the basis of information received by him from the injured Ram Avatar. The injured witness Ram Avatar (PW 2) was also examined during trial, who supported the prosecution case and stated that when he was sleeping in Aarhat, the appellant attacked with Parkhi on his stomach and after receiving injury he cried and caught the appellant but the accused appellant managed to escape from the spot. He categorically stated that this incident was seen by Dhani Ram and Ramesh. He also stated that he was medically examined by the doctor and remained in the hospital of 13 days.

7. Dr. H.I. Rizvi (PW-3) was also examined to prove the injury report. Investigating Officer Jang Bahadur Singh (PW 4) was examined, who proved the site plan and charge-sheet submitted against the accused. S.I. Mangelal was also examined as PW-5, who at the time of commission of crime was posted as Head Constable and scribed the first information report on the basis of written report given by Ramchandra and register the case against the appellant.

8. Thereafter the prosecution closed its evidence and thereafter accused appellant was examined under Section 313 CrPC, who denied the allegations levelled against him on the basis of evidence of the prosecution and claimed that he has been implicated falsely in this case on account of enmity. In defence, he did not produce any evidence though he has stated in 313 CrPC that he produced the defence.

9. The trial court after considering the evidence of prosecution and submissions of both the parties acquitted the appellant from the charges levelled under Section 3(2)(5) SC/ST Act and convicted the appellant under Section 326 IPC. Hence this appeal.

10. I have heard Sri Arun Sinha, learned counsel for the appellant and Sri M.Y. Ansari, learned A.G.A. for the State.

11. Learned counsel for the appellant confined his submissions to the extent that even if, the evidence of

prosecution is taken as such, no offence under Section 326 IPC is made out and at the most, offence under Section 324 IPC would be made out. It was further stated that the appellant is in jail from the date of his conviction which was recorded on 20.02.2013 by Additional District and Sessions Judge/TEPC-2, Lucknow and as such he was submitted that appellant may be released after reducing the sentence for the period, which has already undergone by him as no minimum sentence is prescribed and maximum sentence provided upto three years. It was further submitted that the manner in which the incident was taken place and that only one injury has been caused and the assault has not been repeated, hence lenient view may be taken in favour of the appellant. The appellant is not a previous convict and he is also entitled to the benefit of provisions of provocation.

12. On the other hand, Sri M.Y. Ansari, learned A.G.A. for the State was submitted that after perusing the material evidence available in the record of the trial court, the trial court has rightly passed the impugned judgment. Learned A.G.A. supported the version of the prosecution.

13. The main contention of learned counsel for the appellant is that neither from the statement of injured nor from the injury report and from the statement of doctor, it appears that the injury caused to Ram Avatar was grievous one. No supplementary report has been brought on record to demonstrate that injury was grievous. During examination, the doctor did not opined that injury was serious or dangerous to life or grievous in nature.

14. Learned trial court while convicting the appellant was of the opinion that injury caused by the accused appellant to Ram Avatar was grievous and dangerous to life. The trial court at pages 12 and 13 of its judgment held that on the basis of evidence, it is proved that in the intervening night of 14/15.08.2000 at about 12.00 (night) at the Aarhat situated at Pandeyganj, P.S. Wazirganj, District Lucknow, appellant Santosh Kumar Shukla by using a dangerous weapon made from iron, namely, Parkhi voluntarily assaulted the injured Ram Avatar causing grievous injury, which was dangerous to life and thereby he committed the offence under Section 326 IPC. So far as the commission of offence under Section 326 IPC is concerned, the trial court actually misread the evidence and formed the opinion on the basis of evidence which was not at all available on record.

15. To establish an offence under Section 326 IPC, the prosecution has to establish first that an accused voluntarily causes grievous hurt by means of any instrument for shooting, stabbing or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal.

16. The first ingredient for the offence under Section 326 IPC is that injury should be caused voluntarily having no element of provocation as defined under Section 335 IPC. The second ingredient is to prove that injury caused is grievous and thirdly the weapon

classified in Section 326 IPC. In case, any condition mentioned in Section 326 IPC is lacking, offence under Section 326 IPC could not be made out.

17. Grievous hurt has been defined in Section 320 IPC, which reads as under:

320. Grievous hurt. - The following kinds of hurt only are designated as "grievous": -

First - Emasculation.

Secondly - Permanent privation of the sight of either eye.

Thirdly - Permanent privation of the hearing of either ear.

Fourthly - Privation of any member or joint.

Fifthly - Destruction or permanent impairing of the powers of any member or joint.

Sixthly - Permanent disfiguration of the head or fact.

Seventhly - Fracture or dislocation of a bone or tooth.

Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

18. The prosecution admittedly has not proved any of the category out of eight categories mentioned under Section 320 IPC. The doctor has not stated that injury was grievous. The injured himself stated that he remained hospitalized for 13 days only, so, 8th condition would also not be attracted. No emasculation, permanent privation of the sight of either eye or of the hearing of either ear or privation of any member or joint was established. It was also not proved that there are any fracture or dislocation of a bone or tooth or permanent disfigurement of the head or face or destruction or permanent impairing of the powers of any member or joint. Therefore, the prosecution has utterly failed to establish that injury caused to Ram Avatar was grievous one.

19. From the evidence available on record, it appears that hurt has been caused voluntarily by a dangerous weapon which could may be used as an instrument of stabbing. Hence the offence shall squarely falls within the ambit of Section 324 IPC and consequently, I express my concurrence with the submission of learned counsel for the appellant that no offence under Section 326 IPC is made out and only offence under Section 324 IPC is made out against the appellant.

20. Offence under Section 324 IPC is punishable with imprisonment for three years, or fine or with both.

21. Having considered the period for which the appellant has undergone, in the opinion of the Court, would be sufficient to meet the ends of justice in the present case for the reason that the only injury was caused by the accused appellant and has not repeated the assault and the weapon used was not a ordinarily used weapon for assault. The weapon used for assault is an instrument of picking the gains from the gunny bags. The appellant is neither previous convict nor has any criminal history.

22. So far as the calculation of undergone period of the accused appellant is concerned, the record reveals that the accused appellant was arrested on 05.10.2000 and in this regard, an entry was made in General Diary no.61 at 20.30 hours by the police at Police Station Wazirganj. When he was arrested, he was having injuries in his legs and was unable to move, therefore, the appellant was released on bail from the police station on the next day. Thereafter he did not seek any regular bail from the court concerned. The case was also committed to the court of sessions without getting any bail. Therefore, before conviction, he did not remain in jail for a single day. However, when he was convicted in this case, he was taken into custody on 20.02.2013 and since then he is in jail. After judgment and order dated 20.02.2013 passed by the trial court, the appellant served out more than eleven months period of his sentence as a convict.

23. Considering the facts and circumstances of the case, the appeal is partly allowed. The conviction of the appellant Santosh Kumar Shukla is set aside under Section 326 IPC and is acquitted from the charges levelled under Section 326 IPC but he is convicted under Section 324 IPC and is sentenced for the period undergone and fine of Rs.10,000/-. In default of payment of fine, the appellant will further undergo imprisonment of one month. After realization of fine, a sum of Rs.7500/- shall be paid to the injured of this case. The sentence awarded to the appellant is accordingly reduced to meet the ends of justice in the light of the order passed by this Court.

24. Let a copy of this judgement be sent to the trial court and also to Chief Judicial Magistrate, Lucknow for compliance of the order passed by this Court without any delay.

25. The Senior Registrar of this Court shall ensure the compliance of this order forthwith.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2014

BEFORE
THE HON'BLE BHARAT BHUSHAN, J.

Criminal Revision No. 1028 of 2011

Ram Bachan & Anr.... Revisionists
Versus
State of U.P. & Anr.... Respondents

Counsel for the Petitioner:
Sri Ajeet Kumar Singh, Sri Shashi Prakash Rai, Ms. Archita Raghuvanshi, Km. Harshita Raghuvanshi

Counsel for the Respondents:
A.G.A., Sri Sharad Srivastava

Criminal Revision-Against summoning order-complaint case-argument that unless all witness as well as complainant not examined as per section 202(2)-where offence traible by Session Court-can not be summoned-held-examination of all witnesses-not a condition precedent for issuance of process-named in complaint-no interference called far-revision dismissed.

Held: Para-8-
The Apex Court in Shivjee Singh Vs. Nagendra Tiwary reported in 2010 7 SCC 578 has further clarified the legal position. The Apex Court has held that examination of all witnesses cited in the complaint is not a condition precedent for issuance of process against the persons named as accused in the complaint.

Case Law discussed:
1981 ALJ 344; 1985 ALJ 348; 1991 ALJ 569; 2010 7 SCC 578.

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

(1) This criminal revision is directed against the summoning order dated 8.12.2010 passed by Xth Civil Judge (Junior Division) Gorakhpur in Criminal Case No. 26/2010 (Ram Chela Vs. Ram Bachan) whereby revisionists Ram Bachan and Sadanand have been summoned to face trial under Sections 435, 436, 429, 427& 506 IPC.

(2) Brief facts of the criminal revision are that opposite party no. 2, Ram Chela lodged FIR stating that on 21.2.2010 at about 2:30 am revisionists/accused lit fire upon the house of complainant/opposite party no. 2, completely burning the household goods and his pet animals including 8 months old calf. Thus, they destroyed goods worth rupees one lakh. The matter was investigated and a closure report dated 17.4.2010 was filed in the court. Meanwhile complainant filed a criminal complaint for the same incident in the court of additional judicial Magistrate Ist Ghazipur. The statement of complainant was recorded under Section 200 Cr.P.C. The statement of two witnesses, namely, Benchu and Upendra were also recorded and thereafter the impugned summoning order was passed on 8.12.2010 against the revisionists.

(3) Aggrieved, accused persons namely, Ram Bachan and Sadanand have preferred the present criminal revision primarily on the ground that evidence of all witnesses was not recorded under the proviso to Section 202 (2) Cr.P.C. which provides that if it appears to the Magistrate that the offence complained of is triable exclusively by the court of sessions he shall call upon the complainant to produce all his witnesses and examine them on oath.

(4) Heard Sri Shashi Prakash Rai holding brief of Ms. Archita Raghuvanshi, learned counsel for the revisionist, Sri Sharad Srivastava, learned counsel for opposite party no. 2 and learned AGA for the State.

(5) Learned counsel for the revisionists has pointed out that offence under Section 436 Cr.P.C. is exclusively triable by the Sessions Court, therefore, it was incumbent upon the Magistrate to record testimonies of all witnesses in terms of proviso 202 (2) Cr.P.C. He has relied upon several judgments of this Court in Dinesh Chand Sinha Vs. Rahmatullah and another 1981 ALJ 344, Bhagwan and others Vs. Kishan Singh 1985 ALJ 348, Dharamveer and others Vs. State of U.P. And others 1991 ALJ 569. Learned counsel for the revisionist has argued that the word 'shall' employed in proviso to Section 202 (2) Cr.P.C. indicates mandatory character of this provision. As learned Magistrate passed the impugned order without recording testimonies of all witnesses. The same cannot be sustained.

(6) A perusal of criminal complaint would show that the name of Bechu and one Kamlesh have been mentioned in the complaint. The statement of Bechu was recorded during inquiry along with complainant. Additional statement of one Upendra was also recorded. The judgment of this Court in Bhagwan and others (supra) relied by learned counsel maintains that complainant has a right to examine only those witnesses upon whom he intended to rely. A careful examination of F.I.R. reveals that name of witnesses were not mentioned in it. Complaint reveals the name of only two

witnesses namely, Bechu and one Kamlesh and a general statement to the effect that witnesses helped him to extinguish the fire. The learned Magistrate examined three witnesses before passing the impugned order. Apparently, only Kamlesh was not produced.

(7) Learned revisionist has claimed that non examination of Kamlesh would vitiate the summoning order. I am afraid that the learned counsel for revisionist is giving too much emphasis to the word 'shall' employed in proviso 202 (2) Cr.P.C. because the proviso entails that Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath. The word 'his witnesses' is not without significance. It denotes that complainant can choose his witnesses and can adduce the testimony of only those witnesses upon whom he intends to rely.

(8) The Apex Court in Shivjee Singh Vs. Nagendra Tiwary reported in 2010 7 SCC 578 has further clarified the legal position. The Apex Court has held that examination of all witnesses cited in the complaint is not a condition precedent for issuance of process against the persons named as accused in the complaint. The Apex Court has held thus:

As a sequel to the above discussions, we hold that examination of all the witnesses cited in the complaint or whose names are disclosed by the complainant in furtherance of the direction given by the Magistrate in terms of proviso to Section 202(2) is not a condition precedent for taking cognizance and issue of process against the persons named as accused in the complaint and the High Court committed serious error in directing the Chief Judicial Magistrate to conduct further inquiry and pass fresh order in the light of proviso to Section 202 (2).

(9) In view of the aforesaid judgment of the Apex Court, present revision is not sustainable and liable to be rejected. The criminal revision is accordingly dismissed.

(10) Let a copy of this order be sent to the concerned trial court within fifteen days for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2014

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHOK PAL SINGH, J.

Service Bench No. 1699 of 2008

Dr. Pramod Kishore Sharma... Petitioner
Versus
State of U.P. .... Respondent

Counsel for the Petitioner:
Sri Anil Kumar Tiwari, Sri I.P. Singh
Sri V.S. Tripathi

Counsel for the Respondents:
C.S.C.

Financial Hand Book-Volume II to IV-Rule 81-B-(2)- Grant of medical leave-for exceeding 12 month-through out service carrier-medical board already recommended for medical leave-not open for government to sit over on opinion of medical board-taking different view contrary to provisions of financial hand book-not sustainable-direction for fresh consideration issued.

Held: Para-10
It is well settled proposition of law that the proviso contained in statutes are the exceptions to main provisions and in

appropriate cases, the benefits available to the government employees in terms of the said proviso should be provided after considering the material on record. In the present case, since the Medical Board has recommended for grant of medical leave, it is not open for the State Government to take a different view without assigning any reason.

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

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

2. The present writ petition under Article 226 of the Constitution of India has been preferred by the petitioner feeling aggrieved with the impugned order dated 19th April, 1999 by which the opposite parties have declined to grant medical leave to the petitioner for the period from 17th April, 1997 to 13th October, 1997 inspite of opinion expressed by the Medical Board for grant of medical leave. The petitioner has further prayed for issuance of a writ, order or direction in the nature of mandamus commanding the opposite parties to release the amount of Rs. 1,48,218.40/- in lieu of medical expenses incurred in his treatment.

3. The petitioner, a P.H.M.S. Doctor was assaulted by the anti social elements on 6th June, 1996 while discharging his duties at Primary Health Centre, Amawan, district-Raebareli. On account of murderous assault by the anti social elements, the petitioner suffered with the fractures of his both legs and right hand alongwith other grievous injuries. In consequence thereof, the petitioner had undergone the medical treatment in different hospitals from 6th June, 1996 to 13th October, 1997. For the period during which the petitioner had undergone medical treatment, he had applied for medical leave. The Medical Board vide its opinion dated 25th October, 1997 has recommended for grant of medical leave to petitioner from 7th June, 1996 to 13th October, 1997. The petitioner has also moved an application for reimbursement of medical expenses to the tune of Rs. 1,48,218.40/-. However, the government has sanctioned the leave to the petitioner without pay for the period from 17th April, 1997 to 13th October, 1997 vide its order dated 19th April, 1999, as contained in Annexure No. 6 to the writ petition. Feeling aggrieved with the order dated 19th April, 1999 (Annexure No. 6 to the writ petition) and also non reimbursement of medical expenses, the petitioner has approached this court by filing the instant writ petition.

4. During the pendency of instant writ petition, the State Government has reimbursed an amount to the tune of Rs. 1,39,962.00/- on 15th February, 2010 to the petitioner. Accordingly, the substantial amount with regard to medical expenses has been reimbursed to the petitioner by the State Government in the year 2010 (Supra). However, the grievance remains with regard to leave sanctioned by the State Government without salary by the impugned order dated 19th April, 1999.

5. Attention of this court has been invited by learned counsel for the petitioner towards Rule 81-B (2) of the Financial Hand Book Volume-II (Parts II to IV). For convenience, relevant portion of Rule 81-B (2) of the Financial Hand Book Volume-II (Parts-II to IV) is reproduced as under :-

"(2) Leave on medical certificate.(i) A Government servant to whom these

rules apply may be granted leave on medical certificate not exceeding twelve months in all during his entire service. Such leave shall be given only on production of a certificate from such medical authority as the Governor may, by general or special order, specify in this behalf and for a period not exceeding that recommended by such medical authority :

Provided that when the maximum period of twelve months is exhausted, further leave on medical certificate not exceeding six months in all during entire service may be granted, in exceptional cases on the recommendations of a medical board:

Provided further that in all cases in which Government servants may have before the date of application of these rules to them availed of leave on medical certificate under Fundamental Rule 81-B and Subsidiary Rules 157 or 157-A, as the case may be, the period of such leave availed of, under Fundamental Rule 81-B and Subsidiary Rule 157-A, as the case may be, and half the period of such leave availed of under Subsidiary Rule 157, shall be taken into account in calculating the leave due to them under this rule.

(ii) Under this rule, leave upto sixty days may be granted by the competent authority on recommendation of the authorised medical authority. Leave exceeding this period may not be granted unless the competent authority is satisfied that there is a reasonable probability that the Government servant will be fit to return to duty on the expiry of the leave applied for :

Provided that when a Government servant dies during the treatment of his illness and the medical leave is otherwise due to such Government servant, the authority competent to grant leave shall sanction the medical leave."

6. From a plain reading of the aforesaid provisions contained in the Financial Hand book, it appears that under the said rules, medical leave can be granted not exceeding 12 months during the entire service period. However, under the proviso, an additional medical leave of six months may also be granted during the entire service period in exceptional cases on the recommendation of the Medical Board. Accordingly, the medical leave may be sanctioned by the State Government for the period of 18 months subject to recommendation of the Medical Board.

7. In the present case, it is not disputed that the petitioner was assaulted by the anti social elements while he was discharging his duties in the Primary Health Centre, Amawan, Raebareli and he suffered with the fractures of his both legs and right hand alongwith other grievous injuries and had undergone for prolonged treatment in different medical hospitals. Keeping in view the injuries caused and the question with regard to injuries suffered by the petitioner and the treatment provided thereon was the subject matter for consideration by the Medical Board. The Medical Board on 25th October, 1997, recommended for grant of medical leave in accordance to rules for the period from 17th June, 1996 to 13th October, 1997. The opinion of the Medical Board as contained in Annexure No. 3 to the writ petition, in its totality is reproduced as under :-

मुख्य चिकित्सा अधिकारी, लखनऊ के कार्यालय में दिनांक 22.10.97 को आयोजित मण्डलीय चिकित्सा परिषद लखनऊ, उ0 प्र0 की बैठक की कार्यवाही श्री डा0 पी0 के0 शर्मा चिकित्सा अधिकारी, जनपद रायबरेली के संबंध में।

मुख्य चिकित्सा अधिकारी रायबरेली के पत्र संख्या . 9995.2 दिनांक 17.10.97 के संदर्भ में डा0 पी0 के0 शर्मा चिकित्साधिकारी अपने स्वास्थ्य परीक्षण हेतु मंडलीय चिकित्सीय परिषद उ0 प्र0, लखनऊ के समक्ष उपस्थित हुये परिषद द्वारा डा0 पी0 के0 शर्मा का स्वास्थ्य परीक्षण एवं चिकित्सा अभिलेखों का निरीक्षण किया गया। डा0 पी0 के शर्मा अपने कार्य हेतु स्वस्थ्य पाये गये, चिकित्सा अभिलेखों के आधार पर मण्डलीय चिकित्सा परिषद लखनऊ द्वारा डा0 पी0 के0 शर्मा को दिनांक 7.6.96 से दिनांक 13.10.97 तक के नियमानुसार अनुमन्य चिकित्सा अवकाश की संस्तुति की जाती है।

ह0 अपठनीय ह0 अपठनीय

25.10.97

सदस्य एवं सचिव एवं मुख्य चिकि0

विभागाध्यक्ष नेत्र विभाग लखनऊ ह0 अपठनीय

मेडिकल कॉलेज लखनऊ अध्यक्ष एवं अपर निदेशक

चि0 स्वा0 लखनऊ मण्डल लखनऊ

कार्यालय मुख्य चिकित्साधिकारी, लखनऊ।

संख्या बी–7/8–97–5767 दिनांक 22.10.97/3.11.97

मूल रूप में मुख्य चिकित्साधिकारी रायबरेली को उनके पत्र संख्या 9995–2 दिनांक 17.2.97 के संदर्भ में उक्त पत्र के संलग्न्को सहित आवश्यक अग्रिम कार्यवाही हेतु प्रेषित। उपरोक्तानुसार

उप मुख्य चिकित्साधिकारी

कृते मुख्य चिकित्साधिकारी, लखनऊ

8. A plain reading of the opinion of the Medial Board seems to make out a case for grant of medical leave under the terms of provisions contained in Clause-2 of Rule 81-B of the Financial Hand-Book (Supra). The provisions contained in the said Financial Hand-Book (Supra) entitles a government servant to obtain medical leave ordinarily for the period of 12 months in all during his entire service only on production of a certificate from such Medical Authority as the Governor may, in general or by special order, specify in this behalf. However, an additional medical leave for a period of six months may also be granted in the case after a period of 12 months is exhausted on the recommendation of the Medical Board. The Legislature to their wisdom under the Proviso has used the words " Further leave on medical certificate not exceeding six months". It means that an additional medical leave of six months may be granted to a government servant during the entire period of his service on the recommendation of the Medical Board. Accordingly, when the petitioner suffered with the injuries caused by the assailants on 6th June, 1996 and undergone for a prolonged medical treatment in different hospitals, then, after expiry of period of 12 months, an additional leave upto six months could have been granted to the petitioner keeping in view the unfortunate incident in which he suffered grievous injuries. Only rider imposed by the Financial Hand-Book is that an additional leave of six months shall be exceptional that too on the recommendation of the Medical Board. In the present case, admittedly, the Medical Board has recommended for grant of medical leave from 7th June, 1996 to 13th October, 1997. The members of the Medical Board are the experts of the field and ordinarily, it is not open for the State Government to take a different view than what has been expressed and recommended by the Medical Board. In case, the State Government wants to take a different view than what has been expressed by the Medical Board, then, it must give justifiable reasons for doing so. The provisions contained in the Financial Hand-Book(Supra) are the financial provisions and ordinarily its benefits must be given to government employees in case, they have undergone a prolonged medical treatment for their ailments or injuries. Once, the injuries have not been disputed followed by the prolonged medical treatment, there appears no reason for the State Government to sanction the leave without pay in contravention of the recommendation of the Medical Board.

9. The impugned order passed by the State Government seems to suffer from non application of mind to the statutory rights available to the petitioner in terms of the provisions contained in Financial Hand-Book (Supra).

10. It is well settled proposition of law that the proviso contained in statutes are the exceptions to main provisions and in appropriate cases, the benefits available to the government employees in terms of the said proviso should be provided after considering the material on record. In the present case, since the Medical Board has recommended for grant of medical leave, it is not open for the State Government to take a different view without assigning any reason.

11. Accordingly, the impugned order seems to have been passed arbitrarily without keeping in view the true spirit of the provisions contained in the Financial Hand-Book. Hence, not sustainable in law.

12. Since, the petitioner has been paid the outstanding dues with regard to medical reimbursement, no further order is required to be passed by this court. However, the impugned order being not sustainable, as held hereinabove, the writ petition deserves to be allowed. Accordingly, the writ petition is allowed.

13. A writ in the nature of certiorari is issued quashing the order dated 19th April, 1999 as contained in Annexure No. 6 to sthe writ petition, with all consequential benefits.

14. A writ in the nature of mandamus is also issued directing the State Government to pass a fresh order with regard to medical leave of the petitioner keeping in view the observations made in the present order expeditiously say preferably within a period of two months from the date of receipt of a certified copy of the present order.

15. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2014

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Consolidation No. 1901 of 1983

Saeeduddin... .Petitioner
Versus
D.D.C and Ors.... Respondents

Counsel for the Petitioner:
Sri K.P. Singh, Sri A.S. Chaudhary, Sri P.V. Chaudhary

Counsel for the Respondents:
C.S.C., Sri Om Nam Shukla, Sri P.S. Chaudhary, Sri Rajendra Prasad Yadav, Sri Sampurnanand, Sri V.R. Singh

C.P.C. Section-11-Resjudicata-filing of plaint of earlier suit not-required-even ex-parte decree-under order 9 rule 9 CPC-binding-between the parties unless-challenged otherwise-consolidation officer as well D.D.C-rightly held the bar of section 11 C.P.C.-petition dismissed.

Held: Para-7
The burden to establish that summon was not served upon him was on defendant of that suit which could not be shifted on the plaintiff while determining as to whether an ex parte decree would operate as res judicata against him or not. In this division bench authority, it has also been held that it is not

necessary to file copy of plaint of earlier suit for establishing plea of res judicata. In this regard, Supreme Court authority reported in Isher Singh Vs. Sarwan Singh, AIR 1965 SC 948 was also considered by the Division Bench.

Case Law discussed:
1996 RD 73; AIR 1964 SC 1810; 1984 RD 35; AIR 1973 All. 120; AIR 2000 NOC 21; 1983 RD 30; AIR 1987 All. 100; 1984 ACJ 324; AIR 1965 SC 948; I.L.R. (1902) 24 All. 429(437); AIR 1953 SC 33.

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

1. Heard Sri A.S. Chaudhary, learned counsel for petitioner and Pundit Pankaj Shukla holding brief of Sri Sampunanand Shukla, learned counsel for contesting respondents.

2. This writ petition arises out of consolidation proceedings pertaining to title in respect of plot No.1275, which is a grove. In the basic year when consolidation started in the area in question, it was recorded in the names of Munshi Raza and others, respondents No.2 to 5. Original petitioner Saeeduddin since deceased and survived by legal representatives filed objections under section 9-A(2) of U.P. Consolidation of Holdings Act claiming co-tenancy on the ground that the parties were descendants of a common ancestor and the property was joint. Consolidation Officer as well as Deputy Director of Consolidation rejected the claim of original petitioner mainly on the principle of res judicata, however S.O.C. had decided the matter in favour of the petitioner. The objections before C.O. (Judicial) Pratapgarh were registered as Case No.1765 and 1766 and were rejected on 04.03.1981. The number of the appeal filed against the said order was 477 and it was allowed by S.O.C. Pratapgarh on 30.09.1981. Revision filed against the same was numbered as Revision No.289/594, Munshi Raza Vs. Saeeduddin and others and was allowed on 27.11.1982.

3. The judgment which was held to operate as res judicata by the C.O. and D.D.C. was given in a suit under Section 229-B of U.P.Z.A. & L.R. Act Munshi Raza and others Vs. Smt. Mulima and others on 03.08.1968 by Judicial Officer/ Assistant Collector, First Class, Pratapgarh. The suit was decreed. In the said suit, Saeeduddin, original petitioner of this writ petition was defendant No.4. Copy of the said judgment is Annexure-2 to the writ petition. It is mentioned in the said judgment that suit was contested only by its defendant No.1, Mulima.

4. The argument of learned counsel for petitioner is that as petitioner who was defendant No.4 in the suit had not been served hence the judgment of the suit does not operate as res judicata against him. If all the parties are not served suit is not decided. If even after service whether actual or presumed some one does not appear, the judgment operates as res judicata against that person. Learned counsel for petitioner has cited an authority of the Supreme Court reported in Devi Ram Vs. Ishwar Chand, 1996 RD 73 contending that in order to attract doctrine of res judicata, issues and cause of action must be same. In the instant case the issues and cause of action in both the cases were same. Copy of the earlier judgment was filed by the contesting respondent before the Consolidation Officer. As the pleadings were clearly mentioned in the judgment of the Judicial Officer hence it was not necessary to file the pleadings. The Constitution Bench

authority of the Supreme Court reported in Gurbux Singh Vs. Bhooralal, AIR 1964 SC 1810 deals with Order 2 Rule 2, C.P.C. and not Section 11, C.P.C. Relevant portion of para-7 of the said authority is quoted below:

"Just as in the case of a plea of res judicata, which cannot be established in the absence on the record of the judgment and decree, which is pleased as estoppel, we consider that a plea under Order 2 Rule 2, C.P.C. cannot be made but except of proof of the plaint in the previous suit the filing of which is said to create the bar."

5. From the above portion, it is clear that the Supreme Court held that for raising the plea under Order 2 Rule 2 C.O.C., filing of plaint was essential and for raising the plea of res judicata filing of the judgment and decree was essential.

6. Learned counsel for petitioner has cited an authority reported in Bullarey Vs. D.D.C. 1984 RD 35. In the said case, it was held that if earlier suit was dismissed in default, it would not operate as res judicata in the proceedings before consolidation authorities. However, in the instant case, bar of Section 11 was pleaded as suit had earlier been decreed and not the bar of Order 9 Rule 9, C.P.C. In the authority of Ramesh Chand Vs. Board of Revenue, AIR 1973 All. 120 (Full Bench) cited by learned counsel for petitioner himself, it has been held that for raising the plea of res judicata, copy of the judgment and decree must be filed. There is no such requirement that copy of the pleadings (in the instant case, plaint of the earlier suit) should also be filed. In view of this, I am unable to agree with the view taken by the Madras High Court in A.M.K. Mariam Bibi Vs. M.A. Abdul Rahim, AIR 2000 NOC 21 cited by learned counsel for petitioner holding that for raising plea of Section 11, C.P.C. pleading in previous suit between same parties should be filed.

7. Learned counsel for petitioner has also cited the authority of Brij Lal Vs. D.D.C. 1983 RD 30 holding that for an ex parte decree to operate as res judciata between the parties it has to be established that the defendants had or must be deemed to have notice of the suit and the burden to prove this fact would be on the person, who pleads the bar of res judicata. A contrary view has been taken by Division Bench of this Court in the judgment reported in Bramha Nand Vs. D.D.C., Ghazipur, AIR 1987 All. 100 overruling the above authority of Brij Lal and another reported in Nathai Vs. J.D.C., 1984 ACJ 324. In the Division Bench authority, it has been held that if party places reliance upon an ex parte decree for raising plea of res judicata he is under no obligation to prove service of summons on defendant. The burden to establish that summon was not served upon him was on defendant of that suit which could not be shifted on the plaintiff while determining as to whether an ex parte decree would operate as res judicata against him or not. In this division bench authority, it has also been held that it is not necessary to file copy of plaint of earlier suit for establishing plea of res judicata. In this regard, Supreme Court authority reported in Isher Singh Vs. Sarwan Singh, AIR 1965 SC 948 was also considered by the Division Bench.

8. More than 100 years before Privy Council in I.L.R. (1902) 24 All. 429 (437) held that an ex parte decree would operate

as res judicata on all points which might and ought to have been raised by the defendant. Section 11, C.P.C. 1908 also uses the same words "might' and "ought' in its explanation-iv. Same view has been taken by the Supreme Court in Raj Lakshmi Dasi and Ors. v. Banamali Sen and Ors, AIR 1953 SC 33.

9. Accordingly, the courts below rightly held that earlier ex parte judgment declaring Munshi Raza and others to be bhoomidhars in possession of the disputed land operated as res judicata. Petitioner did not file any application for setting aside the said judgment and decree of 1968.

10. Accordingly, I do not find any error in the impugned order. Writ Petition is therefore dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2014

BEFORE
THE HON'BLE HET SINGH YADAV, J.

Criminal Revision 3679 of 2013

Parvez... Revisionist
Versus
State of U.P. and Anr.... Opp. Parties

Counsel for the Petitioner:
Sri Sushil Kumar Pandey

Counsel for the Respondents:
A.G.A.

Juvenile Justice(Care & Protection of children) Act 2000-Section-53-Revision-against order by appellant court-rejecting prayer for bail-offence under section 376 IPC-at the time of occurrence revisionist was minor-trail commenced like regular criminal-plea of juvenile taken on highly belated stage-revisionist already in jail for more than 5 years-very ambit of act itself rehabilitory in nature-u/s 15 of act board being satisfied an enquiry-the accused was minor-ought to have send special home for period of 3 years only-held-judge passed lop-sided order confining order of refusal of bail-both order set-a-side-considering more than 5 years detention-be released from custody by forthwith.

Held: Para-17-
one more point that surfaces for consideration is that the very scheme of the Act 2000 is rehabilitatory in nature and not adversarial. Children Act has been enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. It is for this reason that a juvenile would undergo inquiry by the Board which is not in the form of regular trial irrespective of the gravity of the offence. As per Section 15 of the Act 2000 where a Board after having satisfied on inquiry that a juvenile has committed an offence, then notwithstanding anything to the contrary of any other law for the time being in force, may, if it so thinks fit, make an order at the most directing the juvenile to be sent to a Special Home for a period of three years only. In the case in hand, the revisionist has been in detention since 06.1.2009. As mentioned earlier, he has already undergone a period of more than the maximum period for which a juvenile may be confined to a special home. Thus, at the time of rejection of the bail by the Sessions Judge in appeal, his detention was illegal.

Case Law discussed:
2011(13) SCC 211; 2011(13) SCC 744.

(Delivered by Hon'ble Het Singh Yadav, J.)

1. This criminal revision under section 53 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short 'the Act 2000') has been preferred

against the order dated 6.12.2013 passed by the learned Sessions Judge, Muzaffar Nagar in Criminal Appeal No. 101 of 2013 (Gayyur Khan Vs. State of U.P.) arising out of rejection of bail prayer of juvenile, Parvez @ Parvez Khan.

2. Heard Sri Sushil Kumar Pandey, learned counsel for the revisionist and learned A.G.A. for the State at prolix length.

3. The facts which are relevant and necessary for the disposal of the revision, briefly stated, are that on Jan. 04, 2009, first informant lodged F.I.R. alleging therein that the revisionist had sexually assaulted his minor daughter aged about 4 years. Pursuant thereto, case was registered at crime no. 05/2009 under section 376 I.P.C. against the revisionist at P.S. Adarshmandi, Distt.-Muzaffarnagar(now Distt.-Shamli). The revisionist was arrested on Jan. 05, 2009 and was confined in jail .He was dealt with the criminal justice system as applicable for adults. The revisionist's father however, for the first time on Feb.17, 2010 raised claim of his being juvenile before the court of Addl. Sessions Judge, Muzaffarnagar where the trial was pending by invoking provision of section 7-A of the Act 2000. The trial court made an enquiry as per rules applicable and after inordinate delay recorded finding on Sept.07, 2013 that the revisionist was a juvenile on the date of commission of offence, his age being 16 years 8 months and 2 days. The trial court accordingly, processed the matter for transfer of the case to the Juvenile Justice Board, Muzaffarnagar (in short 'the board') for enquiry and for passing appropriate order.

4. The revisionist's father moved an application before the Board under Section 12 of the Act 2000 seeking his release on bail which was rejected by the Board on 21.10.2013 substantially on the ground of gravity of offence which is alleged to have been committed.

5. It would appear that an appeal was preferred under Section 52 of the Act 2000 which was dismissed by the learned Sessions Judge observing that juvenile in conflict with law kidnapped a female child aged about 4 years and raped her as a result of which she received injuries on her private part, further observing that this indicated his criminal proclivities. It was further observed that he, as a juvenile, was smitten with libido-psyche and could go to any extent to gratify his lust, that his family members had no commanding control over him and that in such a view, if the appellant was set at liberty on bail, it would not only be an instance of miscarriage of justice but would push the appellant in further moral and psychological degradation. The appellate court also held the view that the juvenile/appellant being above 16 years of age, was conscious of his illegal criminal activity and by this reckoning, his case fell in more than one clauses of Exception as is provided under Section 12 of the Act.

6. The quintessence of the arguments advanced across the bar by Sri Pandey is that the very scheme of the Act 2000 is rehabilitatory in nature and not adversarial, that the bail to a juvenile in conflict with law is a rule and rejection is an exception that the bail prayer of a juvenile can only be refused on the grounds mentioned in Section 12 of the Act 2000 itself and no other grounds and that in this case, the Board as well as the learned Sessions Judge in the appeal preferred under Section 52 of the Act

2000 have refused bail to the revisionist only on the ground of gravity of the offence alleged to have been committed. He further argued that the general law of bail applicable to the adults cannot be imported for application while considering the bail prayer of a juvenile. By this reckoning, it is reasoned, refusing bail to the juvenile by the Board and the learned Sessions Judge are out of ambit of Section 12 of the Act 2000.

7. The next limb of argument advanced across the bar by Sri Pandey is that the learned Sessions Judge while dismissing the appeal has made observations and derogatory remarks against the revisionist without any material and prima facie evidence on record, are fraught with deleterious impact on the inquiry being conducted by the Board on the charges levelled upon the revisionist. He laid much emphasis that the Board as well as the learned Sessions Judge have failed to consider the peculiar aspect of this case that the revisionist has been languishing in jail since 06.1.2009, and thus, he has already spent a period of more than 3 years in incarceration. As per Section 15 of the Act 2000, the Board if satisfied on inquiry that the juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, if it is so thinks fit, it can make an order directing the juvenile to be sent to the Special Home for a maximum period of three years. Thus, the revisionist at the time of moving bail application before the Board had already suffered incarceration for 4 years 9 months and 15 days in jail which is more than the maximum period for which a juvenile may be confined in special home. This bespeaks, it is vociferously submitted, the Board and the learned Sessions Judge had rejected the bail prayer of the revisionist in whimsical and wanton manner even de-hors the rules and procedure of the Act 2000.

8. Learned A.G.A. very fairly conceded to the facts that the revisionist who has been declared juvenile in conflict with law, has already undergone excess period of detention maximum awardable to a juvenile in conflict with law by the Board after concluding the inquiry as envisaged under Section 15 of the Act 2000.

9. I have given my careful consideration to the submissions made across the bar as above by learned counsel of either sides and have also been taken through the materials on record.

10. In this case, it would appear, initially the revisionist was being prosecuted under the general criminal law applicable to the adults. His father raised the claim of juvenility before the trial court. The trial court made an inquiry and ultimately, pronounced him a juvenile, invoking the procedure provided under Section 7-A of the Act 2000 as aforementioned . The the case of revisionist was referred to the Board for conducting inquiry and passing appropriate order in accordance with the provisions of the Act 2000. When the revisionist was brought before the Board, his father moved the application under Section 12 of the Act 2000 seeking his release on bail. His bail application was rejected by the Board and the appeal preferred under Section 52 of the Act 2000 was also rejected by the learned Sessions Judge. Hence this revision.

11. Before delving into the propriety of the bail rejection orders passed by the

Board as well as by the lower appellate court, it is expedient to have a look at the bail provisions provided under Section 12 of the Act 2000 which reads thus:-

"12. Bail of juvenile.-

(1) When any person accused of a bailable or non-bailable offence, and apparently a juvenile, is arrested or detained or appears or is brought before a Board, such person shall, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force, be released on bail with or without surety but he shall not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

(2) When such person having been arrested is not released on bail under sub-section (1) by the officer in-charge of the police station, such officer shall cause him to be kept only in an observation home in the prescribed manner until he can brought before a Board.

(3) When such person is not released on bail under sub-section (1) by the Board it shall, instead of committing him to prison, make an order sending him to an observation home or a place of safety for such period during the pendency of the inquiry regarding him as may be specified in the order."

12- On critical analysis of the above section it may be summarised as under:

(i) Gravity of offence is immaterial for considering bail prayer of juvenile.

(ii) Bail provisions contained in the Code of Criminal Procedure, 1973 or in any other law for the time being in force, as applicable in case of adults, shall have no application.

(iii) Release of a juvenile on bail is a rule, and refusal is an exception.

(iv) Bail to a juvenile can be refused only on the grounds as mentioned in the section itself and not on any other ground out of ambit and scope of the section.

(v) The grounds of refusal of bail as provided in the section shall not be readily inferred but there must be some material and/or evidence on record to substantiate the refusal.

(vi) The bail provisions contained in Act-2000 have an overriding effect over the general criminal justice system applicable to the adult.

11. A juvenile shall not be released on bail, if there appear reasonable grounds for believing that (i) the release is likely to bring him into association with any known criminal or; (ii) expose him to moral, physical and psychological danger or; (iii) his release would defeat the ends of justice. The Board has refused bail to the revisionist on the ground that he has committed rape upon a minor girl aged about 4 years further observing that his release is likely to bring him into association with any known criminal and his release is likely to expose him to moral, physical and psychological danger and further that his release would defeat the ends of justice. I have very closely scrutinised the order and there is not a whisper in the order as to on what basis there appear reasonable grounds for

believing that his release is likely to bring him into association with any known criminal or expose him to moral, physical and psychological danger and that his release would defeat the ends of justice. Thus, the ground mentioned in the bail rejection order of the Board are based on guess work and hypothetical consideration.

12 .This Court, in a catena of decisions, has categorically held that there must be some material and evidence on record to refuse bail prayer of a juvenile for believing that his release was likely to bring him into association with any known criminal or would expose him to moral, physical and psychological danger and that his release would defeat the ends of justice. The bail to a juvenile cannot be refused on hypothetical considerations. The Board also failed to consider that the juvenile had already undergone a period more than maximum period for which juvenile may be confined in special home, even if the Board is satisfied on inquiry that he has committed an offence. In this way, the Board has passed a lop-sided order even ignoring that the detention of the revisionist at the time when his bail prayer was refused, was illegal and in violation of his fundamental rights conferred under Article 21 of the Constitution of India. The bail prayer of the revisionist was refused in the instant case as if he was an inveterate adult criminal to be dealt with under the general criminal law. Thus, the Board refused the bail prayer of the revisionist in antagonism of the settled principles governing the bail matters of a juvenile in conflict with law.

13. In appeal under Section 52 of the Act 2000, the learned Sessions Judge has also committed the self-same illegality while rejecting the appeal and confirming the bail rejection order passed by the Board.

14. From a perusal of the impugned order passed by the learned Sessions Judge, it would transpire that the bail was declined to the revisionist attended with the observation that juvenile kidnapped a female child aged about 4 years and ravished her as a result of which she sustained injuries on her private part. Thus, the learned Sessions Judge, too, refused the bail to the revisionist treating the offence as serious and grave crime. This does not constitute a ground for rejection of bail as mandated by section 12 of the Act 2000 but constitutes a ground for rejection of bail in a case involving an adult under the general criminal law. It appears that the Sessions Judge while deciding the appeal has slurred over the fundamental objects for which the Act 2000 was enacted possibly on account of her inability to adapt to a system which is, however, different from the general criminal law.

15. In connection with the case in hand, it would be appropriate to refer to the observations made by the apex court in Hari Ram Vs. State of Rajsthan and another, 2011 (13) SCC 211 which I feel, are truly attracted in this case :-

"2. The said law which was enacted to deal with offences committed by juveniles, in a manner which was meant to be different from the law applicable to adults, is yet to be fully appreciated by those who have been entrusted with the responsibility of enforcing the same, possibly on account of their inability to adapt to a system which, while having the trappings of the general criminal law, is, however, different there from.

3. The very scheme of the aforesaid Act is rehabilitatory in nature and not

adversarial which the courts are generally used to. The implementation of the said law, therefore, requires a complete change in the mind-set of those who are vested with the authority of enforcing the same, without which it will be almost impossible to achieve the objects of the Juvenile Justice Act, 2000."

16. The observations of the Learned Sessions Judge that the juvenile has ravished the modesty of a 4 years girl child, and that this exhibits his criminal proclivities and that he, even as a juvenile has a libido-psyche and can go to any extent to soothe his lust, are based on hypothetical grounds without there being any shred of evidence on record at that stage. There is not an iota of material or evidence at the stage of bail on record to make room for such observation. In my considered view, the observations made by the Sessions Judge in the order would certainly be fraught with the consequences which may impinge upon the inquiry pending against the revisionist before the Board. The above observations made by the Sessions Judge, I feel constrained to say, are based on guess work and hypothetical consideration. Moreover, these observations are whimsical as there is no shred of evidence on record to support them. The Sessions Judge while deciding the appeal of a juvenile in bail matters, had no business to pass such unwarranted remarks stigmatizing a juvenile. It is worth mentioning here that one of the objects and reasons for the enactment of the Act 2000 is to minimise the stigma upon the juvenile in keeping with his developmental needs.

17. One more point that surfaces for consideration is that the very scheme of the Act 2000 is rehabilitatory in nature and not adversarial. Children Act has been enacted to protect young children from the consequences of their criminal acts on the footing that their mind at that age could not be said to be mature for imputing mens rea as in the case of an adult. It is for this reason that a juvenile would undergo inquiry by the Board which is not in the form of regular trial irrespective of the gravity of the offence. As per Section 15 of the Act 2000 where a Board after having satisfied on inquiry that a juvenile has committed an offence, then notwithstanding anything to the contrary of any other law for the time being in force, may, if it so thinks fit, make an order at the most directing the juvenile to be sent to a Special Home for a period of three years only. In the case in hand, the revisionist has been in detention since 06.1.2009. As mentioned earlier, he has already undergone a period of more than the maximum period for which a juvenile may be confined to a special home. Thus, at the time of rejection of the bail by the Sessions Judge in appeal, his detention was illegal.

18. In the case of Amit Singh Vs. State of Maharashtra and another, 2011 (13) SCC 744, the apex court held thus:

"The claim of juvenility can be raised before any court at any stage, even after the final disposal of the case. Section 20 and 7-A set out the procedure which the court is required to adopt, when such claim of juvenility is raised. The petitioner was a juvenile in terms of the 2000 Act because he had not completed 18 years of age and is entitled to get the benefit of provisions under Ss. 2(l), 7-A, 20 and 64 of the Act. The petitioner has already undergone 12 years in jail since

then, which is more than the maximum period for which a juvenile may be confined to a special home. Under these circumstances, the petitioner is directed to be released from custody forthwith."

19. The case of the revisionist, in my opinion, is on a better footing qua the above cited case. In this case, the offence was committed on 4.1.2009 much after incorporation of the Act No. 33 of 2006 in the Act 2000. This brooks no dispute that the revisionist was a juvenile on the date when offence was committed. Thus, certainly his case was to be dealt with under the provisions of the Act 2000. But unfortunately for him, he was subjected to trial under the general criminal law applicable to the adults and was declared juvenile only on Sept. 7, 2013 after a period of more then three years from the date of moving application by his father, under Section 7-A of the Act 2000. By all reckoning, this constitutes a serious lapse on the part of the authorities of criminal administration of justice. What shocks the conscience of this Court is that the juvenile was in detention since 06.1.2009 and thus he had already undergone a period of more than three years in detention by the time, his bail prayer and the appeal against his bail rejection orders were made. This leaves no manner of doubt that the Sessions Judge had passed the lop-sided order in confirming the bail refusal order rendered by the Juvenile Board, blissfully oblivious of the fact that the principles of bail of an adult as per the Code are not attracted in a case of juvenile, and in complete antagonism of the settled principles governing the bail matter of a juvenile as set forth in Section 12 of the Act 2000.

20. The revision accordingly, succeeds. The order of the Board dated 21.10.2013 passed in Case Crime No. 5 of 2009, under Section 376 I.P.C., P.S.-Adarsh Mandi, Shamli, District-Shamli and the impugned order of the Sessions Judge, Muzaffarnagar, dated 6.12.2013 passed in Criminal Appeal No. 101 of 2013 are hereby set aside.

21. Since, the revisionist (a juvenile in conflict with law) has already undergone a period of more than 5 years in detention/Special Home, which is more than maximum period for which a juvenile may be confined to a Special Home, where a Board is satisfied on inquiry that he has committed the offence, it is ordered that the revisionist-Parvez would be released from the custody forthwith, if not wanted in any other case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 07.01.2014

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Bail (Second) No. 4707 of 2013

Laxman Prasad... Petitioner
Versus
State of U.P..... Respondent

Counsel for the Petitioner:
Sri Jyotindra Misra, Sri Sunil Dixit

Counsel for the Respondent:
Sri Sharad Dixit-AGA, Sri K.N. Mishra

Cr.P.C.-Section 437(i)(ii)-Second Bail-offence under section 302-weapon recovered as pointed out by applicant-having criminal history-parity with co-accused-can not be claimed-as the co-accused has no criminal history-apart from that-the witness are afraid due to twice conviction of applicant-incident occurred to create pressure-for withdrawl of case relating to property-can not be said apprehension in mind of prosecution

witness-as unreasonable-application rejected.

Held: Para-14&17

14. So far as, question of parity with co-accused Ashok Kumar is concerned, this Court is of the opinion that parity cannot be extended to the present applicant because the weapon used in this incident for assault had been recovered on the pointing out of the present applicant. This fact is also worth notice that co-accused Ashok Kumar is not a previous convict hence on this count, the applicant is not entitled for bail on the ground of parity.

17. From a perusal of investigation of the present case, it reveals from the statement of Ganga Prasad that the witnesses are afraid with the present applicant because he has been convicted twice (out of which in one case he was acquitted in appeal) and this incident was also occurred to put pressure to withdraw the case relating to land in question and relinquish the claim by the complainant over the property in question. In view of this, it cannot be said that apprehension in the mind of the prosecution witnesses that in case, the accused applicant is released on bail, he will influence and tamper the prosecution witnesses not to give evidence against him, is not reasonable.

Case Law discussed:

(2012)2 SCC 382; (1978) 1 SCC 118; (2003) 1 SCC 15; (2004)7 SCC 528; (2005)8 SCC 21; (2001)4 SCC 280; (2002) 3 SCC 598; (2010) 14 SCC 496.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. Heard learned Senior Counsel for the applicant Sri Jyotindra Misra assisted by Sri Sunil Dixit, Advocate, learned counsel for the complainant Sri K.N. Mishra and learned A.G.A. for the State Sri Sharad Dixit .

2. By means of the present second bail application, the applicant has prayed for bail in Case Crime No.28 of 2013, under Sections 302, 303, 506 IPC, Police Station Kotwali Dehat, District Gonda.

3. The first bail application of the applicant had been rejected for want of prosecution by this Court vide order dated 19.07.2013.

4. As per the case narrated in the first information report, the present applicant-Laxman Prasad, Ashok Kumar and Onkar Nath exhorted to kill the deceased-Prag Dutt and in consequence thereof, the co-accused Ramesh shot fire upon the deceased and, therefore, the deceased died. This incident was occurred on 12.02.2013 at about 05.30 p.m. in Village Madhaupur. The motive of incident was that a litigation was going on in between the parties and the accused persons were threatening to withdraw the case and leave the land in question in favour of the accused persons.

5. It has been contended by learned counsel for the applicant that in this case co-accused Ashok Kumar, who has been assigned the similar role with the role of the present applicant, has been granted bail by this Court vide order dated 15.05.2013 in Bail No.2752 of 2013.

6. It was further contended by learned counsel for the applicant that only on account of criminal history, the bail to the applicant cannot be denied and it is the duty of the Court to look into the merit of the case and the role assigned to the accused and then decide whether the bail should be granted or not. In this regard learned counsel for the applicant invited the attention of this Court to paragraph 10 of a judgment of the Apex Court rendered in Maulana Mohammed

Amir Rashadi vs. State of Uttar Pradesh and another, (2012) 2 SCC 382, which reads as under:

"10. It is not in dispute and highlighted that the second respondent is a sitting Member of Parliament facing several criminal cases. It is also not in dispute that most of the cases ended in acquittal for want of proper witnesses or pending trial. As observed by the High Court, merely on the basis of criminal antecedents, the claim of the second respondent cannot be rejected. In other words, it is the duty of the court to find out the role of the accused in the case in which he has been charged and other circumstances such as possibility of fleeing away from the jurisdiction of the court, etc."

7. It was further submitted by learned counsel for the applicant that the present applicant-Laxman Prasad is on bail after conviction in Case Crime No.273 of 1982 and, therefore, there is no impediment in granting bail if the applicant is eligible to bail otherwise. It was further contended that the provisions of Section 437(1) (ii) of the Code of Criminal Procedure (in short 'CrPC) will not apply while exercising jurisdiction to consider the bail by court of sessions or by High Court under Section 439 CrPC and it is not an impediment in granting the bail by court of sessions or by High Court.

8. Learned counsel for the complainant as well as learned A.G.A. for the State heavily relied upon the previous conviction of the applicant and stated that in view of the mandate contained in Section 437 (1)(ii), CrPC, the applicant is not entitled for bail. It was further contended that the provisions of Section 437, CrPC would apply while granting bail under Section 439, CrPC, thus, the contention of learned counsel for the applicant that this provisions under Section 437 (1) (ii) will not come into play especially when the accused applicant is on bail during the pendency of appeal before this Court, is not sustainable.

9. Prime consideration before this Court is whether the provisions contained in Section 437 (1)(ii), CrPC would apply while deciding the bail under Section 439, CrPC by court of sessions or by High Court or not?

10. The aforesaid question is not res integra. While considering the aforesaid question, the Apex Court in paragraphs 13 and 14 in Gurcharan Singh Vs. State (Delhi Admn.), (1978) 1 SCC 118 has observed as under:

"13. Mr Mulla drew our particular attention to some change in the language of Section 437(1) CrPC (new Code) compared with Section 497(1) of the old Code. Mr Mulla points out that while Section 497(1) CrPC of the old Code, in terms, refers to an accused being "brought before a Court", Section 437(1) CrPC uses the expression "brought before a Court other than the High Court or a Court of Session". From this, Mr Mulla submits that limitations with regard to the granting of bail laid down under Section 497(1) to the effect that the accused "shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life" are not in the way of the High Court or the Court of Session in dealing with bail

under Section 439 of the new Code. It is, however, difficult to appreciate how the change in the language under Section 437(1) affects the true legal position. Under the new as well as the old Code an accused after being arrested is produced before the Court of a Magistrate. There is no provision in the Code whereby the accused is for the first time produced after initial arrest before the Court of Session or before the High Court. Section 437(1) CrPC, therefore, takes care of the situation arising out of an accused being arrested by the police and produced before a Magistrate. What has been the rule of production of accused person after arrest by the police under the old Code has been made explicitly clear in Section 437(1) of the new Code by excluding the High Court or the Court of Session.

14. From the above change of language it is difficult to reach a conclusion that the Sessions Judge or the High Court need not even bear in mind the guidelines which the Magistrate has necessarily to follow in considering bail of an accused. It is not possible to hold that the Sessions Judge or the High Court, certainly enjoying wide powers, will be oblivious of the considerations of the likelihood of the accused being guilty of an offence punishable with death or imprisonment for life. Since the Sessions Judge or the High Court will be approached by an accused only after refusal of bail by the Magistrate, it is not possible to hold that the mandate of the law of bail under Section 437 CrPC for the Magistrate will be ignored by the High Court or by the Sessions Judge."

11. So far as the question of previous conviction is concerned, while dealing with the said issue, the Apex Court in Ram Pratap Yadav Vs. Mitra Sen Yadav, (2003) 1 SCC 15, ruled in paragraph 7 as under:

"7. The learned counsel for the appellant has submitted by inviting attention of the Court to the provisions of Section 437 CrPC that a person accused of or suspected of the commission of any non-bailable offence shall not be released on bail if he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for 7 years or more, unless special reasons for enlarging the accused on bail are available and recorded in writing. The learned counsel for Respondent 1 submitted that the powers of the Sessions Court and the High Court to enlarge the accused on bail under Section 439 CrPC are very wide and are not fettered by the provisions of Section 437 CrPC. Be that at it may, it cannot be denied that previous conviction of an accused for a heinous offence punishable with imprisonment for life, his involvement in other crimes and the quantum of punishment for the offences in which the applicant is seeking bail are all relevant factors to which the court should consciously advert to while taking a decision in the matter of enlargement on bail. A prayer for bail having been rejected by the Sessions Court although the High Court while exercising its jurisdiction under Section 439 CrPC is not acting as a court of appeal or a court of revision over the order of the Sessions Court, nevertheless, the High Court should keep in mind, while hearing the application for bail, the factum of the prayer having been rejected by the Sessions Court and the reasons therefor expressly set out in the order of the Sessions Court. The order of the High

Court, howsoever brief it may be, should make it appear that the High Court while forming opinion on prayer for bail was conscious of the reasons for rejection of prayer for bail as assigned by the Sessions Court."

12. In Kalyan Chandra Sarkar Vs. Rajesh Ranjan, (2004) 7 SCC 528, the Apex Court again consider the aforesaid aspect in paragraph 14, which reads as under:

"14. This Court also in specific terms held that the condition laid down under Section 437(1)(i) is sine qua non for granting bail even under Section 439 of the Code. In the impugned order it is noticed that the High Court has given the period of incarceration already undergone by the accused and the unlikelihood of trial concluding in the near future as grounds sufficient to enlarge the accused on bail, in spite of the fact that the accused stands charged of offences punishable with life imprisonment or even death penalty. In such cases, in our opinion, the mere fact that the accused has undergone certain period of incarceration (three years in this case) by itself would not entitle the accused to being enlarged on bail, nor the fact that the trial is not likely to be concluded in the near future either by itself or coupled with the period of incarceration would be sufficient for enlarging the appellant on bail when the gravity of the offence alleged is severe and there are allegations of tampering with the witnesses by the accused during the period he was on bail."

13. In view of the aforesaid decisions of Highest Court of this Country and discussions made thereinabove, it is crystal clear that the provisions contained in Section 437, CrPC will fully apply while considering the bail application either by court of sessions or by High Court. The fact that the applicant is a previous convict and has been released on bail in appeal is not in dispute but nothing has been brought on record on behalf of the applicant that his conviction was also suspended. Ordinarily, the punishment awarded after conviction is suspended while granting the bail to the accused persons during appeal, therefore, it cannot be said that the applicant is not a previous convict.

14. So far as, question of parity with co-accused Ashok Kumar is concerned, this Court is of the opinion that parity cannot be extended to the present applicant because the weapon used in this incident for assault had been recovered on the pointing out of the present applicant. This fact is also worth notice that co-accused Ashok Kumar is not a previous convict hence on this count, the applicant is not entitled for bail on the ground of parity.

15. So far as criminal history of the applicant is concerned, it is not a ground to be considered within the scope of Section 437, CrPC but while dealing with the bail applications, certain considerations should be kept in mind by the Court as held in several judgments by the Apex Court. These considerations are in built in Section 437, Cr.P.C. One of the considerations while considering the bail is that there is any likelihood of tampering the evidence or there is a reasonable apprehension of the witnesses being influenced by the accused. In this regard, the character, behaviour, means, position and standing of the accused is also required to be seen as held in State of U.P. Vs. Amarmani Tripathi,(2005) 8 SCC 21, Prahlad Singh Bhati Vs. N.C.T., Delhi &

Another, (2001) 4 SCC 280, Ram Govind Upadhyay Vs. Sudarshan Singh and Others, (2002) 3 SCC 598 and in Prasanta Kumar Sarkar Vs. Ashis Chatterjee, (2010) 14 SCC 496.

16. In this case, the applicant has a criminal history of eight cases as per the contents of paragraph 14 of the counter affidavit. Out of eight cases, in three cases, the applicant is acquitted in which one is of Section 302 IPC and in two cases, the applicant is on bail. In Case Crime No.273 of 1982, under Section 302 IPC the applicant was convicted and against which the applicant filed an appeal and he is on bail. The said appeal is pending before this Court.

17. From a perusal of investigation of the present case, it reveals from the statement of Ganga Prasad that the witnesses are afraid with the present applicant because he has been convicted twice (out of which in one case he was acquitted in appeal) and this incident was also occurred to put pressure to withdraw the case relating to land in question and relinquish the claim by the complainant over the property in question. In view of this, it cannot be said that apprehension in the mind of the prosecution witnesses that in case, the accused applicant is released on bail, he will influence and tamper the prosecution witnesses not to give evidence against him, is not reasonable.

18. In view of the aforesaid facts and circumstances of the case, I do not find that it is a fit case for grant of bail. Hence, the bail application of the applicant stands rejected.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.01.2014

BEFORE

THE HON'BLE ARVIND KUMAR TRIPATHI (ii), J.

U/S 482/378/407 No. 7018 of 2013

Monu@ Vaibha Singh & Ors.... Applicants
Versus
The State of U.P. & Anr..... Opp. Parties

Counsel for the Applicants:
Sri Shashank Shekhar Parihar
Meenakshi Singh

Counsel for the Respondents:
Govt. Advocate.

Cr.P.C.-Section 482-Application challenging summoning order-after availing revision-second revision by same party or application under 482-held-not maintainable.

Held: Para-31
In the instant case, there was a remedy available to the petitioners in the form of criminal revision and they have exhausted it and the criminal revision was dismissed. Code of Criminal Procedure bars second revision by the same party too, hence after exhausting the right of revision, power under Section 482 Code of Criminal Procedure, cannot be exercised by this Court.

Cr.P.C.-Section 37(i)-Direction for same day disposal of bail application-based upon Amrawati case-considering subsequent amendment-in provision 437(i)-after Amrawati case-no such direction-can be given.

Held: Para-35-
So far as direction to Magistrate is concerned, such direction cannot be given to Magistrate considering relevant amendment and addition of fourth proviso of Section 437(1)of Code of Criminal Procedure, which was added by legislature after the decision of Amarawati's Case.

Case Law discussed:
(2006) 7 SCC 296; (2006) 4 SCC 359; (2013) 3 SCC 330; (2013) 9 SCC 293; (2009) 4 SCC

437; Crl. Law Journal 2275; 1978 Crl. L.J. 1575; AIR 1968 Supreme Court 117; [(2006) 2 SCC (Crl.)272]; AIR 1989 SC 885(890); AIR 1977 SC 2401; AIR 2013 SC 2248.

[Delivered by Hon'ble Arvind Kumar Tripathi (II), J.]

(1) Heard Sri H.G.S.Parihar, Senior Advocate assisted by Sri Shashank Shekhar Parihar, learned counsel for the petitioners, Sri Jyotindra Mishra, Senior Advocate assisted by Sri Vaibhav Kallia learned counsel for respondents and learned AGA for the State.

(2) This petition under Section 482 Cr.P.C. has been filed by Monu alias Vaibhav Singh, Ajit Singh, Rana Pratap Singh & Vijai Pratap Singh alias Tirpan Singh for quashing the order dated 30.04.2013 passed by Chief Judicial Magistrate, Gonda in Case No. 883 of 2013 (Dr. Rajesh Pandey vs. Deceased Sonu alias Gaurav Singh and others) and order dated 25.06.2013 passed by the Incharge Session Judge, Gonda in Crl. Revision No. 335 of 2013 (Monu alias Vaibhav Singh and others vs. State of U.P. and Ors.).

(3) From perusal of the record, it is evident that a first information report was registered, on a written report dated 9.5.2012 of Dr. Rajesh Kumar Pandey at Police Station- Kotwali Nagar, District-Gonda on 15.05.2012, in which one Sonu Singh was named as accused and it was mentioned that five-six unknown persons were with him. This case was registered as case crime no.559-A of 2012 under Section-147/148/149/307/504/506 & 427 IPC. During investigation, some intense legal battle was fought in the court room and a final report was submitted by the Investigating Officer on 10.01.2013, which is annexed as Annexure 11 of this petition. A protest petition was filed by the complainant and after hearing the complainant and after perusal of the case diary, Chief Judicial Magistrate took cognizance of the offence under Section 190(1)(b) of Code of Criminal Procedure and summoned Monu alias Vaibhav Singh, Ajit Singh, Rana Pratap Singh & Vijai Pratap Singh alias Tirpan Singh (all petitioners in this petition) to face trial under Section 147/148/149/307/326/427/504/506 IPC. Feeling aggrieved, a Criminal Revision No.335 of 2013 was filed by the petitioners, which was rejected by the Incharge, Sessions Judge, Gonda vide order dated 25.06.2013. Feeling aggrieved, this petition under Section 482 Cr.P.C. was filed.

(4) It was submitted by learned counsel for the petitioner that:-

(i) the learned C.J.M. has taken cognizance on the basis of the protest application filed by the informant, in which he has made request to summon 8 alleged accused for trial in Case Crime No.559-A/2012, under-Sections 147, 148,149, 307, 326, 427, 504, 506 IPC and four accused have been summoned. The protest application is in form of complaint for summoning accused, who were not mentioned in the column of accused during the investigation as such the learned magistrate ought to have adopted procedure for taking cognizance on the complaint or he ought to have referred to matter for re-investigation/further investigation.

(ii) The learned Magistrate has considered the material collected by the investigating officer Sri Yogendra Nath

Singh, against whom complaint was made and he was not found conducting investigation properly and in fair manner, and vide order dated 29.12.2012 passed by the Superintendent of Police Gonda, the investigation was transferred to Sri Lallu Ram Diwakar, S.H.O. Colonelganj, Gonda and the writ petition no.342 M/B of 2012 was filed by Dr. R.K.Pandey (Opposite Party no.2) which was dismissed by this Hon'ble High Court vide order dated 15.01.2013.

(iii) Sri Lallu Ram Diwakar had conducted investigation and recorded statement of no. of witnesses and also did spot inspection and collected material which show that prima facie allegation made by the informant were not found correct but the learned C.J.M. has discarded the material collected by Sri L.R. Diwakar for no rhyme and reason and held that it will be proved by the parties during trial.

(iv) The learned C.J.M. has not applied its mind properly and discarded the material available in the case diary without recording any dissatisfaction, which was favouring the petitioner.

(5) It was further submitted that after submission of the final report, the Magistrate has got three options:- 1) He should accept the final report. 2) He may pass orders for re-investigation and 3) He may take cognizance of the offence himself. It was further submitted that when the Magistrate is of the opinion that he has to take cognizance then the Protest petition will be treated as complaint. It was further submitted that in the instant case, the Court was not able to apply its judicial mind as prior to his applying the judicial mind protest petition was filed and Magistrate had to pass orders. It was further submitted that Magistrate in the instant case should have passed orders for treating the protest petition as a complaint or for re-investigation.

(6) It was further submitted that taking of cognizance is a judicial function and it is the satisfaction of the Magistrate and his satisfaction should be mentioned in the order. Learned Magistrate has not shown his dis-agreement with the finding of the Investigating Officer. He has further stated that a revision was filed against the impugned order, that too, was dismissed, without applying his mind. It was further submitted that there are two stories, first is the application dated 09.05.2012 which was the basis of FIR in case crime no. 559-A of 2012 and second is the application sent by complainant from district jail dated 15.12.2012. It was further submitted that there are two versions in these two applications and in view of this and the report submitted by the Investigating Officer, the findings recorded by Investigating Officer while submitting the final report are based on evidence and the order taking cognizance is likely to be quashed and the matter is likely to be send to the Magistrate for treating it as a complaint case and pass orders afresh after recording the statement under Section 200 and 202 Cr.P.C.

(7) Learned counsel for the applicant has relied upon the cases of Hon'ble Apex Court has held under:-

(i) Popular Muthiah Vs. State (2006) 7 SCC 296 , (ii) Minu Kumari & Another Vs. State of Bihar & Others (2006)4 SCC 359, (iii) Rajiv Thapar & Other Vs. Madan Lal Kapur (2013)3 SCC 330, (iv) Prashant Bharti Vs. State of Delhi (2013)

9 SCC 293 and (v) Lal Kamlendra Pratap Singh reported in (2009) 4 SCC 437.

(8) Learned counsel for the opposite party no.2 submitted that there is no illegality in the impugned order. The Magistrate has every right to pass the orders on the protest petition after going through the evidence recorded by the Investigating Officer and he was justified in taking cognizance under Section 190(1)(b) Cr.P.C. as the Magistrate has only considered the material and evidence collected by the Investigating Officer and Magistrate has not relied upon any other evidence outside the case diary.

(9) Learned counsel for opposite party no.2 relied upon case Law of Pooran Singh & Others Vs. State of U.P. and Others 2003 Crl.Law Journal 2275, Kuli Singh and Others Vs. State of Bihar and Others, 1978 Crl. L.J, 1575 and Abhinandan Jha and Others Vs. Dinesh Mishra AIR 1968 Supreme Court, 117.

(10) In the case of Popular Muthiah Vs. State (2006) 7 SCC 296; Hon'ble Apex Court has held that High Court can exercise its inherent jurisdiction suo moto in the interest of justice and it can do so while exercising other jurisdiction such as appellate or revisional jurisdiction, no formal application for invoking inherent jurisdiction is necessary.

(11) Hon'ble Apex Court has further held that the jurisdiction of the learned magistrate in the matter of issuance of process or taking of cognizance depends upon existence of conditions precedent therefore. The magistrate has jurisdiction in the event a final form is filed, (i) to accept the final form, (ii) in the event, protest petition is filed, to treat the same as a complaint petition and if a prima facie case is made out, to issue process, (iii) to take cognizance of the evidence against a person although a final form has been filed by the police, in the event he comes to the opinion that sufficient material exists in the case diary itself and (iv) to direct re-investigation into the matter.

(12) In the case of Minu Kumari & Another Vs. State of Bihar & Others (supra) has held as under:-

"The Section does not confer any new power on the High Court. It only saves the inherent power which the Court possessed before the enactment of the Code. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts. All courts, whether civil or criminal possess, in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong in course of administration of justice on the principle "quando lex aliquid alicui concedit, concedere videtur

et id sine quo res ipsae esse non potest" (when the law gives a person anything it gives him that without which it cannot exist). While exercising powers under the section, the court does not function as a court of appeal or revision. Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone courts exist. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent abuse. It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice."

(13) In the case of Rajiv Thapar & Other Vs. Madan Lal Kapur (supra), Hon'ble the Apex Court has held, as under;

"The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held."

(14) In the case of Prashant Bharti Vs. State of Delhi (supra), the Apex Court has held that when all the ingredients mentioned in Hon'ble the Apex Court's decision in Rajiv Thapar (supra) stands satisfied then High Court ought to have persuaded it on the basis of material available before it, while passing the impugned order to quash the criminal proceeding initiated against the appellant-accused, in exercise of the inherent powers vested with it under Section 482 Cr.P.C.

(15) For ready reference and convenience Section 482 Cr.P.C. is quoted below:-

"482. Saving of inherent powers of High Court. Nothing in this Code shall be deemed to limit or affect the inherent

powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

(16) In the case of State of Orissa Vs. Saroj Kumar Sahoo; [(2006) 2 SCC (Crl.) 272], Hon'ble the Apex Court has held as under :-

"When exercising jurisdiction under Section 482 of the Cr.P.C., the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge."

(17) Hon'ble the Apex Court in the same case has further held as under:-

"It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with."

(18) The same view has been reiterated by Apex Court in Rajiv Thapar's Case (supra).

(19) In view of the above settled legal position, while deciding the instant petition, all the submission made by petitioner's counsel mentioned in Para 5(ii)(iii) are not tenable as it will require discussion and evaluation of evidence recorded during investigation.

(20) So far as, submission in Para 5(i)(above) is concerned. FIR discloses that one named accused (now dead) and some unknown persons were involved in crime. The names were later mentioned in statement under Section 161 Cr.P.C. recorded by investigating officers.

(21) Hon'ble the Apex Court in the case of Abhinandan Jha Vs. Dinesh Mishra (supra) has held that on receiving final report it was not within the powers of the magistrate to direct the police to submit a charge-sheet but it is open to him to agree or disagree with the police report. If he agrees that no case is made out for issuing process, he may accept the report and drop the proceedings. He may come to the conclusion that further investigation is necessary, in that event he may pass the order to that effect. If ultimately, the magistrate is of the opinion that the facts set out in the police report constitute an offence he can take cognizance of the offence, notwithstanding the contrary opinion, expressed in the police report. It was observed therein that the magistrate in that event could take cognizance under Section 190(1)(c) of the Code.

(22) The reference to Section 19(1)(c) of the code was a mistake for Section 190(1)(b) and this has been pointed out in a later decision of H.S. Bains Vs. State AIR 1980 S C 1883.

(23) In H. S. Bains case (supra) it was held by the Supreme Court that the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses expressed in the police report submitted to the Magistrate under Section 173(2), Cr.P.C. The Magistrate may prefer to ignore the conclusions of the police regarding the

credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statements of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police. In that case it was observed : "If a complaint states the relevant facts in his compliant and alleges that the accused is guilty of an offence under Section 307, Indian Penal Code the Magistrate is not bound by the conclusion of the complainant. He may think that the facts disclose an offence under Section 324, Indian Penal Code only and he may take cognizance of an offence under Section 324 instead of Section 307. Similarly if a police report mentions that half a dozen persons examined by them claim to be eye-witnesses to a murder but that for various reasons the witnesses could not be believed, the Magistrate is not bound to accept the opinion of the police regarding the credibility of the witnesses. He may prefer to ignore the conclusions of the police regarding the credibility of the witnesses and take cognizance of the offence. If he does so, it would be on the basis of the statement of the witnesses as revealed by the police report. He would be taking cognizance upon the facts disclosed by the police report though not on the conclusions arrived at by the police.

(24) In another decision in India Carat Pvt. Ltd. v. State of Karnataka AIR 1989 SC 885 (890), it was held by Apex Court as under :-

"The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusions arrived at by the investigation officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. The High Court was, therefore, wrong in taking the view that the Second Additional Chief Metropolitan Magistrate was not entitled to direct the registration of a case against the second respondent and order the issue of summons to him."

(25) In the case of Tularam v. Kishore Singh : AIR 1977 SC 2401, it was held by Apex Court that if the police, after making an investigation, sent a report that no case was made out against the accused, the Magistrate could ignore the conclusion drawn by the police and take cognizance of the case under Section 190(1)(b) on the basis of material collected during investigation and issue process or in the alternative he could take

cognizance of the original complaint and examine the complainant and his witnesses and thereafter issue process to the accused, if he was of opinion that the case should be proceeded with.

(26) From the aforesaid decisions, it is thus clear that where the Magistrate receives final report the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require :-

(I)He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

(II)He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner, or.

(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202, Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

(27) Now, it is settled legal position that Where the Magistrate decides to take cognizance of the case under Section 190(1))(b) of the Code ignoring the conclusions arrived at by the investigating agency and applying his mind independently to the facts emerging from the investigation records, in such a situation the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code and consequently the proviso to Section 202(2), Cr.P.C. will have no application. It would however be relevant to mention that for forming such an independent opinion the Magistrate can act only upon the statements of witnesses recorded by the police in the case diary and other material collected during investigation. It is not permissible for him at that stage to make use of any material other than investigation records, unless he decides to take cognizance under Section 190(1)(a) of the Code and calls upon the complainant to examine himself and the witnesses present if any under Section 200.

(28) In the instant case, a perusal of the impugned order reveals that Magistrate has after considering the protest petition and considering the evidence recorded by investigating officers has found that there is sufficient evidence to proceed against the accused persons, namely, Monu @ Vaibha, Ajit Singh, Rana Pratap Singh and Vijay Pratap Singh @ Tirpan Singh under Sections 147,148,149,307,326,427,504,506 IPC. It is abundantly clear that no other extraneous material except statement of witnesses in case diary has been considered. In view of this, Magistrate has not committed any illegality in summoning the accused persons under Section 190(1)(b) of the Code of Criminal

Procedure. There was no occasion to adopt the procedure of complaint case.

(29) A part from that in the Case of Mohit alias Sonu and Anr. vs. State of U.P. and Anr.[AIR 2013 SC 2248], the Apex Court has held that So far as the inherent power of the High Court as contained in Section 482 of Cr.P.C. is concerned, the law in this regard is set at rest by this Court in a catena of decisions. However, we would like to reiterate that when an order, not interlocutory in nature, can be assailed in the High Court in revisional jurisdiction, then there should be a bar in invoking the inherent jurisdiction of the High Court. In other words, inherent power of the Court can be exercised when there is no remedy provided in the Code of Criminal Procedure for redressal of the grievance. It is well settled that inherent power of the court can ordinarily be exercised when there is no express provision in the Code under which order impugned can be challenged. (Para 22)

(30) Hon'ble the Apex Court has further held as under:-

"16. While we fully agree with the view taken by the learned Judge that where a revision to the High Court against the order of the Subordinate Judge is expressly barred under sub-section (2) of Section 397 of the 1973 Code the inherent powers contained in Section 482 would not be available to defeat the bar contained in Section 397(2). Section 482 of the 1973 Code contains the inherent powers of the Court and does not confer any new powers but preserves the powers which the High Court already possessed. A harmonious construction of Sections 397 and 482 would lead to the irresistible conclusion that where a particular order is expressly barred under Section 397(2) and cannot be the subject of revision by the High Court, then to such a case the provisions of Section 482 would not apply. It is well settled that the inherent powers of the Court can ordinarily be exercised when there is no express provision on the subject-matter. Where there is an express provision, barring a particular remedy, the Court cannot resort to the exercise of inherent powers."(Para 16)

"The intention of the Legislature enacting the Code of Criminal Procedure and the Code of Civil Procedure vis-a-vis the law laid down by this Court it can safely be concluded that when there is a specific remedy provided by way of appeal or revision the inherent power under Section 482 Cr.P.C. or Section 151 Cr.P.C. cannot and should not be resorted to." (Para 23)

(31) In the instant case, there was a remedy available to the petitioners in the form of criminal revision and they have exhausted it and the criminal revision was dismissed. Code of Criminal Procedure bars second revision by the same party too, hence after exhausting the right of revision, power under Section 482 Code of Criminal Procedure, cannot be exercised by this Court.

(32) Learned counsel for the petitioner prayed that if the petition is not going to succeed then they be granted benefit of the decision of Amrawati Vs. State 2005 Crl. L.J. 755 (All) as approved by the Apex Court's decision in Lal Kamlendra (2009)4 Supreme Court Case 437 and it may also be ordered that discharge application be considered by Chief Judicial Magistrate.

(33) Chief Judicial Magistrates have not been given powers of discharge in cases triable by Sessions Court, as it is the trial court i.e. Sessions Court, who has to hear accused before framing of the charge. All the magistrate can do is to commit the case to Session's Court after following procedure under Section 207 of Code of Criminal Procedure. In view of this legal position, such direction will be against law and cannot be issued to Chief Judicial Magistrate.

(34) So far as the direction to consider the bail application in the light of Amrawati (supra) and Lal Kamlendra's case (supra) is concerned, this court has held in Amrawati's case (supra) that this Court cannot direct Sessions Judge considering the provision of first proviso to Section 439(1) of Code of Criminal Procedure.

(35) So far as direction to Magistrate is concerned, such direction cannot be given to Magistrate considering relevant amendment and addition of fourth proviso of Section 437(1)of Code of Criminal Procedure, which was added by legislature after the decision of Amarawati's Case.

(36) From the above discussion, the instant petition is liable to be dismissed and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.01.2014

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Writ Petition No.9057 (S/S) of 1990
alongwith W.P. No. 5293(S/S) of 1994

Mohammad Aslam Ullah & Ors.. ..Petitioners
Versus
Shravasti Sahkari Chini Mills Ltd. & Ors.
Opp. Parties

Counsel for the Petitioners:
Sri Manish Mathur

Counsel for the Opp. Parties:
Sri Anuj Kumar Srivastava

Constitution of India, Art.-226-Scope of judicial review-termination of daily wager-governed by cooperative societies-can not be interfered by Writ Court-by exercising power either under Art. 226 or 227-petition dismissed.

Held: Para-12
It is true that the powers of High Court of judicial review has been discussed in several authorities. On some of them, the petitioner relied upon. I do not burden this judgement by citing and discussing those authorities for the reason that in view of the fact of this case the writ petition under article 226 could not be entertained. It is well settled that if this Court could not invoke its jurisdiction under Article 226 or 227 of Constitution of India, the question of judicial review of the order or action of authority does not arise as held by their Lordships of Constitutional Bench of Supreme Court of India in The State of Uttar Pradesh Vs. Mohammad Nooh, AIR 1958 SC 86.

Case Law discussed:
(2003)8 SCC 639; (2007) 11 SCC 756; AIR 1958 SC 86; (2003)8 SCC 639; (1981)1 SCC 722; (1979)3 SCC 489; (2007) 11 SCC 756.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. Petitioners of writ petition No.9057 (S/S) of 1990 including the petitioner of writ petition No.5293 (S/S) of 1994 are the daily wagers working in Shravasti Sahkari Chini Mills Ltd. Nanpara, Baharich. This Mill is a Cooperative Society under U.P. Cooperative Societies Act with 100% shares of State Of Uttar Pradesh.

2. The services of petitioners are governed by Standing orders of the Mill

and rules of Sugar Wages Board. The management of the Mill decided to regularize the services of daily wagers like petitioners, but did not regularize the services of the petitioners. Consequently, an industrial dispute arose on behalf of Petitioners having case No.44 of 1990. During the pendency of industrial dispute, the services of the petitioners were terminated on 23.07.1990. The order of termination was challenged in Writ Petition No. 9057 of 1990 (S/S), wherein an interim protection has been extended to the petitioners vide order dated 05.09.1990 allowing them to continue in service and to pay the wages. When wages as per Sugar Wages Board were not paid, the petitioners filed a claim case under section 15 of Payment of wages Act. In this case the petitioners were awarded amount. The petitioner No.1 also found entitled to the amount of Rs.42384/- The O.P. No.1 instead of filing the appeal under section 17 of payment of wages act filed a writ petition No.4490 of 1993 (S/S) and obtained the interim order staying the operation of order passed under section 15 of Payment of wages Act. In the meantime, industrial dispute reference case was referred by the State Government to Labour Tribunal and was pending on the date of presentation of Writ Petition No.5293 of 1994 (S/S). The Mill management issued a show cause notice on 20/21.07.1993 to the petitioner No.1 due to activities prejudicial to the interest of Mill management and ill mannered actions with other officers and employees of O.P. No.1. An FIR has also been lodged on 08.09.1994 by O.P. No.1, the Mill, against petitioner no.1 alleged to be arrested red handed while committing theft in the Mill premises. On 30.09.1994, the petitioner No.1 was dismissed from service as a daily wager. The industrial Dispute referred to Labour Court was decided against the petitioners vide order dated 15.10.1997 and the claim of regularization of petitioners was declined, the copy of which is annexed as Annexure No. 1 to the counter affidavit filed by O.P.s In writ petition No. 5293 of 1994 (S/S). From the perusal of this award, it appears that petitioner No.2,4,5,6 and 7 were absorbed in service on regular basis, so they withdrew from the proceedings. So far as petitioner No.3 Waziruddin is concerned, he did not contest the matter before labour court nor challenged the award. Consequently, the petitioner No.1 remains here to contest the proceedings.

3. The petitioner No.1 was also acquitted of the charges of theft on 04.01.2002 by Chief Judicial Magistrate, Bahraich in case No.4627 of 1995.

4. By means of Writ Petition No. 5293 of 1994 (S/S) Petitioner Mohammad Aslam Khan (the petitioner No.1 in Writ Petition No.9057 (S/S) of 1990) sought quashing of the aforesaid order dated 30.09.1994 (Annexure-7) terminating his services as a daily wager by issuing a writ order or direction in the nature of certiorari and by issuing a mandamus directing the opposite parties to treat the petitioner in continuous service with all consequential benefit including payment of salary and arrears of pay. It is pertinent to mention here that the petitioner did not challenge the award delivered by Labour Court wherein his claim for regularization has been declined.

5. Since both the petitions are now related to the claim of petitioner Mohammad Aslam Ullaha khan, they are being disposed of by this common judgement.

6. Pleadings were exchanged in both the petitions in between the parties.

7. Heard Sri Manish Mathur, learned Counsel for the petitioner and Sri Anuj Kumar Srivastava, learned counsel for the opposite parties.

8. The learned Counsel for the petitioners submits that the termination of petitioners is bad for two reasons. First; that the services of the petitioners could not be dispensed with during the pendency in the light of section 6-N of U.P. Industrial Disputes Act and secondly; no opportunity of being heard has been provided to the petitioners before termination of their services. It was further urged that similarly situated persons were regularised but the petitioners' services were not regularised rather in a biased manner the services of the petitioners were terminated.

9. Contrary to it, the learned counsel for the opposite parties has submitted that this writ petition is not legally maintainable because the Cooperative Sugar Mill is not the State or instrumentality or agency of the Government as held in General Manager, Kishan Sahkari Chini Mills Ltd, Sultanpur, U.P. Vs Satrughan Nishad and others, (2003) 8 SCC 639. The remedy lies within the provisions of U.P. Cooperative Societies Act 1965 and not before this Court under Article 226 of Constitution of India as held in Ghaziabad Zila Sahkari Bank Ltd. v. Addl. Labour Commissioner, (2007) 11 SCC 756, at page 778.

10. The award delivered by the Labour Court has not been challenged in the present writ petitions, wherein the claim of petitioners for regularization has been turned down.

In this petition, the order of dismissal of petitioners has been challenged on the ground that no opportunity of being heard has been provided to the petitioners.

11. It is not in dispute that a show cause notice has been issued to the petitioners before passing the order of dismissal. It is also not in dispute that the petitioners replied the show cause notice. It is also not in dispute that the petitioners were not the regular employee of Chini Mill but daily wagers. It is also not in dispute that their claim for regularisation has been turned down and no challenge has been made against the order passed by Labour Court. Therefore services of such an employee can be dispensed with at the will of employer without issuing or giving any prior notice. As per standing orders of Mill even a temporary workman who has been appointed temporarily against a permanent, seasonal of temporary post can be terminated without notice. Therefore, it could not be said that the principles of natural justice were violated.

12. It is true that the powers of High Court of judicial review has been discussed in several authorities. On some of them, the petitioner relied upon. I do not burden this judgement by citing and discussing those authorities for the reason that in view of the fact of this case the writ petition under article 226 could not be entertained. It is well settled that if this Court could not invoke its jurisdiction under Article 226 or 227 of Constitution of India, the question of judicial review of the order or action of authority does not arise as held by their Lordships of Constitutional Bench of Supreme Court of

India in The State of Uttar Pradesh Vs. Mohammad Nooh, AIR 1958 SC 86.

13. In view of pronouncement of Hon'ble Supreme Court, the present writ petitions would not be maintainable as held General Manager, Kisan Sahkari Chini Mills Ltd., Sultanpur, U.P. v. Satrughan Nishad, (2003) 8 SCC 639, at page 644 :

"5. Shri Rakesh Dwivedi, learned Senior Advocate appearing in support of the appeals, submitted that the contesting respondents could not have been allowed to invoke the writ jurisdiction of the High Court as the Mill, which is a registered cooperative society, was not State within the meaning of Article 12 of the Constitution as it was neither an instrumentality nor an agency of the Government of Uttar Pradesh. On the other hand, Shri Sunil Gupta, learned Senior Advocate appearing on behalf of the contesting respondents, submitted that the Mill was an instrumentality of the Government, as such it was an authority within the meaning of Article 12 of the Constitution.

6. The point raised is no longer res integra as the same is concluded by decisions of this Court. In the case of Ajay Hasia v. Khalid Mujib Sehravard,(1981)1 SCC 722, a Constitution Bench of this Court, while approving the tests laid down in the case of Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489 as to when a corporation can be said to be an instrumentality or agency of the Government, observed at pp. 736-37 which runs thus: (SCC para 9)

"9. The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgement in the International Airport Authority case. These tests are not conclusive or clinching, but they are merely indicatives which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities', it must be realised that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation. We may summarise the relevant tests gathered from the decision in the International Airport Authority case as follows:

(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)

(2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)

(4) Existence of deep and pervasive State control may afford an that the corporation is a State agency or instrumentality. (SCC p.508, para 15)

(5) If the functions of the corporation are of public importance and closely

related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)

(6) "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)"

In para 9 at page 467-648 the Apex Court concluded as follows:

"This being the position in that case, this Court held that the High Court has no jurisdiction to entertain an application under Article 226 of the Constitution. In the present case, the Mill is engaged in the manufacture and sale of sugar which, on the same analogy, would not involve any public function. Thus, we have no difficulty in holding that the jurisdiction of the High Court under Article 226 of the Constitution could not have been invoked."

14. In Ghaziabad Zila Sahkari Bank Ltd. v. Addl. Labour Commissioner, (2007) 11 SCC 756, at page 778, the Apex Court ruled as under :

"61. The general legal principle in interpretation of statutes is that "the general Act should lead to the special Act". Upon this general principle of law, the intention of the U.P. Legislature is clear, that the special enactment U.P. Cooperative Societies Act, 1965 alone should apply in the matter of employment by cooperative societies to the exclusion of all other labour laws. It is a complete code in itself as regards employment in cooperative societies and its machinery and provisions. The general Act, the U.P. Industrial Disputes Act, 1947as a whole has and can have no applicability and stands excluded after the enforcement of the U.P. Cooperative Societies Act. This is also clear from necessary implication that the legislature could not have intended head-on conflict and collision between authorities under different Acts."

15. The aforesaid pronouncement of Highest Court of India leaves no room to doubt that the remedy, if any lies for petitioners, the same would be within the four corners of U.P. Cooperative Societies Act and not in this Court.

16. In view of the aforesaid discussions made both the writ petitions deserve to be dismissed, hence accordingly dismissed but with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 12162 of 2013

Mahipal Verma.... Petitioner
Versus
Rent Control and Eviction Officer & Ors... Respondents

Counsel for the Petitioner:
Sri Sharad Kumar Pandey

Counsel for the Respondents:
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Constitution of India, Art.-226-Allotment of shop-RCEO rejected on ground shop being new construction under section

2(2) of Act no. 13 of 1972-provisions of Act not applicable-argument that in earlier petition the land lord had given consent for allotment-held-once the finding of RCEO neither perverse-nor statute applicable-by consent jurisdiction can not be conferred.

Held: Para-4
The submission is thoroughly misconceived. Once a statute itself is not applicable upon a subject matter, even by consent of the parties, jurisdiction cannot be conferred.

Case Law discussed:
AIR 1951 SC 230; AIR 1954 SC 340; [1964]52 ITR 220(All); 1985(2) ARC 533; AIR 1986 All. 132; (1995) 5 SCC 159; AIR 1996 SC 1373; AIR 2007 SC 2499; AIR 2012 SC 1239; 2013(1)AWC 566(All).

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

1. Heard Sri S.K.Pandey, learned counsel for the petitioner and perused the record.

2. It is not in dispute that petitioner's application for allotment of shops No.13/807/9 and 13/366/4 (New Number 13/500) situated in Mohalla Sheikh Farookh, Saharanpur, has been rejected by Rent Control and Eviction Officer/City Magistrate, Saharanpur (hereinafter referred to as "RCEO") by impugned order dated 6.3.2010 on the ground that these shops are new constructions and by virtue of second proviso to Section 2(2) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972"), construction having been raised in 1991, are not within the ambit of Act, 1972 therefore, application for allotment before RCEO itself is not maintainable and shops cannot be allotted by applying power under Act, 1972 on account of the fact that shops are outside the purview of the said Act.

3. On the merits of the question that shops are not new and within the ambit of Act, 1972, no argument could be advanced by learned counsel for the petitioner and he could not show that the findings recorded by RCEO are perverse or incorrect. He, however, said that there is a settlement made by landlord in another matter relating to some other shops, which came to this Court in Writ Petition No.27260 of 2008 stating that tenants may seek allotment of shops in disputed in the present case. It is also true that Writ Petition No.27260 of 2008 has been dismissed by this Court but it is said that landlord has already made statement therein that shop in question is liable to be allotted to the petitioner under Act, 1972.

4. The submission is thoroughly misconceived. Once a statute itself is not applicable upon a subject matter , even by consent of the parties, jurisdiction cannot be conferred.

5. As early as in 1951 the Apex Court in United Commercial Bank Limited versus Their Workmen AIR 1951 SC 230 held:

"No acquiescence or consent can give a jurisdiction to a court of limited jurisdiction which it does not possess."

6. In Kiran Singh versus Chaman Paswan AIR 1954 SC 340, the Court said:

"A defect of jurisdiction ... strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."

7. In Benarsi Silk Palace Vs. Commr. of Income Tax [1964] 52 ITR 220 (All), this Court held:

"Jurisdiction could be conferred only by statute and not by consent and acquiescence. Since jurisdiction is conferred upon Income Tax Officer to proceed under Section 34 (1) only if he issues a notice an assessee cannot confer jurisdiction upon him by waiving the requirement of a notice because jurisdiction cannot be conferred by consent or acquiescence."

8. In Kali Das Wadhwani & Anr. Vs. Jagjiwan Das and another 1985 (2) ARC 533, this Court observed as under:

"It is well settled that a jurisdiction cannot be conferred on a court by consent, acquiescence or waiver where there is none, nor can it be ousted where it is. Acquiescence, waiver or consent of the parties may be relevant in objections relating to pecuniary or territorial jurisdiction of the Court, but these factors have no relevance where the Court lacks inherent jurisdiction which strikes at the very root or authority of the Court to pass any decree and renders the decree, if passed a nullity."

9. In Sardar Hasan Siddique Vs. State Transport Appellate Tribunal, AIR 1986 All. 132, the Division Bench of this Court observed:

"A Tribunal of limited jurisdiction cannot derive jurisdiction apart from the statute. No approval or consent can confer jurisdiction upon such a tribunal. No amount of acquiescence waiver or the like can confer jurisdiction of a Tribunal is lacking, the doctrine of nullity will come into operation and any decision taken or given by such a Tribunal will be a nullity."

10. In Karnal Improvement Trust Vs. Prakashwanti, (1995) 5 SCC 159, the Hon'ble Supreme Court observed that acquiescence does not confer jurisdiction and an erroneous interpretation equally should not be perpetuated and perpetrated defeating of legislative animation. A similar view has been taken in U.P. Rajkiya Nirman Nigam Ltd. Vs. Indure Pvt. Ltd., AIR 1996 SC 1373.

11. In S. Sethuraman Vs. R. Venkataraman and Ors. AIR 2007 SC 2499, the Apex Court observed that if jurisdiction cannot be conferred by consent, it cannot clothe the authority to exercise the same in an illegal manner. The above authority has been referred to and relied on by Apex Court recently in AIR 2012 SC 1239 Collector, Distt. Gwalior and another Vs. Cine Exhibitors P. Ltd. and another.

12. Looking into this very question and considering the authorities, discussed above, this Court also in Ramesh Chandra Yadav Vs. IInd Additional District Judge, Jalaun & Ors., 2013(1) AWC 566 (All.), where a similar question was involved, in para 7, held:

7. He, however, could not dispute that the building in question having been constructed and completed in 1977, in 1983, ten years having not passed, Act No. 13 of 1972 was not applicable by virtue of Section 2 (2) of Act, 1972. That being so the Prescribed Authority under Section 21 of Act, 1972 lacked patent jurisdiction. A jurisdiction cannot be conferred even by consent of parties. It is an elementary principle. Where a Court has no jurisdiction over the subject matter of the action in which an order is made, such order is wholly void, for jurisdiction cannot be conferred by consent of parties. No waiver or acquiescence on their part can make up the

patent lack or defect of jurisdiction. If the decision/order of Court/authority is void for want of jurisdiction over the subject matter, it cannot operate as res judicata; so as to make that judgment conclusive between the parties, since the essential pre-requisite is that it should be the judgment of a Court of competent jurisdiction within the meaning of Section 11 of the Civil Procedure Code. Something which is wholly without jurisdiction, that is nullity in the eyes of law, no principle of law would come to confer any kind of effectiveness to such proceedings so as to have any legal consequences.

13. In view of the aforesaid discussion as also exposition of law, I do not find any reason to interfere.

14. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 23055 of 2013

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

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

Counsel for the Respondents:
C.S.C.

Financial Hand Book-Vol.-II-Part-II to IV-Chapter VI-Para 49-claim of salary of higher post-beyond 90 days-without concurrence of finance department-working on officiating basis-whether entitled for salary of higher post?-held-case relied in Prem Chandra Srivastava case-not considered this aspect-even dismissal of SLP by Apex Court-can not be relied upon-considering validity of direction of Division Bench-matter referred to larger bench.

Held: Para-14

14. In our opinion the following substantial questions of law needs to be examined by a Larger Bench:

(a) whether the proviso to para 49 of Chapter VI of Financial Hand Book Vol. II (Para II to IV) which requires the concurrence of the finance department, if officiating appointment is to be continued beyond 90 days would be applicable in respect of appointments covered by Clause I & III of para 49 or the said proviso would be applicable to appointments under Clause III only.

(b) whether the law laid down by the Division Bench of the High Court in the case of Prem Chand Srivastzva which direct that merely on holding additional charge of an additional post, the incumbent would become entitled to salary of higher post even in absence of sanction from the finance department lays down the correct law or not.

Case Law discussed:
1448(S/B) dis.On. 20.10.08; 563 of 2012(S/B).

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

1. Heard Shri B.P.Singh, Senior Advocate assisted by Shri V.K.Singh, Advocate on behalf of the petitioner and the learned Standing Counsel on behalf of the State.

2. Petitioners, who are seven in number, claim that they were appointed as Passenger Tax Officer /Superintendent in the transport department of the State of U.P. They were asked to work on officiating basis as Assistant Regional

Transport Officer (ARTO) during different periods between the year 1996 to 2003. It is further their case that in the year 203 they have all been regularly selected for appointment as ARTO. For the period of officiation as ARTO i.e. between 1996 yo 2003, the petitioners set up a claim for payment of salary admissible to the post of ARTO inasmuch as it is their case that they were required to hold two posts at the same time and to discharge duties of two posts namely Passenger Tax Officer /Superintendent and Assistant Regional Transport Officer, simultaneously. It is the case of the petitioners that in accordance with Para 49 (1) of Chapter VI of the Financial Handbook, Vol. II, Part 2 to 4, they are entitled to payment of salary of the higher post while holding dual charge.

3. Some of the petitioners had filed Civil Misc. Writ Petition No. 51469 of 2012 and others filed Civil Misc. Writ Petition No. 55030 of 2012 alleging therein that their request for grant of salary of the higher post of ARTO for the period they were holding charge of two posts has not been considered.

4. The writ petitions were decided vide order dated 04.10.2012 and dated 17.10.2012 requiring the state Government to examine the grievance of the petitioners individually in light of the judgment of the High Court in the case of Subhash Chandra Kushwaha vs. State of U.P. (Writ petition no. 1448 (S/B) decided on 20.10.2008).

5. The State Government under the order impugned dated 16.01.2013 passed in individual case of all the petitioners separately has rejected the request of the petitioners.

6. Under the order impugned, it has been recorded that the claim of the petitioners for salary of the higher post for having discharged duties of two posts is not covered by Para 49 of Chapter VI of the Financial Handbook, Vol. II (Part II to IV), on the ground that they have not been initially appointed to higher post and they have only been asked to look after the work of the higher post. It has further been recorded that the petitioners did not raise any grievance in the matter of payment of salary during the relevant period. It has, therefore, been held that it is too late in the day to accept the request of the petitioners for grant of salary of the higher post i.e. ARTO for the period they had held the charge of the said post i.e. between 1996 to 2003. The representations have accordingly been rejected.

7. Shri B.P.Singh submitted before us that the order of the State Government is in teeth of the Division Bench judgment of this Court in the Prem Chand Srivastava vs. State of U.P. and others (Writ Petition No. 563 of 2012 (S/B), decided on 24.05.2013 which in turn had noticed the judgement of another Division Bench in the case of Subhash Chandra Kushwaha (Supra) and had further taken note of Para 49 of Chapter VI the Financial Handbook Vol. II. He submits that for the reasons which have been recorded in the judgment of Division Bench in the case of Prem Chand Srivastava (Supra), the petitioners are also entitled to the same relief for payment of salary for the post of ARTO for the period they had held the charge of the said post. He further points out that against the order of the Division Bench dated 24.05.2013, an Special Leave Petition was filed before the Apex Court. Leave was granted but the Special Leave to Appeal

has been dismissed on 04.09.2013 by means of the following order :

"Leave granted.

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

Subject to above observations, the appeal is dismissed with no order as to costs.?

8. It is also stated that the order of the Division Bench in the case of Prem Chand Srivastava and in the case of Subhash Chandra Kushwaha have since been implemented by the State Government. It is the case of the petitioners that this Court may also follow the judgment of the Division Bench in the case of Prem Chand Srivastava and in the case of Subhash Chandra Kushwaha (Supras).

9. Having heard learned counsel for the parties and having examined the records, we find that the proviso to para 49 which requires that if a government servant holds charge of another post or posts then approval of the financial department for payment of additional pay beyond the period of 90 days has to be obtained.

10. It is worthwhile to reproduce Chapter VI of Financial Handbook Vol II, relevant for our purposes which reads as follows :

:Chapter VI? Combination of Appointments

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

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

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

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

(iii) where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post, or the highest post if the holds charge of more than two posts, in addition to ten per cent of the presumptive pay of the additional post or posts, if the additional charge is

held for a period exceeding thirty days but not exceeding ninety days :

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

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

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

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts.?

11. This proviso to para 49 has not been taken note of in the judgment in the case of Prem Chand Srivastava as well as in the case of Subhash Chandra Kushwaha (Supra). In our opinion, the proviso put an embargo upon the State Government to continue a person with charge of one or more than one post beyond 90 days except with the concurrence of the Finance Department.

12. It is not the case of the petitioners that any such concurrence from the finance department was obtained for payment of additional pay beyond 90 days. We find it difficult to agree to the Division Bench judgments in the case of Prem Chand Srivastava and in the case of Subhash Chandra Kushwaha (Supras).

13. Counsel for the petitioners would contend before this Court that proviso referred to herein above by us would be applicable only in respect of matters covered para 49 (iii) and would not apply to officiating appointment covered by para 49(i). This aspect of the matter has not been examined by any of the aforesaid two Benches in the case of Prem Chand Srivastava and in the case of Subhash Chandra Kushwaha (Supras).

14. In our opinion the following substantial questions of law needs to be examined by a Larger Bench :

(a) whether the proviso to para 49 of Chapter VI of Financial Hand Book Vol. II (Para II to IV) which requires the concurrence of the finance department, if officiating appointment is to be continued beyond 90 days would be applicable in respect of appointments covered by Clause I & III of para 49 or the said proviso would be applicable to appointments under Clause III only.

(b) whether the law laid down by the Division Bench of the High Court in the case of Prem Chand Srivastzva which direct that merely on holding additional charge of an additional post, the incumbent would become entitled to salary of higher post even in absence of sanction from the finance department lays down the correct law or not.

15. Let the papers be placed before the Hon'ble The Chief Justice for

constituting a Larger Bench for answer to the said questions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.01.2014

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 37248 of 2013

State of U.P..... Petitioner
Versus
Nalanda Serv Infraventure Pvt. Ltd. & Ors... Respondents

Counsel for the Petitioner:
Sri Sanjay Goswami, A.C.S.C.

Counsel for the Respondents:
Sri Pankaj Misra, Sri Swapnil Kumar
Sri H.P. Dube

Indian Stamp Act, 1899-Section 31- imposition of penalty and impounding the document-application for fixing valuation of property sought to purchase-held-without jurisdiction-as neither instrument nor any abstract of it-brought before collector.

Held: Para-22 & 23
22. In the present case, neither any instrument was brought before Collector so as to attract sub-section (1) of Section 31 nor at any point of time any abstract of instrument was placed before him. Therefore, in my view, here is not a case where Section 31 could have been invoked.

23. Since in the present case no such instrument was ever placed before authority concerned, in my view, exercise of power by ADM (F&R) by passing impugned order without having any instrument before him, is patently illegal and without jurisdiction.

Case Law discussed:

AIR 1951 All 851; AIR 1956 All 453; AIR 1971 SC 787.

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

1. This writ petition has been preferred by State of U.P. assailing an order dated 25.02.2012 passed by the State's own officer, i.e., Additional District Magistrate (Finance and Revenue), Agra (hereinafter referred to as the "ADM (F&R)" in Case No. 93/2011-12 in purported exercise of powers under Section 31 of Indian Stamp Act, 1899 (hereinafter referred to as the "Act, 1899").

2. This Court issued notices to respondents. I have perused the office report dated 18.11.2013. Service upon respondent no. 1 is deemed sufficient. Sri H.P. Dube, Advocate has put in appearance on behalf of respondents no. 5 and 6, i.e., ADM (F&R), who has also been impleaded in person. Sri Swapnil Kumar, Advocate has put in appearance on behalf of respondents no. 2, 3 and 4.

3. The short question up for consideration is, "whether Section 31 of Act, 1899 is attracted to the case in hand or not".

4. It appears that respondent no. 1 M/s Nalanda Serv Infraventure Pvt. Ltd. filed an application (undated) before ADM (F&R) under Section 31 of Act, 1899 stating that it proposes to purchase an immoveable property, i.e., No. 2/83/2/84 total area 4470 sq. yards, i.e., 3737.367 sq. mater, out of which 2125 sq. yards shall be jointly sold by Vijay Nijhavan, Sandeep Kochar and Naveen Lamba to respondent no. 1 and 2354 sq. yards would be sold by M/s Cheetarmal Ramdayal, hence the ADM (F&R) was requested to determine market value of aforesaid property proposed to be purchased by respondent no. 1. The ADM (F&R) vide

order dated 21.02.2012 directed Tehsildar (Judicial) to make inquiry and submit valuation report. It was submitted by Tehsildar (Judicial) concerned on 24.02.2012 and on the very next day, i.e., 25.02.2012 the ADM (F&R) passed impugned order.

5. It is contended that the instrument of purchase, i.e., draft sale deed was never placed or brought before ADM (F&R) and, therefore, he had no jurisdiction or authority to proceed under Section 31 since bringing of instrument before Collector is the condition precedent to attract Section 31 of Act, 1899.

6. Learned counsel appearing for respondents no. 2, 3 and 4 did not dispute that instrument in any manner was not placed before Collector of ADM (F&R) till he passed the order dated 25.02.2012, impugned in this writ petition. On the contrary, in para 10 of the counter affidavit, it is averred that there is no requirement, in any case, for availability of instrument before Collector for adjudicating upon the market value of the property and duty payable on the instrument for the purpose of attracting Section 31 of Act, 1899. In para 11 it is also said that even respondent no. 5 did not call for the instrument executed in favour of aforesaid respondent.

7. During course of oral argument also Sri Swapnil Kumar, learned counsel appearing for respondents no. 2, 3 and 4, did not dispute that the instrument was never brought before Collector either when application was submitted under Section 31 or even subsequently, at any stage, till the impugned order was passed.

8. In my view it is the instrument itself which brings jurisdiction of Collector, in, to determine the duty with which the said instrument is chargeable. In other words if the instrument itself is not brought before Collector, he has no occasion, authority or jurisdiction to determine the duty chargeable since no instrument is before him. This is evident from a bare reading of Section 31(1) of Act, 1899, which reads as under:

"31. Adjudication as to proper stamp.--(1) When any instrument whether executed or not, and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any), with which it is chargeable, and pays the fee of such amount as may be fixed by the State Government by notification in the official Gazette the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable." (emphasis added)

9. Sub-section (2) further provides, that the Collector may require the party concerned to furnish with an abstract of instrument and also with such affidavit or other evidence, as he may deem necessary to prove that "all the facts and circumstances affecting chargeability of instrument with duty or the amount of duty with which it is chargeable are fully and truly set forth therein".

10. The jurisdiction of Collector under Section 31(1) is not invoked by a mere application but it is the instrument which is brought before Collector and in respect thereof when Collector's opinion is required as to what should be the appropriate duty chargeable thereon, the Collector shall determine the same. When the instrument itself is not before

Collector, the question of such determination obviously cannot arise. It is not a hypothetical determination which is required to be made by Collector. It is in respect of an instrument which is placed before him, in regard whereto, he has to render his opinion about the appropriate duty chargeable on such instrument and considered.

11. Though the parties have not been able to place any direct authority on the subject in question but I find some support from certain authorities in which Section 31 has been read.

12. In Chunni Lal Burman Vs. Board of Revenue, U.P. and others, AIR 1951 All 851 a Division Bench of this Court while reading Sections 31 and 32 of Act, 1899 says that aforesaid provisions make it clear that when an instrument is presented to Collector for his opinion as to the duty chargeable upon it, the question of impounding the document by him would not arise if the instrument is not sufficiently stamped. The only duty caste upon Collector is to determine stamp duty payable upon the instrument. If thereafter the applicant decides to pay such stamp duty or deficient stamp duty, as the case may be, and other conditions under Section 32 are fulfilled, the Collector would make an endorsement on the document/instrument that it is sufficiently stamped but he cannot impound the document and impose penalty for the reason that Section 33 of Act, 1899 is not attracted at the stage when Collector is required to determine stamp duty payable on an instrument brought before him by invoking jurisdiction under Section 31 or 32 of Act, 1899. This decision clearly contemplates the bringing of instrument before Collector to attract Section 31.

13. Again in Mohd. Amir Ahmad Vs. Dy. Commissioner and others, AIR 1956 All 453 a Full Bench of this Court considered the intra-relation and scope of Sections 31, 32 and 33 of Act, 1899. It observed:

"The procedure, in cases to which Sections 31 and 32 apply is that when in instrument is brought before the Collector, he proceeds to give his opinion. After the Collector has given his opinion it is left entirely to the applicant to pay the duty or not . . . . ." (emphasis added)

14. In appeal this matter was taken to Apex Court and the decision of this Court has been affirmed in State of U.P. Vs. Mohd. Amir Ahmad, AIR 1971 SC 787. The Court said that Section 33 does not extend to determination of question as to what the duty payable is. Such function comes within the scope of Section 31, which is complete by itself and ends by saying that "the Collector shall determine the duty with which, in his judgment, the instrument is chargeable, if it is chargeable at all". The Court then said:

"The scheme of the Act shows that where a person is simply seeking the opinion of the Collector as to the proper duty in regard to an instrument, he approaches him under Section 31. If it is not properly stamped and the person executing the document wants to proceed with effectuating the document or using it for the purpose of evidence, he is to make up the duty under Section 32 the Collector will then make an endorsement and the instrument will be treated as if it was duly stamped from the very beginning. But if he does not want to proceed any further than the seeking the determination of the duty payable; then, '-no consequence will

follow, 'and an executed document is-in the same position as instrument which is unexecuted and unstamped and after the determination of the duty the Collector becomes functus officio and the provisions of Section 33 have no application. The provisions of that section are a subsequent stage when something more than mere assessing of the opinion of the Collector is to be done."

15. Learned counsel for the respondents, however, made a reference to a judgment dated 09.05.2007 of this Court passed in Writ Petition No. 21535 of 2006, whereby the writ petition was dismissed challenging an order determining stamp duty payable on an application filed and contended that in that matter also, the document/instrument was not placed before Collector yet this Court declined to interfere and dismissed the writ petition. I have gone through the aforesaid order and finds that this question, whether Section 31 can be attracted if no instrument is brought before Collector at any point of time, was neither raised, nor argued, nor decided and, therefore, aforesaid order does not constitute a precedent deciding an issue which is up for consideration in this case and hence is not binding on this Court. A decision would be binding on the coordinate court if an issue has been raised therein, argued and decided since it is the ratio laid down in the decision which binds a Court and not what actually has been done ultimately by the Court. A case is decided in various ways and many a times under Article 226 of the Constitution, the Court declines to interfere for different reasons since it is a discretionary extraordinary jurisdiction. It is the ratio which binds having the precedential value and not what has actually been done by the Court. I do not find that any exposition of law has been settled in above case that if no instrument is brought before Collector, still he can proceed to determine market value of the property, in one or the other manner, by taking recourse to Section 31 of Act, 1899.

16. Reliance is also placed on a recent decision of Apex Court in Raymond Ltd. and another Vs. State of Chhattisgarh and others, 2007(3) SCC 79. Referring to para 13 thereof that on mere application filed by a person the Collector is competent to determine stamp duty, payable, even if no instrument is placed before him, an attempt was made to read para 13 of the judgment as if Section 31 of Act, 1899 provides power to Collector to determine duty with which the instrument would be chargeable only if an application in this behalf is made. The phrase "application in this behalf made" is stressed to argue that the Apex Court has read Section 31 in the manner as if the Collector would be justified in determining stamp duty payable even if no instrument in whatever manner is brought before him.

17. From a careful reading of the judgment, however, I find that this argument is totally fallacious and even otherwise is incorrect. From the facts stated in initial part of the judgment, i.e., paras 2 and 3, it is evident that alongwith application instrument was also available before Collector. Thus there was no dispute on this aspect. The application was filed by appellant-company with a view to pre-assess the stamp duty payable on the instrument on sale and the impact thereof. The Collector constituted a valuation committee who assessed property and submitted report. Thereafter

the Collector passed an order determining stamp duty chargeable on the instrument under Section 31 of Act, 1899. Para 3 of the judgment makes it clear that the said order was accepted by appellant, M/s Raymond Ltd. and the amount of stamp duty and registration charges were deposited, whereupon Collector made an endorsement on 16.01.2001, on the deed of conveyance, by way of a certificate, in terms of Section 31, whereupon the instrument was duly stamped. Therefore, a deed of conveyance/instrument was already available before Collector on which he made assessment and passed order though it was not executed at that time but executed subsequently on 19.01.2001 and was registered on 21.01.2001. Therefore, it is factually incorrect on the part of petitioner, in the present case, that the aforesaid decision has interpreted Section 31 as if determination of stamp duty can be made by Collector even if no instrument is brought before him and only an application is filed. Moreover, in para 13 also the Court further said:

"13. . . . .The power to determine the amount of stamp duty chargeable for the instrument is, thus, contained in Section 31. . . . . "

18. In para 18 of the judgment the Court further said:

"18. Section 31 of the Act contemplates two situations viz. where the Collector determines that the instrument brought before him was already fully stamped or an additional amount of stamp duty is required to be paid. The question of issuance of a certificate by way of an endorsement in either of the cases would arise when the additional stamp duty, if any, is paid." (emphasis added)

19. It is then argued that, Section 31(1) if read as if the instrument in its entirety must be brought before Collector then sub-section (2), as such, would render superfluous and redundant which permits the Collector to be furnished with an "abstract of instrument". It is contended that under sub-section (2) the Collector may require applicant to furnish with an abstract of instrument, meaning thereby, when an application is filed it is open to applicant not to place any instrument before Collector and simply require his opinion with regard to stamp duty chargeable on an instrument which has yet to see light of the day.

20. In my view, this argument is nothing but a gross misinterpretation of scheme of statute. Sub-section (1) is applicable only when an applicant brings an instrument before Collector irrespective of the fact, whether the instrument is executed or not but the bringing of instrument before Collector is a condition precedent. However, sub-section (2) may come into picture when an instrument formally has not been drafted and an application is filed seeking opinion of Collector about the chargeability of stamp but in such a case an abstract of instrument has to be placed containing all the fact and circumstances which may affect the chargeability of instrument with duty.

21. It cannot be doubted that stipulations and conditions settled in instrument are relevant for determining the chargeability of stamp duty on an instrument. The mere location of land and the fact that somebody wants to sale or purchase the said land, is not sufficient.

22. In the present case, neither any instrument was brought before Collector

so as to attract sub-section (1) of Section 31 nor at any point of time any abstract of instrument was placed before him. Therefore, in my view, here is not a case where Section 31 could have been invoked.

23. Since in the present case no such instrument was ever placed before authority concerned, in my view, exercise of power by ADM (F&R) by passing impugned order without having any instrument before him, is patently illegal and without jurisdiction.

24. In the result, the writ petition is allowed. The impugned order dated 25.02.2012 is hereby quashed.

25. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2013

BEFORE
THE HON'BLE RAM SURAT RAM (MAURYA), J.

Civil Misc. Writ Petition No.46506 of 2013

Raj Nath Dubey & Anr... .Petitioners
Versus
D.D.C. Allahabad & Ors.... Respondents

Counsel for the Petitioners:
Sri A.C. Pandey, Sri Rajeev Mishra

Counsel for the Respondents:
C.S.C., Sri A.K. Mishra, Sri Vrindaban Mishra

C.P.C.-Section 11-Principle of 'resjudicata'-earlier decision about facts regarding illegitimate son being finding of fact-barred by resjudicata-but even being illegitimate son of Kanhai-who died issuless-having illegitimate relation with mother of petitioner-entitled to succeed-not barred by resjudicata-order of consolidation authorities modified accordingly.

Held: Para-22
In view of the aforesaid discussions, the writ petition succeeds and is allowed. It is held that the findings in the previous judgments that Kanhai was 'Brahmin' (Hindu) by caste and died unmarried; The petitioners failed to prove that Smt. Jhulari was the wife of Kanhai and they were sons of Smt. Jhulari and Kanhai; Jagannath, Amar Nath and Raj Nath were born to Smt. Ram Pyari, who was widow of Ram Nath, due to her illegitimate relation with Kanhai, are the findings on issues relating to the facts and operate as res-judicata. However, the findings that children born to Smt. Ram Pyari, due to her union with Kanhai were illegitimate children and not entitled to inherit Kanhai are findings on the legal issues and the previous judgments in this respect would not operate as res-judicata, in the subsequent proceedings, in respect of other properties.

Case Law discussed:
AIR 1971 SC 2355; AIR 1966 All 84 (FB); (2011) 2 SCC 705; 1969 RD 10; 1967 RD 101; 1971 RD 48; (2013) 5 SCC 252; (2003) 1 SCC 730; (2010) 11 SCC 483; 1967 RD 101; 1971 RD 48; (2009) 9 SCC 757; AIR 1953 SC 65; AIR 1966 SC 1061; (2013) 5 SCC 252; AIR 1971 SC 2355; (2005) 12 SCC 1; AIR 2006 SC 2965; (1991) 2 AC 93; AIR 1981 SC 178; (1997) 2 SCC 53; AIR 1960 SC 971; AIR 1992 SC 756; (2010) 9 SCC 209; AIR 1965 SC 1970.

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri Rajeev Mishra and Sri A.C. Pandey, for the petitioners and Sri A.K. Mishra, Senior Advocate, assisted by Sri Vindraban Mishra, for the contesting respondents (hereinafter referred to as the respondents). There is no factual controversy, at this stage, as such the counsel for the respondents proposes not to file any Counter

Affidavit. With the consent of the parties the arguments were heard at the admission stage and the writ petition is being decided finally.

2. The writ petition has been filed against the orders of Consolidation Officer (respondent-3) dated 01.12.2012, Settlement Officer Consolidation (respondent-2) dated 06.03.2013 and Deputy Director of Consolidation (respondent-1) dated 23.05.2013, passed in title proceedings, under U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as "the Act").

3. The dispute relates to the land of khatas 1, 3, 4 and 5 of village Sarai Aziz, talluka Harikishun, tahsil Phoolpur, district Allahabad, which were recorded in the names of the respondents, in basic consolidation record. The consolidation was started in the year 2000, in the village. Raj Nath Dubey (petitioner-1) filed an objection (registered as Case No. 18/19) for recording his name over 1/2 share of the disputed land, along with the respondents. It has been stated by the petitioner that the land in dispute was the property of Kishun, who had five sons namely, Bechai, Kanhai, Bindra, Pancham and Sheetal. Bindra, Pancham and Sheetal died issueless and the properties of Kishun was inherited by Bechai and Kanhai alone. The respondents are sons/grandsons of Bechai and the petitioners are sons of Kanhai as such they have 1/2 share in the land in dispute. Assistant Consolidation Officer, by order dated 22.02.2001, referred the dispute to the Consolidation Officer for decision on merits. Later on, Amar Nath Dubey (petitioner-2) filed an application dated 03.03.2001, alleging therein that his father Kanhai had three sons namely Jagannath, Amar Nath and Raj Nath, who jointly inherited Kanhai. He had also filed an objection in respect of the disputed land, before Assistant Consolidation Officer but the same was misplaced as such he may be impleaded as an objector in the objection of Raj Nath Dubey. The impleadment application moved by Amar Nath Dubey was allowed.

4. The respondents contested the objection on the grounds that Kanhai son of Kishun was unmarried and died issueless. His share in the land in dispute was inherited by them, who are sons/grand sons of Bechai, his brother. The petitioners were not the sons of Kanhai. They earlier filed an objection during consolidation, in respect of the land of village Chak Nuruddinpur alias Nagdilpur, pargana Sikandara, district Allahabad, in which it has been held that Jagannath, Amar Nath and Raj Nath were born to Smt. Ram Pyari due to her illegitimate relations with Kanhai and they being illegitimate sons, not entitled to inherit Kanhai. It was also held that the respondents were the heirs of Kanhai. The judgments of consolidation authorities in the previous proceedings operate as res-judicata between the parties and the objection of the petitioners was liable to be dismissed on this ground alone. On the basis of the pleadings of the parties, the Consolidation Officer, framed issues on 30.04.2005. Issue No. 3 was framed as to Whether the objection of the petitioners, claiming share of Kanhai, alleging themselves as his sons, is barred by res-judicata?

5. On the application of the respondents, the Consolidation Officer decided Issue No. 3 as a preliminary issue. The Consolidation Officer, by order

dated 01.12.2012, held that in the previous objection filed in the year 1966, in respect of the land of village Chak Nuruddinpur alias Nagdilpur, pargana Sikandara, district Allahabad, between the same parties, the Consolidation Officer held that Jagannath, Amar Nath and Raj Nath were illegitimate sons of Kanhai and were not entitled to inherit his share as Kanhai was 'Brahmin' Hindu and this judgment has become final from the stage of revision as such judgments in previous proceeding operate as res-judicata. The claim of the petitioners as an heirs of Kanhai has already been decided against them in previous proceeding as such their fresh claim in respect of the property of another village on the same ground between the same parties was not maintainable. On these findings, Issue no. 3 was decided against the petitioners and the objection was dismissed, by order dated 01.12.2012.

6. The petitioners filed an appeal (registered as Appeal No. 1697) from the aforesaid order. The appeal was heard by Settlement Officer Consolidation (respondent-2), who by his order dated 06.03.2013 held that in previous Case No. 1716, relating to the land of village Chak Nuruddinpur alias Nagdilpur, pargana Sikandara, district Allahabad, the Consolidation Officer by order dated 28.11.1965 held that Kanhai was un-married. Jagannath, Amar Nath and Raj Nath were born to Smt. Ram Pyari due to her illegitimate relation with Kanhai and they are not heirs of Kanhai. The appeal filed by Jagannath and others was dismissed by order dated 01.08.1966 and the revision was also dismissed by order dated 29.12.1966. In the present proceeding, the petitioners are again claiming themselves as the sons of Kanhai as such their claim is barred on the principles of res-judicata. On these findings the appeal was dismissed.

7. The petitioners filed a revision (registered as Revision No. 1056) from the aforesaid order. The Deputy Director of Consolidation (respondent-1), by order dated 23.05.2013, held that in the previous proceeding, the petitioners were not found as the sons of Kanhai and their claim for inheritance of the share of Kanhai, in the land of village Chak Nuruddinpur has not been accepted. The previous judgments are binding upon the parties and operate as res-judicata. On these findings, the revision was dismissed. Hence this writ petition has been filed.

8. The counsel for the petitioners submitted that findings of the consolidation authorities in the judgments in previous proceeding on the issues of facts alone operate as res-judicata. However, the findings that children born to Smt. Ram Pyari, due to her union with Kanhai were illegitimate children and an illegitimate son of a 'Brahmin' was not entitled to inherit the properties of his father are findings on the legal issues. The previous judgments in this respect is illegal as such the judgments in this respect will not operate as res-judicata in respect of other properties. The rule of res-judicata is a rule of procedure and cannot supersede the law of the land as held by the Supreme Court in Mathura Prasad Sarjoo Jaiswal Vs. Dossibai N. B. Jeejeebhai, AIR 1971 SC 2355. Kanhai was unmarried as such the children born to Smt. Ram Pyari, after her becoming widow, with the union of Kanhai, were the children of Kanhai under the Hindu law. Judgements of the consolidation

authorities in previous proceedings, holding Jagannath, Amar Nath and Raj Nath as the illegitimate sons of Kanhai are illegal. In any case, Kanhai left behind him neither his widow, nor any issue as such their claim for inheritence of Kanhai has priority over the brother's sons. He further submitted that the word "son" occurring under Section 171 of U.P. Act No. 1 of 1951 will include illegitimate son also. The exclusion of illegitimate son from inheritance under Section 171 of U.P. Act No. 1 of 1951 will not be automatically inferred, in the absence of statutory exception. Full Bench of this Court in Raj Narain Saxena Vs. Bhim, AIR 1966 All 84 (FB), which has been approved by Supreme Court in Rajendra Prasad Gupta Vs. Prakash Chandra Mishra, (2011) 2 SCC 705, held that exclusion clause must be specific under the statute. He further submitted that right of inheritance in tenancy holdings of an illegitimate son of 'Shudra' (Hindu) has been recognized through out, by this Court, as held in Tej Pal Vs. Roop Chand, 1969 RD 10. There is no basis to carve out a separate class of illegitimate son of 'Shudra' (Hindu) and illegitimate son of 'Brahmin' (Hindu). As Kanhai died after enforcement of the Constitution as such classification based on caste without any object is arbitrary and violative of Article 14 of the Constitution. The orders of respondents-1, 2 and 3 are illegal and liable to be set aside.

9. In reply to the aforesaid arguments, the counsel for the respondents submitted that doctrine of res-judicata is applicable in consolidation proceedings also as held by this Court in Smt. Kanizan Vs. Ghulam Nabi, 1967 RD 101, Sukhbir Singh Vs. Khacheru 1971 RD 48. Supreme Court in Kalinga Mining Corporation Vs. Union of India, (2013) 5 SCC 252 held that principles of res-judicata is applicable in respect of issue relating to the facts and law both. In the previous judgments between the same parties, it has been held that Jagannath, Amar Nath and Raj Nath were illegitimate sons of Kanhai and being illegitimate sons, they would not inherit, Kanhai who was Brahmin (Hindu). Subsequent objection of the petitioners on the same ground is barred by res-judicata. He submitted that Constitutional Bench of Supreme Court in Gulraj Singh Vs. Mota Singh, AIR 1965 SC 605 held that "child", "son" and "daughter" occurring in the Hindu Succession Act, 1956 would include only legitimate children i.e. born in wedlock of legitimate relation of husband and wife. There was no custom of remarriage of 'Brahmin' (Hindu) widow as such it has been rightly held in the previous proceedings that remarriage of Smt. Ram Pyari to Kanhai was not possible under the law nor it was proved. The children born to Smt. Ram Pyari after her becoming widow due to illegitimate relation with Kanhai were illegitimate children. Division Bench of this Court in Meghu Vs. DDC and others, 1971 RD 44 (DB) held that right of inheritance of an illegitimate son of 'Shudra' is confined to the self acquired properties of his father. Supreme Court in Jinia Keotin Vs. Kumar Sitaram Manjhi, (2003) 1 SCC 730, and Bharatha Matha Vs. R. Vijaya Renganathan, (2010) 11 SCC 483 held that even under Section 16 of the Hindu Marriage Act, 1955, children born of void marriage were entitled to inherit the self acquired property of their father. In the present case, admittedly the land in dispute is coming from the time of Kishun, father of Bechai and Kanhai and not the self acquired property of Kanhai.

The judgements of consolidation authorities do not suffer from any illegality and no interference is required by this Court.

10. I have considered the arguments of the counsel for the parties and examined the record. Although Section 11 C.P.C. is not applicable to the proceedings under the Act but principle of res-judicata, constructive res-judicata and estoppel are applicable to the proceedings under the Act as held by this Court in Smt. Kanizan Vs. Ghulam Nabi, 1967 RD 101 and Sukhbir Singh Vs. Khacheru Singh, 1971 RD 48. Supreme Court in Gangai Vinayagar Temple v. Meenakashi Ammal, (2009) 9 SCC 757, held that res judicata is an ancient doctrine of universal application and permeates every civilised system of jurisprudence. This doctrine encapsulates the basic principles in all judicial systems which provide that an earlier adjudication is conclusive on the same subject-matter between the same parties. The principles of res judicata reflect "a wisdom that is for all time". Privy Council in Sheoparsan Singh v. Ramnandan Singh, 43 Indian Appeal 91, traced the principle of res judicata from the old Hindu text of Katyayana. Res judicata was also expounded in Greek custom and also by the Roman jurists. The maxims: res judicata pro veritate accipitur (a thing adjudicated is received as the truth); The maxims: "si judicio tecum actum fuerit sive in rem sive in personam, nihilominus ob id actio durat, et ideo ipso jure posteo de eadem re adversus te agi potest: sed debes per exceptionem adjurari": if a defendant omits, either intentionally or negligently, to raise a question of res judicata by an exception, no such question will be submitted whereas, if such a question is properly raised, it must be considered whether the issue has been rendered res judicata pro veritate accipitur. The principle of res-judicata is founded upon the maxims "1. nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause;2. interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and 3. res judicata pro veritate accipitur: a judicial decision must be accepted as correct. Thus the principle of res-judicata is applicable to the consolidation proceedings.

11. The counsel for the petitioner submitted that the previous judgment is erroneous on the question of law as such so far as issue relating to law, it will not operate as res-judicata in the subsequent proceeding, for different property. While the counsel for the respondents submitted that principles of res-judicata will apply in even in case of an erroneous judgment on the question of law. In order to appreciate the controversy in this respect Section 11 C.P.C. are quoted below:

Section 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.

12. In order to operate a judgment of previous suit as res-judicata, the judgment must be of a Court of competent jurisdiction and has been heard and finally

decided by such Court. Section 44 of the Evidence Act, 1872, permits a party to the suit to show that the previous judgment was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. If a party is able to prove that the previous judgment was not delivered by a Court competent to deliver it or was obtained by fraud or collusion, then bar of res-judicata will not apply.

13. So far as a judgment erroneous on the issue of law is concerned, Supreme Court in Mohanlal Goenka Vs. Benoy Krishna Mukherjee, AIR 1953 SC 65, held that at the various stages through which the execution proceedings passed from time to time will show that neither at the time when the execution application was made and a notice served upon the judgment-debtor, nor in the applications for setting aside the two sales made by him did the judgment-debtor raise any objection to execution being proceeded with on the ground that the execution court had no jurisdiction to execute the decree. The failure to raise such an objection which went to the root of the matter precludes him from raising the plea of jurisdiction on the principle of constructive res judicata after the property has been sold to the auction-purchaser who has entered into possession. There is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it. Thus in this case the correctness of the decision in the previous execution case between the parties was challenged in a subsequent suit on the ground that the matter was not within the competence of the executing court. Supreme Court found that as this objection was not raised by the judgment debtor as such erroneous judgment of the executing court is binding on the parties. Supreme Court again in State of W.B. v. Hemant Kumar Bhattacharjee, AIR 1966 SC 1061, held that a wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. The same principle has again been propounded in Kalinga Mining Corporation Vs. Union of India, (2013) 5 SCC 252.

14. The question as to whether the erroneous judgment on the point of law between the parties operates as res-judicata in subsequent suit for different property came for consideration before Supreme Court in Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy, AIR 1971 SC 2355 in which Supreme Court held as follows:-

"11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the same parties. But, where the decision is on a question of law i.e. the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11 of the Code of Civil Procedure means the right litigated

between the parties i.e. the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of res judicata, for a rule of procedure cannot supersede the law of the land."

15. This judgment has been again followed in Isabella Johnson (Smt.) Vs. M.A. Susai, AIR 1991 SC 993. Same view has been taken by Supreme Court in Union of India Vs. Pramod Gupta, (2005) 12 SCC 1 and Viswanath Prasad Singh Vs. Rajendra Prasad, AIR 2006 SC 2965. House of Lord in Arnold Vs. National Westminster Bank Plc., (1991) 2 AC 93, noticed the distinction between "cause of action" "estoppel" and "issue estoppel". Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject-matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, prevent the latter from being reopened. Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue. Here also bar is complete to relitigation but its operation can be thwarted under certain circumstances:-

"But there is room for the view that the underlying principles upon which estoppel is based, public policy and justice have greater force in cause of action estoppel, the subject-matter of the two proceedings being identical, than they do in issue estoppel, where the subject-matter is different. Once it is accepted that different considerations apply to issue estoppel, it is hard to perceive any logical distinction between a point which was previously raised and decided and one which might have been but was not. Given that the further material which would have put an entirely different complexion on the point was at the earlier stage unknown to the party and could not by reasonable diligence have been discovered by him, it is hard to see why there should be a different result according to whether he decided not to take the point, thinking it hopeless, or argue it faintly without any real hope of success. In my opinion, your Lordships should affirm it to be the law that there may be an exception to issue estoppel in the special circumstances that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to courts to recognise that in special circumstances

inflexible application of it may have the opposite result.

Next question for consideration is whether the further relevant material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact, or whether what may not entirely inappositely be described as a change in the law may result in, or be an element in special circumstances enabling an issue to be reopened.

Your Lordships should appropriately, in my opinion, regard the matter as entire and approach it from the point of view of principle. If a Judge has made a mistake, perhaps a very egregious mistake, as is said of Walton, J.'s judgment here, and a later judgment of a higher court overrules his decision in another case, do considerations of justice require that the party who suffered from the mistake should be shut out, when the same issue arises in later proceedings with a different subject-matter, from reopening that issue?

I am satisfied, in agreement with both courts below, that the instant case presents special circumstances such as to require the plaintiffs to be permitted to reopen the question of construction decided against them by Walton, J., that being a decision which I regard as plainly wrong."

16. Supreme Court in Mohanlal Goenka, Hemant Kumar Bhattacharjee, and Kalinga Mining Corporation (supra) considered the binding effects of the judgments of previous suit between the parties. These judgments are not an authority in respect of judgment erroneous in law will operate as res-judicata in subsequent suit based upon different cause of action for different property. The judgments in Mathura Prasad Bajoo Jaiswal, Isabella Johnson, Pramod Gupta and Viswanath Prasad Singh (supra) specifically held that previous judgment on the question of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule of res judicata a party affected by the decision will not be precluded from challenging the validity of that order on the ground of res judicata, as the rule of procedure cannot supersede the law of the land. The petitioners in this case state that the previous judgments holding Jagannath, Amar Nath and Raj Nath as an illegitimate sons of Kanhai are erroneous in law as such it will not operate as res-judicata in subsequent proceedings.

17. The findings in the previous judgments that Kanhai was 'Brahmin' (Hindu) by caste and died unmarried; The petitioners failed to prove that Smt. Jhulari was the wife of Kanhai and they were sons of Smt. Jhulari and Kanhai; Jagannath, Amar Nath and Raj Nath were born to Smt. Ram Pyari, who was widow of Ram Nath, due to her illegitimate relation with Kanhai as remarriage of a widow was not permitted in 'Brahmin' (Hindu), are the findings are findings on issues relating to the facts and operate as res-judicata. However, the findings that children born to Smt. Ram Pyari, due to her union with Kanhai were illegitimate children and an illegitimate son of a 'Brahmin' was not entitled to inherit the properties of his father are findings on the legal issues and the judgments in this respect would not operate as res-judicata, in the subsequent proceedings, in respect of other properties.

18. Now the question arise as to whether Jagannath, Amar Nath and Raj Nath, who were born to Smt. Ram Pyari, (who was widow of Ram Nath), due to her union with Kanhai, were the illegitimate sons of Kanhai? Remarriage of a 'Brahmin' widow was not permitted either under Hindu law or under the custom prevalent in the caste. The parties are governed by Mitakshara Law of Benaras School. Sri Ganga Nath Jha, in his book 'Hindu Law In Its Sources' and Maynes in 'Hindu Law & Usage' (Tenth Edition) on the basis of the various text found that under ancient Hindu Law there were thirteen varieties of the sons, which are quoted below:-

VARIETIES OF SONS

(I) AURAS-THE BODY-BORN SON- That born ones own lawfully married wife is the body born son.

(II) PURTIKAPURTAM-THE SON OF THE APPOINTED DAUGHTER- The father, having no son, having made offerings to Agni and Prajapati, shall give away the appointed daughter, after having made the agreement that the son born to her would be his son.

(III) KSHETRAJ- If a son is born of the wife of a man, by another person who has been duly authorized by the husband or elders of the husband is Kshetraj son (soil born son).

(IV) GUDHAJA-THE SECRETLY BORN SON- If a son born in a man's house and it is not known whose son he is-this son secretly born in the house shall belong to him of whose wife he is born.

(V) KANINA-MAIDEN BORN -If the secretly born son is of a maiden- he belongs to his mother's father or to the man who marries her.

(VI) PUNARBHAVA- BORN OF A REMARRIED WOMAN- When a woman having abandoned her husband who is impotent or an outcast takes another husband- such son is called punerbhava and this son belonged to progenitor.

(VII) DUTTAK-ADOPTED- That son whom his mother or father gives away is dattak and belongs to a man to whom he has been given away.

(VIII) KRITA-PURCHASED- If a man buys a boy from his mother and father with a view of making him his son is called krita.

(IX) KRTRIMA-APPOINTED- When a man appoints a son who is worthy, capable of discerning right and wrong and endowed with filial virtues- that son is called as Krtrima.

(X) SVAYAMDATTA-SELF OFFERED- If a boy, being deprived of his parents or being abandoned without cause, offer himself to a man-he is declared to be a self offered son.

(XI) SAHODHA-OBTAINED WITH THE WIFE- The son obtained in the womb is the Sahodhar- If a son is born to a girl married while pregnant- he belongs to the man who espouses the girl.

(XII) APAVIDDHA- CAST -OFF- On being abandoned by his mother or by his father, if the son is taken up by another man, he belongs to this man.

(XIII) PARASHAVA- THE LIVING CORPSE- Parashava is the son born,

through lust to a Brahmana from a Shudra woman- that son is a living corpse.

In paragraph-79 of Maynes in 'Hindu Law & Usage', it has been mentioned that amongst Auras son, the son of the remarried wife and son of the Sudra wife were of course, a man's own actual sons, just like Auras, though of inferior status. In paragraph-88, it has been mentioned that these thirteen varieties of the sons have been broadly categorized as two kinds of sons by Dr. Jolly, namely 'AURAS' (body born son) and DUTTAK (adopted son). Auras, Punarbhava and Parashava are the body born sons while Putrikaputram, Kshetraj, Gudhaj, Kanina, Duttak, Krita, Krtrima, Swayamdutta, Sahodha, Apavidha are adopted sons.

19. Supreme Court in Shyam Sunder Prasad Singh v. State of Bihar, AIR 1981 SC 178 held that "Aurasa" is the son procreated by a man himself on his wife married according to sacramental forms prescribed by sastra. "Putrika-putra" is the son of an appointed daughter. "Kshetraja" is the son begotten on the wife of a person by another person -- sagotra or any other. "Gudhaja" is the son secretly Bom in a man's house when it is not certain who the father is. "Kanina" is the son Bom on an unmarried girl in her fathers house before her marriage. "Paunarbhava" is the son of a twice married woman. "Dattaka" is the son given by his father or mother. "Krita" is the son bought from his father and mother or from either of them. "Kritrima" is the son made (adopted) by a person himself with the consent of the adoptee only. "Svayamdatta" is a person who gives himself to a man as his son. "Sahodhaja" is the son Bom of a woman who was pregnant at the time of her marriage. "Apavidha" is a person who is received by another as his son after he has been abandoned by his parents or either of them. There is one other kind of son called "Nishada" who is the son of a Brahmin by a Sudra who is not referred to in the above quoted text of Yajnavalkya.

21. Supreme Court in K.V. Muthu v. Angamuthu Ammal, (1997) 2 SCC 53 held as follows:-

"Son" as understood in common parlance means a natural son born to a person after marriage. It is the direct blood relationship which is the essence of the term in which "son" is usually understood, emphasis being on legitimacy. In legal parlance, however, "son" has a little wider connotation. It may include not only the natural son but also son's son, namely, the grandchild, and where the personal law permits adoption, it also includes an adopted son.

Section 3(57) of the General Clauses Act defines "son" as under:

" "son' in the case of anyone whose personal law permits adoption, shall include an adopted son."

Relying upon this definition, the Lahore High Court in Divi Ditta, In re AIR 1931 Lahore 661held that where the personal law of the parties permits adoption, the word "son" will include an adopted son. In Adit Narayan Singh v. Mahabir Prasad Tiwari, 48 Indian Appeals 86, the Privy Council held that "sons" in Mitakshara Chapter II 6(1) include a grandson. In the ancient Hindu Law, twelve sons are mentioned by the truth-seeing sages all of whom need not be mentioned here. The attempt only is to indicate that the term "son" itself is a flexible term and may not be limited to

the direct descendant. Its true meaning, like the term "family" discussed above, will depend upon the context in which it is used. Even illegitimate son may be treated as legitimate, as for example, the "son" referred to in Section 16 of the Hindu Marriage Act, as originally enacted.

Coming now to "foster son", it may be pointed out that a "foster son" is a son who is not the real son or direct descendant of a person after his marriage.

In Shorter Oxford Dictionary, "foster son" is defined as "one brought up as a son though not a son by birth". The word "foster", in the same dictionary, is indicated to mean, to supply with food; to nourish, feed, support; to bring up with parental care; to nurse, tend with care, to grow.

"Foster Brother" is a male child nursed at the same breast as, or reared with, another of different parentage. "Foster Father" is described as one who performs the duty of a father to another's child. "Foster Mother" is indicated to mean a woman who nurses and brings up another's child, either as an adoptive mother or as a nurse, while "Foster Sister" means a female child nursed at the same breast as, or reared with, another of different parentage.

These definitions indicate that a "foster child" need not be the real legitimate child of the person who brings him up. He is essentially the child of another person but is nursed, reared and brought up by another person as his own son.

If a child comes to a person or is found by that person as forlorn child or the parents of that child, may be, on account of their poverty or their family circumstances, bring that child to the other person and request him to bring up that child which is accepted by that person and such child is brought up from the infancy as the own son by that person who loves that child as his own, nourishes and brings him up, looks after his education in the school, college or university and bears all the expenses, such child has to be treated as the son of that person particularly if that person holds the child out as his own. Care, therefore, in rearing up the child need not always be parental. It can be even that of a "foster father". In such a situation, the son so brought up would be the "foster son" of that person and since the devotion with which he was brought up, the love and care which he received from that person were like those which that person would have given to his real son, the "foster son" would certainly be a member of the family.

20. The arguments of the counsel for the petitioners that as the illegitimate son is not excluded specially under Section 171 of U.P. Act No. 1 of 1951 as such his exclusion cannot be inferred, is not liable to be accepted. Supreme Court in Vanguard Fire & General Insurance Company Ltd. Vs. Fraser & Rose, AIR 1960 SC 971 held that when a word is defined to mean such and such, the definition is prima facie restrictive and not exhaustive. Under Section 171 of U.P. Act No. 1 of 1951, the word "son" has been used. The son is a restrictive heir. The case law of Raj Narain Saxena (supra) relied upon by the counsel for the petitioners related to the procedural law and has no application in substantive law.

21. Kanhai was unmarried and issueless and had no son of the varieties of

the sons from (I) to (XII) above. As such Jagannath, Amar Nath and Raj Nath who were born to Smt. Ram Pyari, after her becoming widow comes either in the category of Punerbhava or Parasava and were his body born sons. Supreme Court in S P S Balasubramariyam Vs. Suruttayan, AIR 1992 SC 756, Challamma Vs. Tilaga, (2009) 9 SCC 299 and Madan Mohan Singh Vs. Rajni Kant, (2010) 9 SCC 209 held that living in relation for long time and giving birth to a child, raise a presumption of marriage. The Hindu Widow's Remarriage Act, 1856 has come in to force as such Smt. Ram Pyari, being a widow was not disable to remarry. In the absence of widow and Auras son of Kanhai, Jagannath, Amar Nath and Raj Nath are entitled to inherit Kanhai. Supreme Court in Amireddi Raja Gopala Rao v. Amireddi Sitharamamma, AIR 1965 SC 1970 held that a concubine was not disqualified from claiming maintenance by reason of the fact that she was a Brahmin. The claim of a concubine who was a respectable woman of the Brahmin caste and her illegitimate sons for maintenance was allowed. No doubt, a Pratiloma connection is denounced by the Smriti-writers and the Commentators, and before the Hindu Marriages Validity Act, 1949 (Act 21 of 1949) Pratiloma marriages between a Sudra male and a Brahmin female were declared invalid but even those cases recognise that a Brahmin concubine in the exclusive and continuous keeping of a Sudra until his death was entitled to claim maintenance.

In this case, if Smt. Ram Pyari was a Brahmin, then she belongs to same caste and in other case, there was Anuloma connection and not pratiloma.

22. In view of the aforesaid discussions, the writ petition succeeds and is allowed. It is held that the findings in the previous judgments that Kanhai was 'Brahmin' (Hindu) by caste and died unmarried; The petitioners failed to prove that Smt. Jhulari was the wife of Kanhai and they were sons of Smt. Jhulari and Kanhai; Jagannath, Amar Nath and Raj Nath were born to Smt. Ram Pyari, who was widow of Ram Nath, due to her illegitimate relation with Kanhai, are the findings on issues relating to the facts and operate as res-judicata. However, the findings that children born to Smt. Ram Pyari, due to her union with Kanhai were illegitimate children and not entitled to inherit Kanhai are findings on the legal issues and the previous judgments in this respect would not operate as res-judicata, in the subsequent proceedings, in respect of other properties. The impugned orders of Consolidation Officer (respondent-3) dated 01.12.2012, Settlement Officer Consolidation (respondent-2) dated 06.03.2013 and Deputy Director of Consolidation (respondent-1) dated 23.05.2013 are modified accordingly. The Consolidation Officer (respondent-3) is directed to conclude trial on other issues and pass final order after allowing the parties to lead their evidence.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No.59939 of 2013

Ram Deen..... Petitioner
Versus
Commissioner Gorakhpur & Ors..... ...Respondents

Counsel for the Petitioner:
Sri R.C. Maurya

Counsel for the Respondents:
C.S.C.

U.P. Land Revenue Act 1901 Section 201-readwith U.P. Land Laws Amendment Act No. 10 of 1961-Section-3-Power of restoration-can be exercised by the same court-who decided case ex-parte-order passed by Naib Tehsildar-restoration allowed by Tehsildar-can not be justified unless power under section 192 invoked.

Held: Para-13

In the instant case the issue was the entertaining of the restoration application by the Tehsildar and passing an order on the same which otherwise was maintainable before the Naib Tehsildar himself. As noticed and held hereinabove, the restoration was to be considered and decided by the Naib Tehsildar except where Section 192 of the 1901 Act was invoked.

(Delivered by Hon'bleAmreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioner and Sri Rajesh Kumar learned Standing Counsel.

2. Section 201 of the U.P. Land Revenue Act, 1901 provides for filing of a restoration application, if an ex-parte order has been passed against a person arrayed in the proceedings. No appeal or revision will lie against such an order which is alleged to be ex-parte and therefore the only remedy is to file a restoration application.

3. In the instant case, the Naib Tehsildar had passed an order whereas the restoration has been allowed by the Tehsildar. It is this part of the procedure which was questioned by the respondent in a revision which has been allowed by the learned Commissioner directing that the restoration shall be decided by the Naib Tehsildar.

4. Section 224 of the U.P. Land Revenue Act, 1901 is the charging section under which the State Government confers the powers on the Tehsildars and Naib Tehsildars. Section 231 of the U.P. Land Revenue Act, 1901 provides that the powers of a subordinate authority can be exercised by a superior authority. The Tehsildar is admittedly a superior officer to the Naib Tehsildar.

5. It is also to be noted that the powers that are to be exercised by the Tehsildar can also be exercised by the Naib Tehsildar on account of a conferment by virtue of Section 3 of the U.P. Land Laws Amendment Act No. 10 of 1961. Not only this the said amendment was brought about with retrospective effect and a validating clause was also added in order to ensure that any action taken by the Naib Tehsildar exercising the power of the Tehsildar be saved. It is thus clear that that the powers that are exercisable by the Tehsildar can also be exercised by the Naib Tehsildar and the converse is also true.

6. In the instant case the observation made in the impugned order is that the Board of Revenue has ruled that a restoration application will be entertained by the same court which had passed the orders and not by any other court.

7. A perusal of Section 201 would indicate that a rehearing can be conducted on proof of good cause of non-appearance, and the party moving the application satisfies the officer making the order that there has been failure of justice. Such an officer may upon such terms as he thinks fit may revive the case.

8. It is thus clear that the words used by the Legislature in Section 201 are categorical that the restoration application has to be filed before the same presiding officer who had passed the order. The

words are not the same court but the same presiding officer. The presiding officer would naturally mean the persona designata functioning and not the officer by name. This has to be clarified that on account of the fact that the presiding officers of a particular court keep on changing either due to retirement or otherwise any vacancy arising. Thus the Naib Tehsildar of the court that passed the orders in the present case will be presumed to be the presiding officer entitled to entertain the restoration application.

9. Learned counsel for the petitioner submits that the said court was vacant when the restoration application was filed and even when the order came to be passed by the Tehsildar. The submission therefore appears to be that the Tehsildar otherwise had jurisdiction to entertain the restoration application in the absence of the Naib Tehsildar.

10. Section 192 of the U.P. Land Revenue Act, 1901 confers a power to transfer cases to and from subordinates. There is nothing on record to indicate that the case had been actually transferred by invoking the powers under Section 192 to the court of the Tehsildar who passed the order. There is nothing on record to indicate in the order of the Tehsildar that these orders were being passed on account of the court of the Naib Tehsildar being vacant.

11. In such circumstances, the arguments advanced on behalf of the learned counsel for the petitioner cannot be accepted as Section 201 is categorical and therefore the conclusion drawn by the learned Commissioner that the restoration application had to be entertained by the same presiding officer does not suffer from any infirmity.

12. So far as the question of maintainability of the revision is concerned this aspect has already been considered in the order passed by this court on 7.11.2013. The Khatauni which has been filed alongwith the supplementary affidavit indicates the existence of the name of Abha Devi. Learned counsel for the petitioner disputes the capacity of Abha Devi and her rights on certain grounds. This by itself will not make the revision not maintainable or not entertainable. A revision can be filed provided a material irregularity is found particularly with regard to the jurisdiction of the officer to entertain an application. Abha Devi being mentioned and recorded in the Khatauni had a basis for filing the revision. The merits of her claim are a different aspect.

13. In the instant case the issue was the entertaining of the restoration application by the Tehsildar and passing an order on the same which otherwise was maintainable before the Naib Tehsildar himself. As noticed and held hereinabove, the restoration was to be considered and decided by the Naib Tehsildar except where Section 192 of the 1901 Act was invoked.

14. So far as the issue of the vacancy of the court is concerned that can be looked into by the competent authority and in the event the court of the Naib Tehsildar is vacant it is still open to the higher authority to invoke its power under Section 192 and then proceed to pass an appropriate order if the Naib Tehsildar is not available. In the circumstances, there is no occasion for this court to interfere with the impugned orders.

15. The writ petition is dismissed with a direction that the restoration application may be disposed of as expeditiously as possible preferably within a period of six months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 11.12.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 64953 of 2013

Mahipat Singh... Petitioner
Versus
State of U.P. and Ors... Respondents

Counsel for the Petitioner:
Sri Ramesh Chandra Dwivedi

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Right to protection of life-petitioner's brother murdered-petitioner also residing in same village-applied for five arms license-rejected on ground-name of such person having danger to life not disclosed-appeal also got same fate-writ court earlier quashed both order with specific direction-again on same ground application rejected-amounts to contempt-can not be relegated to approach before appellate authority-order quashed with cost of Rs. 20,000/-.

Held: Para-6
In the instant case, the District Magistrate has mechanically, without any application of mind and without considering the observations of the writ court has again passed an order rejecting the petitioner's application for grant of an arms licence solely on the ground that there was no perception of threat to the life of the petitioner. Such reasoning adopted by the respondent is patently erroneous and against the provisions of Section 14 of the Arms Act. Even otherwise, the court finds that sufficient reasons have come on record to indicate the fear of the petitioner of his life where his real brother was murdered by some assailants, and that, by itself, is a sufficient ground. It is not necessary that the petitioner should intimate the District Magistrate the name of the persons against whom he has a threat. It is sufficient for the petitioner to indicate the reasons.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner's brother was murdered in the village where the petitioner was also residing. The petitioner feared for his life and with this unfounded fear that he may also be murdered by unknown assailants and in order to protect his life which is a fundamental right under Article 21 of the Constitution, applied for an arms licence under the Arms Act, 1959.

2. The fact that his brother died is admitted by the respondents. The fact that for this purpose the petitioner had applied is also admitted but due to short-sightedness, the District Magistrate refused to grant a licence and rejected his application on the ground that there was no threat to his life. The petitioner filed an appeal which was also rejected and consequently, the petitioner filed Writ Petition No. 58060 of 2011 which was allowed by a judgement dated 11.10.2011. The writ court quashed the order of the District Magistrate and the appellate order and directed the District Magistrate to re-decide the matter in accordance with the observations made in the judgement. For facility the extract of the judgement is quoted hereunder :-

"7. This Court in Pawan Kumar Jha Vs. State of U.P. and others 2010(10)

ADJ 782 has held that undue restriction on keeping and bearing arms ought notbe based on unfounded fear. Licence is normally to be granted unless there is something adverse.

8. A fire arm licence cannot be denied only on conjectures and surmises and without appreciating the objective of statute under which the power is being exercised. Right to life and liberty which includes within its ambit right of security and safety of a person and taking, adopting and pursuing such means as are necessary for such safety and security, is a fundamental right of every person. Keeping a fire arm for the purpose of personal safety and security is a mode and manner of protection of oneself and enjoyment of fundamental right of life and liberty under Article 21 of the Constitution. In the interest of maintenance of law and order certain reasonable restrictions have been imposed on such right but that would not make the fundamental right itself to be dependant on the vagaries of executive authorities. It is not a kind of privilege being granted by Government to individual but only to the extent where grant of fire arm licence to an individual would demonstratively prejudice or adversely affect the maintenance of law and order including peace and tranquillity in the society, ordinarily such right shall not be denied. It is in these circumstances, this Court has observed that grant of fire arm licence ordinarily be an action and denial an exception. In Vinod Kumar Shukla Vs. State of U.P. and others, (Writ Petition No. 38645 of 2011), decided on 15.07.2011 this Court has said:

"When a fire arm licence is granted for personal safety and security it does not mean that in the family consisting of several persons only one fire arm licence is to be granted. Moreover, this cannot be a reason for denial of arm licence. Fire arm licence can be denied only if the reason assigned by applicant or details given by him in application are not found to be correct but merely because there are one fire arm licence already possessed by one of the family member, the same cannot be denied. Grant of fire arm licence should ordinarily be an action and denial should be an exception. The approach of authorities below is clearly arbitrary and illegal. It also lacks purpose and objective of the statute."

9. The authorities empowered to grant licence under the Act ought not to behave as if they are part of the old British sovereignty and the applicant is a pity subject whose every demand deserved to be crushed on one or the other pretext. The requirement of an Indian citizen governed by rule of law under the Indian Constitution deserved to be considered with greater respect and honour. The authorities thus shall have considered the requirement of applicant with more pragmatic and practical approach. Unless they find that in the garb of safety and security, applicant in fact intend to use the weapon by obtaining a licence for a purpose other than self defence, it ought not to have been denied such licence. I am not putting the statutory power of authority concerned in a compartment since there may be more than one reasons for exercising statutory discretion against applicant but then that must justify in the context of purpose and objective of statute and necessarily ought not be whimsical.

10. Both impugned orders in the case in hand shows that on wholly conjectures and surmises the authorities have denied

petitioner's claim for fire arm licence and have rejected his application in a most arbitrary manner. The two orders, therefore, cannot sustain."

3. The court held that a licence can be granted for right to life and liberty which includes within its ambit right of security and safety of a person being a fundamental right. The petitioner was entitled to get a fire arms for the purpose of personal safety and security. The court also held that the orders passed by the District Magistrate was based on surmises and conjectures.

4. Inspite of this direction, the District Magistrate again rejected the application vide an order dated 6.1.2012 holding that the petitioner does not have any threat to his life. The petitioner being aggrieved, filed an appeal which was allowed and the matter was remanded. The District Magistrate again by the impugned order dated 29.8.2013 has passed an order mechanically on the same ground namely that there is no threat of the life. The petitioner being aggrieved has now filed the present writ petition.

5. This court entertained the writ petition and did not relegate the petitioner to file an appeal as the court was of the opinion that the petitioner was unnecessarily being harassed and was being made to run from one authority to the other. The court finds that the observations made by the writ court in its judgment dated 11.10.2011 has not been adhered to by the District Magistrate. The District Magistrate was bound by such observations and could not ignore such observations. By ignoring such observations the District Magistrate became guilty of contempt of the court.

6. In the instant case, the District Magistrate has mechanically, without any application of mind and without considering the observations of the writ court has again passed an order rejecting the petitioner's application for grant of an arms licence solely on the ground that there was no perception of threat to the life of the petitioner. Such reasoning adopted by the respondent is patently erroneous and against the provisions of Section 14 of the Arms Act. Even otherwise, the court finds that sufficient reasons have come on record to indicate the fear of the petitioner of his life where his real brother was murdered by some assailants, and that, by itself, is a sufficient ground. It is not necessary that the petitioner should intimate the District Magistrate the name of the persons against whom he has a threat. It is sufficient for the petitioner to indicate the reasons.

7. In the light of the aforesaid, the impugned order is quashed. Writ petition is allowed on payment of cost of Rs. 20,000/- which the District Magistrate will pay to the petitioner within two weeks from the date of production of a certified copy of the order. The matter is remitted to the District Magistrate to re-decide the petitioner's application in the light of the observations made in the judgment dated 11.10.2012 and the observations made in this judgment within four weeks.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 66759 of 2013

Chandra Boss... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Yogendra Sahai Saxena

Counsel for the Respondents:
C.S.C.

U.P. Govt. Servant(Discipline and Appeal) Rules, 1999-Rule 4(i)- Suspension-without application of own independent mind-at behest of minister-mandatory requirement under Rule 4(i)-completely goby authority totally surrender its statutory function-at command of minister-not entitled to remain on said posts-which requiring independent decision-order quashed-with cost of Rs. 25000/-.

Held: Para-15
In the present case, respondent no.1 has admitted this fact that he did not apply his mind to any one or the other aspect and simply towed the line as drawn by Minister concerned i.e. he surrendered to the command of Minister and simply complied the same without any application of mind on his part. The mandatory requirement of Rule 4 of Rules, 1999 has completely been given a go bye by respondent no.1, before passing impugned order of suspension. In the present case, Minister obviously was not competent to place petitioner under suspension. His direction could have been taken into consideration but the law nowhere give it status of a statutory command with which respondent no.1 was under an obligation to follow. On the contrary respondent no.1 himself was under an obligation to apply his own mind looking into the entire facts and circumstances, to find out whether requisites of statute justify an order of suspension. Unfortunately, that has not been done, as admitted by respondent no.1 himself that he has not looked into all these aspects while passing impugned order of suspension.

Case Law discussed:
2006(3) ESC 1755; 2004(3) UPLBEC 2934; 2003(1) UPLBEC 780(S.C.).

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

1. With the consent of learned counsel for the parties, I have proceeded to decide the writ petition finally under the Rules of the Court on the basis of record available with this Court i.e. writ petition and affidavit of respondent no.1.

2. This writ petition is directed against order of suspension dated 27.8.2013 passed by Director General, Vikas Dal Evam Yuva Kalyan, U.P. at Lucknow, respondent no.1.

3. Sri Y.S.Saxena, learned counsel for the petitioner contended that the impugned order has been passed without any application of mind in a most arbitrary and illegal manner, inasmuch as, the immediate superior officers of petitioner did not relieve him to participate in the meeting convened by respondent at Lucknow on the ground that there was an official function at Badaun, which was to be presided by Chief Minister himself and petitioner was assigned duty in the said official programme at Badaun and this fact was also reported by immediate superior officers to the respondent no.1 yet respondent no.1 has taken absence of petitioner at Lucknow to be a deliberate, intentional defiance and act of indiscipline, as a result whereof, impugned order of suspension has been passed though petitioner was not at all responsible for such absence as he was already assigned official duty at Badaun by superior officer, who did not relieve him and, therefore, impugned order is patently illegal, showing non application of mind on the part of respondent no.1.

4. Looking to the record, which, prima facie, substantiated the contention advanced on behalf of petitioner, this Court required respondent no.1 vide order dated 6.12.2013 to file an affidavit of his

own to show as to how he found petitioner guilty of any act or omission constituting misconduct when petitioner was not relieved by superior officer.

5. Pursuant to the said order of this Court dated 6.12.2013 Sri Ram Singh, holding the office of Director General, Vikas Dal Evam Yuva Kalyan, U.P. Lucknow has filed affidavit sworn on 17.12.2013. In para 6 thereof, he has categorically stated that order of suspension was passed by him at the dictates of concerned Minister, who took petitioner's absence as a serious act of misconduct showing dereliction of duty, indiscipline, defiance and disobedience of orders of higher authorities and negligence and lack of devotion in discharge of official duties. Since Minister concerned has directed respondent no.1 to suspend petitioner, therefore, he (petitioner) was placed under suspension. In para 8, respondent no.1 has again categorically said that he has simply complied with orders of Hon'ble Minister. Since power of suspension is vested in him, and, therefore, he has passed the order but it is nothing but mere compliance orders of Hon'ble Minister, who presided the meeting held on 26.8.2013 at Lucknow. He has further stated that reason for absence of petitioner was not available in the office of respondent no.1 till the date of meeting when substitute of petitioner, who attended the meeting, informed him. He has placed on record, Chief Development Officer, Badaun's letter dated 24.8.2013 giving information that it is not possible to relieve petitioner so as to attend meeting on 26.8.2013 at Lucknow since petitioner has been assigned duty in Laptop distribution programme to be conducted from 20.8.2013 to 27.8.2013 and this letter was received in the office of Director on 3.9.2013.

6. Sri Ram Singh, the officer concerned, when enquired that he being the competent authority to place petitioner under suspension, when received information about reason of petitioner for his absence to participate in the meeting at Lucknow disclosed by his substitute, who came to attend the meeting at Lucknow then what was the occasion to hold petitioner guilty of deliberate defiance in not attending the meeting when he was not relieved by his superior officer, he said that since a direction was issued by the Minister, he was not in a position to take any other view except of mere compliance of the said direction and that is how order of suspension was passed by him and this fact he has stated in his affidavit also.

7. Interestingly, stand taken by respondent no.1 shows two things very clear:

a. The impugned order of suspension has been passed by competent appointing authority but without independent application of mind on his part but it is simply at the dictates of concerned Minister and without looking into the fact whether suspension of petitioner was justified in the facts and circumstances of the case or not.

b. It is also evident that reason of petitioner's absence and his incapability of attending meeting at Lucknow became known to respondent no.1 on 26.8.2013 when meeting took place at Lucknow since petitioner's substitute, who attended the meeting, disclosed reason for petitioner's absence yet Minister

concerned took an arrogant stand and respondent showing meek surrender, forgot statutory requirement of application of his own mind before passing the impugned order of suspension, and acting on the dictates, issued the impugned order of suspension.

8. Apparently, in the above facts, it cannot be doubted that impugned order of suspension cannot sustain. Learned Standing Counsel also find it very difficult to sustain the same by submitting any substantial argument particularly in view of requirement of statute which provides the conditions which are to be considered before an order of suspension is passed by a competent authority.

9. Rule 4(1) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999"), which confers power of suspension upon authority, relevant in this case, reads as under:

"Suspension.-(1) A Government servant against whose conduct an inquiry is contemplated, or is proceeding may be placed under suspension pending the conclusion of the inquiry in the discretion of the appointing authority:

Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty:

Provided further that concerned head of the Department empowered by the Governor by an order in this behalf may place a Government servant or class of Government servants belonging to Group 'A' and 'B' posts under suspension under this rule:

Provided also that in the case of any Government servant or class of Government servants belonging to Group 'C' and "D' posts the appointing authority may delegate its power under this rule to the next lower authority."

10. An order of suspension is not to be passed in a routine manner as a regular course of business and without any application of mind.

11. Though an order of suspension in a contemplated or pending enquiry per se is not a punishment but it cannot be disputed that it visits certain civil consequences upon concerned Government servant. During the period of suspension, he is not paid full salary and allowances. It also cannot be doubted that it attaches civil stigma upon him vis a vis a society in which he lives and persons with whom he interacts. This Court has considered this aspect in Ayodhya Rai and others Vs. State of U.P. and others 2006(3) ESC 1755 wherein the Court held:

"The questions deal with the prolonged agony and mental torture of an employee under suspension where inquiry either has not commended or proceed with snail pace. This is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment but is resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out

whether the allegations are correct or not. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or by prolonging the enquiry is unreasonable and is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in Society. A person under suspension is looked with suspicion in the Society by the persons with whom he meets in his normal discharge of function."

12. A Division Bench of this Court in Gajendra Singh Vs. High Court of Judicature at Allahabad- 2004 (3) UPLBEC 2934 also observed as under:

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

13. Disapproving unreasonable prolonged suspension, the Apex Court has also observed in Public Service Tribunal Bar Association Vs. State of U.P. & others- 2003 (1) UPLBEC 780 (S.C.) as under-

"if a suspension continues for indefinite period or the order of suspension passed is mala fide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution." . . . . (Para 26).

14. The rule framing authority is also aware of all these facts and that is why it has not given an unbridled power of suspension to the Appointing Authority but in the rules, which have now been framed afresh in 1999, it has been specifically provided that appointing authority shall apply its mind to the fact that act or omission constituting misconduct, in respect whereto a departmental enquiry should be held, is of such grave nature that in case charge(s) is/are proved, major penalty upon concerned Government servant can be imposed. Therefore, it is not every act or omission constituting misconduct, which would justify suspension but when charge(s) are so serious so as to result, if prove, in major penalty only then he can be placed under suspension and not otherwise.

15. In the present case, respondent no.1 has admitted this fact that he did not apply his mind to any one or the other aspect and simply towed the line as drawn by Minister concerned i.e. he surrendered to the command of Minister and simply complied the same without any application of mind on his part. The mandatory requirement of Rule 4 of Rules, 1999 has completely been given a go bye by respondent no.1, before passing

impugned order of suspension. In the present case, Minister obviously was not competent to place petitioner under suspension. His direction could have been taken into consideration but the law nowhere give it status of a statutory command with which respondent no.1 was under an obligation to follow. On the contrary respondent no.1 himself was under an obligation to apply his own mind looking into the entire facts and circumstances, to find out whether requisites of statute justify an order of suspension. Unfortunately, that has not been done, as admitted by respondent no.1 himself that he has not looked into all these aspects while passing impugned order of suspension.

16. Then comes the very circumstances in which it is alleged that petitioner has defied orders of Director to attend meeting at Lucknow. Admittedly, District Magistrate and Chief Development Officer at Badaun have assigned certain official duties which were to be performed by petitioner during the period of 20th August, 2013 to 27th August, 2013. The said duties related to official programme of distribution of Laptops and the same programme was to be presided by Chief Minister also. Taking this responsibility upon himself, Chief Development Officer wrote a letter to Director stating that petitioner has not been relieved by him. This reason of petitioner's absence in the meeting held on 26.8.2013 at Lucknow also came to the notice of respondent no.1, as told by petitioner's substitute, who attended the said meeting at Lucknow. This fact is also admitted by respondent no.1 in his affidavit in para 7 where he has said that till petitioner's substitute gave reason for his absence in the meeting, no information was available in his office.

17. If information earlier was not available, admittedly, it came to his notice on 26.8.2013 itself when petitioner's substitute informed him in the course of meeting. If that be so, it was incumbent upon respondent no.1, if he has any doubt, to get it verified from District Level Officers at Badaun but respondent no.1 did not find it necessary for the reason that compliance of Minister's direction, he sought, was his foremost duty, instead of observing rule of law. It is really unfortunate that a senior bureaucrat, part of executive wing in the State Government, instead of taking rule of law as his primary responsibility, thought otherwise and proceeded to worship political boss's command instead of statutory obligation, provided in law. The constitutional scheme read with statutory rules contemplate a serious onerous duty upon respondent no.1 while passing orders which have civil consequences. Law require that authority, when exercising statutory power, shall observe requirement of law stringently, strictly and in the letter of words and spirit, but respondent no.1, instead, prefer to follow the command of political executive, who himself has no role to play in the case in hand. The respondent no.1 forget his own statutory duty and thought it proper to follow political executive's command blindly, unintelligently, mechanically and by surrendering to his own independent statutory obligation.

18. I find it appropriate to notice at this stage that statement of Ram Singh, Director, present in the Court pursuant to this Court's order dated 6.12.2013 that in the meeting held on 26.8.2013, Gopal Ram, Vyayam Prashikshak, who attended the meeting in place of petitioner, was not fully prepared with the facts and figures

so as to give correct information regarding progress in District Badaun and thereupon Minister concerned felt annoyed and decided that officer concerned i.e. petitioner, who has sent Gopal Ram, without proper briefing must be placed under suspension and it is in furtherance thereof and complying the said decision of Minister concerned, impugned order of suspension was passed by him (Sri Ram Singh, Director). This statement fortify what I have already discussed above.

19. When enquired Sri Ram Singh, respondent no.1 said that he has nothing further to say in the matter since what actually has been done by him he has said in his affidavit.

20. In my view, the way and the manner in which Sri Ram Singh, Director has functioned in discharge of his statutory duties, has shown very candidly that at least he is not a person fit to hold such responsible office since he is amenable to surrender his statutory functions to the command of third parties, who have no role in law and also unaware of his own duties and responsibilities as also the manner in which he is supposed to proceed. Such a person therefore, should not be assigned such important office and deserve to be posted in an office where such independent exercise of power is not required to be performed by him. The State Government, therefore, shall look into the matter forthwith and take appropriate action without any further delay and in any case within 15 days from the date of communication of this judgment.

21. Subject to the above directions and also in the context of discussion made above, it cannot be doubted that impugned order of suspension deserve to be quashed.

22. The writ petition is accordingly allowed. The impugned order of suspension dated 27.8.2013 (Annexure 4 to the writ petition) is hereby set aside. The petitioner shall be entitled to all consequential benefits and also a cost, which I quantify to Rs.25,000/-. At the first instance the cost shall be paid to the petitioner by State of U.P. but it shall have liberty to recover the same from the concerned appointing authority who forgot its statutory duty while passing the order impugned in the writ petition, which has been set aside hereat after making such inquiry, as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.12.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 67335 Of 2013

Sheo Murat Yadav & Anr.... Petitioners
Versus
Debts Recovery Appellate Tribunal & Ors..... ...Respondents

Counsel for the Petitioners:
Sri Sanjay Kumar Gupta, Sri Anirudh Pandey

Counsel for the Respondents:
Sri K.M. Asthana, Sri Satish Chaturvedi

Recovery of Debts due to Banks and Financial Institutions Act 1993-Section 22(g)- Recall application petition dismissed in absence of counsel-condition to deposit of 30% of amount-wholly arbitrary, held-onerous-unsustainable-quashed.

Held: Para-9

In the light of the aforesaid, the Court finds that the direction of the Tribunal imposing a predeposit of 30% of the claimed amount, which has not as yet been adjudicated on merits nor any decree has been passed could not be imposed upon the petitioner. Such onerous conditions is contrary to the provisions of Section 22(2)(g) of the Act of 1993. Such onerous conditions is wholly arbitrary and harshly excessive quite apart from being unreasonable and, therefore, the impugned order cannot be sustained.

Case Law discussed:

AIR 1964 SC 993; AIR 2002 SC 2082; 2006(9) Scale 223; AIR 1964 SC 993; AIR 2002 SC 2082; 2012(2) DRTC 829(Mad); W.P. No. 1987 of 2013.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Since a pure question of law arises for consideration, the writ petition is disposed of at the admission stage itself after hearing the counsel for the parties without calling for a counter affidavit.

2. It transpires that the bank filed original application for recovery of Rs.43 Lacs before the Debts Recovery Tribunal from the petitioner, who is the borrower. Notices were issued, which were duly served and, the petitioner entered appearance by filing a vakalatnama of an Advocate, who was granted time to file written statement. It transpires that the Advocate did not appear nor filed the written statement and, accordingly, the Tribunal issued an order dated 8th November, 2012 to proceed ex parte against the petitioner. The petitioner filed a recall application under Section 22(2)(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Act of 1993)for the recall of the ex parte order. The Tribunal, by an order dated 6th July, 2013 allowed the application and recalled its order dated 8th November, 2012 but, while doing so, imposed certain conditions, namely, that the petitioner would deposit 30% of the total amount claimed by the bank within 15 days in the shape of fixed deposit receipts and, only on the deposit of this amount, the petitioner would be permitted to file the written statement.

3. Since the conditions were not accepted by the petitioner, as being onerous, the petitioner preferred an appeal under Section 20 of the Act of 1993, which was rejected by the Appellate Tribunal holding that the Tribunal had the power to impose such terms and conditions other than cost and that the order was in consonance with the judgment of the Supreme Court in Arjun Singh Vs. Mohindra Kumar and others, AIR 1964 SC 993, Vijay Kumar Madan and others Vs. R.N. Gupta Technical Education, AIR 2002 SC 2082 and Tea Auction Ltd. Vs. Grace Hill Tea Industry and another 2006 (9) Scale 223. The Appellate Tribunal held that imposition of such terms of depositing part of the proposed decreetal amount was not to penalize the petitioner but to prevent dilatory tactics. The Appellate Tribunal accordingly, rejected the appeal. A review application was filed, which was also rejected. The petitioner, being aggrieved, has filed the present writ petition.

4. Having heard the learned counsel for the parties at some length, the Court finds that the Tribunal as well as the Appellate Tribunal fell in error in interpreting the provision of Order 9, Rule 7 with that of Order 9, Rule 13 of the

Code of Civil Procedure. Section 22(2)(g) of the Act of 1993 gives power to the Tribunal as well as the Appellate Tribunal to recall an order passed by it ex parte, which provision is pari materia with the provisions of Order 9, Rule 7 of the Code of Civil Procedure. The distinction between Order 9, Rule 7 and Order 9, Rule 13 of the Code of Civil Procedure has to be drawn out and, for facility, the said provision are extracted hereunder:-

"Order 9, Rule 7.- Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.- Where the Court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Order 9, Rule 13.-Setting aside decree ex parte against defendant.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

[Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, it it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim]"

5. The words used in Order 9, Rule 7 of the Code of Civil Procedure is "good cause" whereas the words used in Order 9, Rule 13 indicates "sufficient cause". The difference is subtle yet distinct. The Court is of the opinion that the burden to discharge under Order 9, Rule 7 of the Code of Civil Procedure is lighter than the burden under Order 9, Rule 13. Further, Order 9, Rule 13 of the Code of Civil Procedure provides not only for payment of cost but "payment in the Court or otherwise as it thinks fit". The words "payment in the court" is other than cost, which is not spelt out in Order 9, Rule 7. The words "or otherwise as it thinks fit" is also not existing under Order 9, Rule 7 of the Code of Civil Procedure, though the word "otherwise" is indicated under Order 9, Rule 7.

6. Consequently, the words "upon such terms as the Court directs as to cost or otherwise" as depicted under Order 9, Rule 7 has a narrower meaning than the words "upon such terms as to costs, payment into Court or otherwise" as it thinks fit" as depicted under Order 9, Rule 13 of the Code of Civil Procedure.

7. The Supreme Court in Arjun Singh Vs. Mohindra Kumar and others, AIR 1964 SC 993 held that the Court cannot exercise its power to put the defendant on such terms as may have the effect of prejudging the controversy involved in the suit and virtually decreeing the suit though the ex parte order has been set aside or to put the parties on such

terms as may be too onerous. The Supreme Court held that cost should be assessed that would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings of the case to an earlier stage. The Supreme Court held that the provision of Order 9, Rule 7 of the Code of Civil Procedure is basically to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation. Ensuring orderly conduct of the proceedings by penalizing improper dilatoriness can only be done by imposition of cost or otherwise but it cannot be interpreted to mean that the word "otherwise" would also include imposition of the amount claimed, which has not as yet fructified by way of a decree or order. The decision of the Supreme Court in Arjun Singh's case (supra) was reiterated in Vijay Kumar Madan and others Vs. R.N. Gupta Technical Education, AIR 2002 SC 2082 and in Tea Auction Ltd. Vs. Grace Hill Tea Industry and another 2006 (9) Scale 223 has followed the same view.

8. In Moin Leather Wear Exports and others Vs. Oriental Bank of Commerce, Chennai, 2012 (2) DRTC 829 (Mad.) a Division Bench of the Madras High Court was faced with a similar situation. The Division Bench held that such conditions of predeposit could not be exercised while setting aside an ex parte order, inasmuch as such conditions is onerous and that an attempt was being made to recover the amount without taking up the matter on merits. Similar view was again reiterated by another Division Bench of the Gwalior Bench of Madhya Pradesh High Court in Alok Saboo and others Vs. State Bank of India and others in Writ Petition No.1987 of 2013 decided on 13th September, 2013.

9. In the light of the aforesaid, the Court finds that the direction of the Tribunal imposing a predeposit of 30% of the claimed amount, which has not as yet been adjudicated on merits nor any decree has been passed could not be imposed upon the petitioner. Such onerous conditions is contrary to the provisions of Section 22(2)(g) of the Act of 1993. Such onerous conditions is wholly arbitrary and harshly excessive quite apart from being unreasonable and, therefore, the impugned order cannot be sustained.

10. For the reasons stated aforesaid, the order of the Tribunal, the order of the Appellate Tribunal and the order passed in review application are patently erroneous and are quashed. The writ petition is allowed. The recall application of the petitioner is also allowed subject to payment of cost of Rs.20,000/-, which shall be paid by the petitioner to the respondent-bank on or before the 31st December, 2013. If such amount is paid and proof is filed before the Debts Recovery Tribunal, the petitioner would be permitted to file the written statement on or before 15th January, 2014. It is made clear that no further time would be allowed to the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 67672 of 2013

Rajesh Mahajan..... .Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Ajay Sengar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-claim of appointment on post of village development officer-petitioner already got compassionate appointment on post of junior clerk-on supernumerary post-held-once accepted-ceased to put any claim for appointment on higher post-contrary to Rules 1978-parity can not be claimed against law.

Held: Para-8&9

8. It is not in dispute that recruitment and appointment to the post of Gram Panchayat Adhikari is governed by a separate set of rules namely U.P. Gram Panchayat Adhikari Service Rules 1978 as amended by U.P. Gram Panchayat Adhikari Service(First Amendment) Rules 1989. Under the Rules, there is no provision for recruitment by transfer from another post, may be in the same pay scale. The petitioner has not shown any legal or otherwise right vested under provision whereupon respondents can be obliged to consider him for appointment on a post of Gram Panchayat Adhikari instead of making recruitment in accordance with statutory rules applicable for the said post.

9. So far as petitioner's right for compassionate appointment is concerned, it has already exhausted as soon as the petitioner was appointed on a post of Junior Clerk vide appointment letter dated 24.4.2006 and accepting the same, he joined thereat and working for last seven years and more. Once an appointment is made on compassionate basis, the incumbent ceased to have any right to claim further appointment on any other post equivalent or higher status. Moreover, it is not the case of the petitioner that he joined the post of Assistant Clerk under any compelling circumstances and under protest.

Case Law discussed:

W.P. No. 1094 of 2005(SS); 1994(6) SCC 560; 2000(4) AWC 3262; 2001(3) UPLBEC 2188; 2004(3) AWC 2535; 2006(2) AWC 1415; 2006(4) AWC 3718; Special Appeal No. 908 of 2006; AIR 2001 SC 2415; (2010) 2 SCC 422; (2010)2 SCC 728; AIR 2000 SC 2306; AIR 2003 SC 3983; AIR 2004 SC 2303; AIR 2005 SC 565; AIR 2006 SC 1142.

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

1. The petitioner has sought a writ of certiorari for quashing advertisement no.1265/P-4/Stha/Gram Panchayat Adhikari-Bharti/2013-14 dated 04th September, 2013 whereby 16 vacancies of Gram Panchayat Adhikari in District Jhansi have been advertised. He has also sought a mandamus commanding respondent no.3 to consider him for appointment on the post of Gram Panchayat Adhikari.

2. The brief facts, not in dispute, are as under:

3. The petitioner's father was a Gram Panchayat Vikas Adhikari and died in harness on 12.6.2005 while posted in Development Block Month, District Jhansi. The petitioner applied for compassionate appointment under U.P. Recruitment of Dependents of Government Servants Dying in harness Rules, 1974 (hereinafter referred to as "1974 Rules"). He was appointed as a Junior Clerk in the pay scale of Rs.3050-4590 (now revised to Rs.5200-20200) against a supernumerary post since there was no vacancy in the office of District Panchayat Raj Office, Jhansi, vide order dated 24.4.2006. It clearly contemplates that supernumerary post shall continue till a vacancy on the post of Junior Clerk in the office, occur. Consequent to the appointment letter dated 24.4.2006, petitioner joined service and has been discharging duties since then. It is also pleaded that post of Gram Panchayat Adhikari were designated as "Multi Purpose Worker" and ceased to exist hence when petitioner was appointed, hence there was no vacancy of Gram Panchayat Adhikari and he was not appointed on the said post in 2006. However, it was revived vide

Government Order dated 22.7.2004 and several persons were appointed/absorbed thereon. Some persons, who were appointed as Junior Clerk, applied for their absorption as Gram Panchayat Adhikari, which was allowed and granting parity, this Court in Writ Petition No.1094 of 2005 (SS) Braj Pal Singh and others Vs. State of U.P. & Others) also issued similar directions vide judgment dated 10.2.2005, which reads as under:

"In this backdrop the Learned Counsel for the petitioners submitted that the petitioners in like manner are also entitled for being considered for appointment on the post of Gram Panchayat Adhikari.

Learned Standing Counsel, in opposition, argued that in view of the fact that the petitioners having been appointed as clerk on compassionate grounds and having accepted the same, subsequently cannot turn around and claim appointment on the post of Gram Panchayat Adhikari as revival of the same at a later stage would not give them any indefeasible right for such appointment.

In view of the fact that subsequently vide Annexures no.10 to 12, upon revival of the posts in question, the candidates were considered and were appointed on compassionate grounds, therefore, in the circumstances, it is hereby directed that the opposite parties shall also consider, within a period of four weeks from the date a certified copy of this order is served on the opposite parties, the case of the petitioners for appointment/absorption on the posts of Gram Panchayat Adhikari against the existing posts.

With the aforesaid direction the writ petition is finally disposed of."

4. It is contended that present petitioner is also entitled for the same benefit. He also drew my attention to the letter dated 24.7.2009 sent by District Panchyat Raj Officer, Jhansi to Director Panchayati Raj in which petitioner was shown as surplus staff working on the post of Junior Clerk and contended that since he is surplus staff, he can be absorbed against vacant post of Gram Panchayat Adhikari and therefore, before making any direct recruitment, petitioner should be considered for the same.

5. This Court vide order dated 11.12.2013 required District Panchayat Raj Officer, Jhansi respondent no.3 to inform whether petitioner is a surplus staff or appointed against a supernumerary post, inasmuch as, a person becomes surplus staff when the post on which he is working is no more existing and he is kept in surplus staff pool but one, who is appointed on a supernumerary post, is not a surplus staff as such and the two terms/canditions are different.

6. Today, District Panchyat Raj Officer himself has appeared before this Court and also filed an affidavit stating that due to wrong format used by his office, an inadvertent mistake has committed, inasmuch as, petitioner is not a surplus staff but is working on a supernumerary post as Junior Clerk and his claim that he is a surplus staff is incorrect. He said that Director required information in regard to staff working on supernumerary post but while conveying this information, format of surplus staff pool was used, which is an error committed inadvertently and indeliberately.

7. In para 9 of affidavit, respondent no.3 has categorically stated that petitioner is not a surplus staff but working on a supernumerary post. Now, it is in these facts

and circumstances, this Court has to consider and decide whether petitioner is entitled to the relief claimed for.

8. It is not in dispute that recruitment and appointment to the post of Gram Panchayat Adhikari is governed by a separate set of rules namely U.P. Gram Panchayat Adhikari Service Rules 1978 as amended by U.P. Gram Panchayat Adhikari Service(First Amendment) Rules 1989. Under the Rules, there is no provision for recruitment by transfer from another post, may be in the same pay scale. The petitioner has not shown any legal or otherwise right vested under provision whereupon respondents can be obliged to consider him for appointment on a post of Gram Panchayat Adhikari instead of making recruitment in accordance with statutory rules applicable for the said post.

9. So far as petitioner's right for compassionate appointment is concerned, it has already exhausted as soon as the petitioner was appointed on a post of Junior Clerk vide appointment letter dated 24.4.2006 and accepting the same, he joined thereat and working for last seven years and more. Once an appointment is made on compassionate basis, the incumbent ceased to have any right to claim further appointment on any other post equivalent or higher status. Moreover, it is not the case of the petitioner that he joined the post of Assistant Clerk under any compelling circumstances and under protest.

10. Moreover, Apex Court in the case of State of Rajasthan Vs. Umrao Singh, 1994(6) SCC 560 has clearly held that once an appointment has been made and the incumbent has joined on a lower post, right to claim compassionate appointment exhausted on that very date and he cannot be allowed to set up his claim for appointment on a higher post on compassionate basis and the decision given by the High Court of Rajasthan otherwise was reversed by the Apex Court. In para 8 of the judgement the Apex Court clearly held:

"...He was appointed to the post of LDC by order dated 14.12.1989. He accepted the appointment as LDC. Therefore, the right to be considered for the appointment on compassionate ground was consummated. No further consideration on compassionate ground would ever arise. Otherwise, it would be a case of "endless compassion"."

11. Again this issue was considered by a Division Bench of this Court in Dinesh Chandra Sharma Vs. District Inspector of Schools, Meerut and others, 2000(4) AWC 3262. There the legal heir of the deceased employee was given appointment on compassionate basis as Clerk. Subsequently, he became qualified for the post of Assistant Teacher and claimed that he was entitled to be considered for appointment on the said post on compassionate ground. The Hon'ble Single Judge relying on Umrao Singh (supra) held that once appointment has been made on compassionate ground, the claimant is not entitled to get any other appointment on different post simply because he has now obtained qualification for other post subsequently.

12. In Kamlesh Kumar Pandey Vs. State of U.P. and another 2001 (3) UPLBEC 2188, Sri Pandey was appointed on compassionate basis as a class-IV employee. He accepted the appointment and joined the service without any objection. Claiming thereafter appointment on a class-III post he approached this Court. Rejecting the claim, it was held:

"Once having accepted an appointment, may be on Class-IV post under existing situation out of will and volition, the 'chapter' of Dying in Harness is closed. No one should be permitted to re-agitate this matter in future on the basis of change of circumstances in further leaving everything in turmoil and in a state of indecisiveness. It if is permitted, no litigation will ever come to an end." (Para 10)

13. Similar is the view taken by another Hon'ble Single Judge in Raghunandan Pandey Vs. District Inspector of Schools, Basti and others, 2004(3) AWC 2535 and in para 8 of the judgement the Court said:

"It is well-settled that appointment on compassionate ground is given only to tide away the sudden financial crisis which the family of the deceased employee faces because of the sudden death of the sole bread earner of the family. Thus, once a member of the family of the deceased employee is given appointment on such ground, which is also accepted by the claimant, the reason for giving such appointment, which is for support to the family of the deceased employee, does not exist thereafter. The appointment under the Dying-in-Harness Rules cannot be made an alternate source or mode of appointment."

14. In Shyamdhar Mishra Vs. State of U.P., 2006(2) AWC 1415 reiterating the aforesaid view following Umrao Singh (supra) this Court in para 9 of the judgement held:

"In my view, once the appointment is made on the compassionate ground, the said rule comes to an end and no further appointment could be made under the said Rules. The authority could not, in any manner, reconsider the case of the petitioner or of any other person where an appointment had already been given at some anterior point of time, on compassionate ground under the Dying-in-Harness Rules."

15. The same thing has been reiterated in Suresh Prasad Singh Vs. State of U.P. and others, 2006(4) AWC 3718 (para 5).

16. Another Division Bench of this Court following Umrao Singh (supra) in Shardendu Tiwari Vs. State of U.P. & others in Special Appeal 908 of 2006 decided on 22.8.2006 held as under :

"The submission of learned Standing Counsel that once compassionate appointment is accepted, the right is exhausted and there cannot be any second consideration for the same right is well founded. The judgment of Apex Court in State of Rajasthan (supra) fully support the said submission."

17. In Surya Kant Kadam Vs. State of Karnataka & Ors. AIR 2001 SC 2415, on which reliance has been placed by petitioner, this Court has not laid down any law and no such issue as raised herein, has been raised, argued and decided therein so as to constitute a binding precedent on this Court. I find that the Court has not decided the matter but I find that Apex Court has decided the matter in the facts and circumstances of that case but looking to the law laid down by Constitutional Bench of Apex Court and various others as already noted above, in my view, the above decision lends no help to him.

18. On the contrary in absence of any right vested in the petitioner to claim appointment directly on the post of Gram Panchayat Adhikari, I have no hesitation in holding that his claim for appointment on the post of Gram Panchayat Adhikari from the post of Junior Clerk, which constitute a separate and independent cadre is not legally permissible and therefore, writ of mandamus

cannot be issued directing respondents to do something which is impermissible in law and illegal. No person has a legal or constitutional right to claim parity in the matter which is something per se illegal. Article 14 has no application in such case. In Union of India & another Vs. Kartick Chandra Mondal & another (2010) 2 SCC 422, the Court has gone to the extent that even if some other persons similarly placed have been absorbed, that cannot be a basis to grant a relief by the Court which is otherwise contrary to statute. In para 25 of judgment, the Court said:

"Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. However, we intend to refer to a latest decision of this Court on this point in the case of State of Bihar v. Upendra Narayan Singh and Ors. (2009) 5 SCC 65, the relevant portion of which is extracted hereinbelow:

"67. By now it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order ..."

19. In State of Karnataka & others Vs. Gadilingappa & others (2010) 2 SCC 728, the Court reiterated that it is well settled principal of law that even if a mistake is committed in an earlier case, the same cannot be allowed to be perpetuated. It is well settled that if a wrong has been committed by the respondents in respect to some other persons, that will not provide a cause of action to claim parity on the ground of equal treatment since the equality in law under Article 14 is applicable for claiming parity in respect to legal and authorized acts. Two wrongs will not make one right. The Apex Court in the case of State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306; Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983; Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303; M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 565; and Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142 has held that Article 14 has no application in such cases.

20. The writ petition therefore, is devoid of merits and is dismissed.

21. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.12.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 68403 of 2013

Mukhtar Ahmad... Petitioner
Versus
Prescribed Officer/A.D.J. Kanpur Nagar & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vivek Mishra, Sri Rajesh Mishra

Counsel for the Respondents:
Sri Manish Tandon, Sri Atul Dayal.

Constitution of India, Art.-226-Writ petition against declaration of vacancy under section 16(i)(h) of U.P. Act No. 13 of 1972-petitioner being prospective allottee-can not challenge-either in revision or writ-petition dismissed.

Held: Para-6
In view of foregoing discussion, as the petitioner's effort challenging the order declaring the vacancy has failed, his status would be of an unauthorized occupant/prospective allottee, therefore he has no right to challenge the order of release.

Case Law discussed:
1986(1) ARC 1; AIR 2002 SUPREME COURT 2204; 2008(2) ARC 264.

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

1. Heard Sri Rajesh Mishra holding brief of Sri Vivek Mishra, learned counsel for the petitioner and Sri Atul Dayal along with Sri Manish Tandon, learned counsel for the respondents.

2. By means of this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 7.5.2011 passed by Rent Control and Eviction Officer/Additional City Magistrate Ist Kanpur Nagar Kanpur (hereinafter referred to as 'R.C.E.O') releasing the accommodation in dispute and order dated 16.11.2013 passed by Additional District Judge Court No. 3 Kanpur in Rent Revision No. 45 of 2011 filed against the order dated 7.5.2011.

3. The facts giving rise to this case are that the petitioner claims himself to be tenant in the accommodation in dispute. The respondents no. 3 and 4 have filed an application under Section 16 (1) (b) of U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as 'the Act') for declaring the vacancy and releasing the accommodation in dispute. After contest, the vacancy was declared on 24.2.1997. The order dated 24.2.1997 was challenged before this Court through writ petition no. 39341 of 1997. This writ petitioner was dismissed with the following order.

Learned counsel for the petitioner states that inspite of several letters the petitioner is not responding. He submits that in this view of the matter the order dated 27.7.2010 could not be complied with. No rejoinder affidavit has been filed and there is nothing on record to indicate that the petitioner is depositing the damages/rent in lieu of his occupation.

Sri K.K. Arora, learned counsel for the respondents states that the petitioner has shifted to his own shop in the market.

Without entering into the merits of the case, as nothing has been brought on record to show that the petitioner is depositing the damages/rent in lieu of his occupation, hence the petition is dismissed in terms of the order dated 27.7.2010.

4. After dismissal of the writ petition by this court, vacancy was declared by R.C.E.O. on 7.5.2011. Challenging the aforesaid order, the petitioner has filed Revision no. 45 of 2011. The revision was also dismissed. Now the petitioner has challenged the order of release along with the order dismissing the revision filed against the order of release.

5. The Full Bench of this Court in Talib Hasan and another Vs. Ist Additional District Judge, Nainital and others 1986 (1) ARC 1, has held that in the matter of release

under Section 16 (1) of the Act, prospective allottee has got no say. Neither he can contest and oppose the release application nor he can file revision against an order allowing the release application of the landlord. The Apex Court also approved the same view in Ram Narayan Sharma Vs. Shakuntala Gaur AIR 2002 Supreme Court 2204. Similar view has been taken by the Division Bench of this Court in Ajay Pal Singh Vs. District Judge, Meerut and others 2008 (2) ARC 264.

6. In view of foregoing discussion, as the petitioner's effort challenging the order declaring the vacancy has failed, his status would be of an unauthorized occupant/prospective allottee, therefore he has no right to challenge the order of release.

7. The writ petition is dismissed.

8. In the last, Sri Rajesh Mishra, learned counsel for the petitioner submits that six months' time may be given to the petitioner to vacate the premises.

9. Considering the facts of this case, it is provided that in case the petitioner files an undertaking within a period of three weeks from today before the R.C.E.O. that he will vacate the premises by 31st May, 2014, the eviction of the petitioner from the accommodation in dispute shall be kept in abeyance till 31st May, 2014. In case of non filing of the undertaking within the aforesaid period, the R.C.E.O. shall be at liberty to proceed in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 69356 of 2013

B.S. Chauhan (Bhuri Singh Chauhan)...
...Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Virendra Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Retirement age-employees working with Dist. Rural development agency-whether retire on achieving age of 60 years-held-no-unless by adopting procedure contained in G.O. 12.08.13-decision taken by government-employees shall be governed by such amended provision-but in between as per existing provision retirement on 58 years-proper-petition dismissed.

Held: Para-16
In view of above and looking to the facts and circumstances of the case, in my view, retirement of petitioner on 31.12.2013, on attaining the age of superannuation of 58 years, according to existing provision, does not warrant any interference. The Government Order dated 12.08.2013 would come into effect only when the entire procedure laid down in para 1 to 6 is completed and, thereafter, a decision is taken and order is issued having effect of amending present provision, extending age of superannuation from 58 to 60 years. Presently it is not the case in present writ petition.

Case Law discussed:
W.P. No. 29195 of 2011; 2008(3) ADJ 21(DB); 1998(4) SCC 65; 1998(4) SCC 114; 2005(8) SCC 394; 2006(3) SCC 620; 2000(10) SCC 153; 2001(5) SCC 482; 2005(5) SCC 598; 2008(1) ADJ 209.

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

1. The petitioner is an employee in District Rural Development Agency (hereinafter referred to as the 'DRDA'), which

is a society registered under the Societies Registration Act, 1860 (hereinafter referred to as the "Act, 1860"). As per the existing provisions applicable to employees of DRDA the age of retirement is 58 years and, therefore, the employees are being retired on attaining the age of 58 years. In Fundamental Rules 56 an amendment was made in exercise of power under proviso to Article 309 of the Constitution changing age of retirement from 58 to 60 years. The employees of DRDA claiming that DRDA is a society managed by State Government officials and, therefore, is an instrumentality of the State, hence is covered by Article 12 of the Constitution. That being so, the employees of DRDA are holders of civil posts and the Rules, applicable to government employees, are applicable to them hence with the enhancement of age of retirement vide Fundamental Rule 56, they are also entitled to continue up to the age of 60 years.

2. This issue came to be considered by a Division Bench of this Court in Special Appeal No.687 of 2010 (State of U.P. Vs. Pitamber). The Court formulated the following question:

"Whether employees of DRDA are Government employees and are holding civil post in the civil service of State to make applicable Fundamental Rule 56".

3. Two more questions were formulated by this Court as under:

"(1) Considering the Bye-laws of the Society and more specifically Bye-laws 19 and 20 (h) read with Government Notification dated March 17, 1994, was it open to the State Government to have issued the Government Order dated 09.03.2004 fixing the age of retirement of the employees of DRDA as 58 years?

(2) Whether the employees of DRDA are holding civil posts and/or are Government employees of the State, in order to make applicable Rule 56 of the Fundamental Rules and, consequently, would they be governed by Government Notification dated 28.11.2001, whereby the age of retirement of the government servants has been fixed as 60 years under Rule 56 of the Fundamental Rules?"

4. Answering the above questions, in paras 16 and 17, the Division Bench said in its judgment dated 19.08.2010 as under:

"16. Considering the above referred judgments and the material on record, it will be clear that firstly the DRDA is a Society registered under the Societies Registration Act. Its funding is 70 percent from the Central Government and 30 percent from the State Government. The members of the Society and also the Working Committee are basically persons holding the posts in government service, mostly in the State Government and some in the Central Government, as the object is of rural development. Bye-law 20 (h) recognizes that the staff are to be appointed by the Governing Body. The accounts are to be approved by the Governing Body in its annual general meeting. Suits are to be filed against the Society. Thus, though there may be funding by the Central/State Governments and control by the State Government, nonetheless they are employees of the Society. Some posts are filled up on transfer by the Governor and in respect of others, appointments are to be made by the Chief Executive Officer, who is the District Magistrate. Considering the tests laid down in Kanik Chandra Dutta (supra), we are clearly of the opinion that the tests laid down in the judgment of the

Supreme Court are not satisfied. Once it is held that they are the employees of DRDA and are not holding civil posts in the service of State, Rule 56 of the Fundamental Rule would not apply to them.

17. In the light of that, we are clearly of the opinion that the appeal filed by the State will have to be allowed. The employees of DRDA after 09.03.2004 will have to retire at the age of 58 years. Consequently, we hold that the view taken by the learned Single Judge in the case of Kalika Prasad (supra) that Rule 56 of the Fundamental Rules would apply so far as the employees of DRDA are concerned, does not lay down the correct law and, hence, we overrule the judgment in Kalika Prasad (supra) and all other judgments, which have taken a similar view."

5. There are two more writ petitions, i.e., Writ Petitions No. 51679 of 2009, 29195 of 2011 (Shoeb Ullah Khan Vs. State of U.P. and others). Both these writ petitions came up before a Division Bench on 04.07.2011. Following the decision in State of U.P. and others Vs. Pitamber (supra), the Court held that employees of DRDA are entitled to continue till the age of retirement, i.e., 58 years only and not 60 years, therefore, the notice issued to them, informing their date of retirement on attaining the age of superannuation as 58 years were valid.

6. Another Hon'ble Single Judge has also followed aforesaid Division Bench decision in Writ Petition No.30920 of 2013 (Lal Ji and Anr. Vs. State of U.P. & 3 Ors.) decided on 29.5.2013 and myself has also followed the same in Writ Petition No.4650 of 2013 (Shiv Lal Vs. State of U.P. & Ors.) decided on 25.7.2013 and several other matters.

7. In that view of the matter, petitioner is not entitled to continue till the age of 60 years as per the existing provisions and is liable to retire on attaining the age of 58 years.

8. There is another aspect of the matter. I find that even under Fundamental Rule 56, age of retirement, if strictly speaking, is still 58 years and there is no amendment in the eyes of law. Fundamental Rule 56 was inserted and substituted by provincial legislation i.e. vide U.P. Act No. 33 of 1976 [U.P. Fundamental Rule 56 (Amendment and Validation) Act, 1976] and therefore, any amendment therein could have been made only by principal provincial legislature and no amendment therein could have been made in exercise of powers under Proviso to Article 309 of the Constitution since legislature has already intervened by promulgating an enactment containing a single provision i.e. Fundamental Rule 56, therefore, even if what has been said by the petitioner is accepted to the correct, since there is no amendment by competent legislature in Fundamental Rule 56, it cannot be said that age of retirement therein has extended to 60 years so as to entitle the petitioner to retire on attaining the age of 60 years. The amendment notification dated 28.11.2001 is a formal amendment notification by State Government in exercise of rule framing power and it appears that State Government completely failed to notice that Fundamental Rule 56 having been brought on statute book by a legislative Act, no amendment can be made therein in exercise of rule framing power under proviso to Article 309 of the Constitution.

9. The petitioners in the present case, however contended that the State Government has taken a decision to enhance the age of retiremeent of the employees of Local Self

Governed Bodies as 60 years vide Government Order dated 01.08.2013 and, therefore, petitioner is entitled to continue till the age of 60 years and the earlier decision rendered by Division Bench in State of U.P. and others Vs. Pitamber (supra) would have no application to the present case. He drew my attention to Annexure-10 to the writ petition, which contains a decision taken by the Cabinet and also the Government Order dated 12.08.2013 (Annexure-11 to the writ petition).

10. From a bare perusal of Government Order dated 12.08.2013 firstly I find that it is applicable to Local Self Government Bodies i.e. Local Bodies, and not to the societies or companies and corporations registered under the respective statutes i.e. Societies Registration Act or the Companies Act etc.

11. What a Local Self Government Body is well established and a society registered under Act, 1860 does not qualify for the same. Even assuming that DRDA qualify to be a Local Self Government Body, still the Government Order dated 12.08.2013 by itself does not construe an order of the Government so as to have the effect of changing the existing provision relating to age of superannuation of the employees of such bodies.

12. I have carefully read the entire order and find that it has communicated a policy decision of State Government that the age of superannuation of employees and Officers in Local Self-governed Bodies would be extended from 58 to 60 years after following the procedure laid down therein. The procedure has also been prescribed in paras 1 to 6 thereof, which read as under:

''(1) सम्बन्धित स्वशासी संस्था के कर्मचारियों/अधिकारियों की सेवानिवृत्ति की आयु 58 वर्ष से बढ़ाकर 60 वर्ष किये जाने पर विचार किये जाने के पूर्व कार्यात्मक आवश्यकता के परिप्रेक्ष्य में संस्था द्वारा यह परीक्षण किया जायेगा कि वर्तमान में किन पदों की उपयोगिता कम अथवा समाप्त हो गयी है। ऐसे कम उपयोगी/अनुपयोगी पदों को समाप्त किये जाने की कार्यवाही संस्था द्वारा सर्वप्रथम की जायेगी।

(2) तदोपरान्त संस्था के स्तर पर यह परीक्षण किया जायेगा कि अधिवर्षता आयु 58 वर्ष से बढ़ाकर 60 वर्ष करने में कितना अतिरिक्त व्ययभार आयेगा।

(3) वित्तीय भार के आंकलन के पश्चात् उसे वहन करने के सम्बन्ध में स्पष्ट व्यवस्था के साथ संस्था द्वारा प्रस्ताव गवर्निंग बाडी के समक्ष प्रस्तुत कर गवर्निंग बाडी का अनुमोदन प्राप्त किया जायेगा। गवर्निंग बाडी के अनुमोदनोपरान्त संस्था द्वारा उक्त प्रस्ताव अपने प्रशासकीय विभाग को उपलब्ध कराया जायेगा।

(4) प्रशासकीय विभाग द्वारा प्रस्ताव का परीक्षण करते हुए यह सुनिश्चित किया जायेगा कि –

(प) ऐसी संस्थायें जो शत–प्रतिशत राजकीय अनुदान से संचालित है, उनके लिये उपरोक्तानुसार प्राप्त प्रस्ताव में निहित व्ययभार तथा अनुपयोगी पदों को समाप्त करने के फलस्वरूप होने वाली बचत को दृष्टिगत रखते हुए संस्तुति की गयी है अथवा नहीं?

(पप) ऐसी संस्थायें जो आंशिक रूप से राजकीय अनुदान से संचालित हैं, उनके लिये जितनी प्रतिशत की धनराशि राज्य सरकार द्वारा अनुदान के रूप में दी जा रही है, प्रस्ताव में निहित अतिरिक्त व्ययभार के उतने प्रतिशत की धनराशि बजटीय व्यवस्था से अनुदान के रूप में अनुमन्य करायी जायेगी तथा शेष व्यय भार का वहन करने हेतु संस्था के पास पर्याप्त संसाधन उपलब्ध हैं अथवा नहीं? उक्त परीक्षण में अनुपयोगी पदों को समाप्त करने के फलस्वरूप होने वाली बचत को भी संज्ञान में लिया जायेगा।

(पपप) ऐसी संस्थायें जो स्वयं के स्रोतों से संचालित हैं, उनके लिये उपर्युक्त प्रस्ताव में निहित व्ययभार को वहन करने हेतु संस्था के पास पर्याप्त संसाधन उपलब्ध हैं अथवा नहीं?

(5) उपरोक्तानुसार व्यवस्था सुनिश्चित करने के पश्चात प्रस्ताव को अपनी संस्तुति के साथ सम्बन्धित वित्त (व्यय नियन्त्रण) अनुभाग की सहमति हेतु संदर्भित कर वित्त विभाग की सहमति प्राप्त की जायेगी।

(6) उपरोक्तानुसार प्रस्ताव पर वित्त (व्यय नियन्त्रण) विभाग की सहमति प्राप्त होने पर सम्बन्धित प्रशासकीय विभाग द्वारा संस्था के कर्मचारियों/ अधिकारियों की अधिवर्षता आयु 58 वर्ष से बढ़ाकर 60 वर्ष किये जाने पर मा0 मंत्रि परिषद का अनुमोदन प्राप्त किया जायेगा एवं तद्नुसार आदेश वित्त विभाग की सहमति से निर्गत किये जायेंगे।''

English Translation by the Court:

"(1) Before considering enhancement of age limit from 58 years to 60 years for retirement of employees/officers of the concerned autonomous body, functional requirement shall be ascertained to see which posts have gone short of or out of utility as of now. The process of scrapping of such less useful/useless posts shall be initiated by the body.

(2) It shall, thereafter, be seen at the level of the body how much additional burden of expenditure shall arise if the age of superannuation is enhanced from 58 years to 60 years.

(3) After assessment of the financial burden, approval of the governing body shall be obtained on presentation of a proposal by the body to the governing body specifying clear provisions for affording such financial burden. After getting approval from the governing body, the said proposal shall be made available by the body to its Administrative Department.

(4) The Administrative Department, while looking into the proposal, shall ensure:

(i) Whether or not recommendation has been made for the bodies operated with 100% government grant after keeping in view the burden of expenditure as contained in the aforesaid proposal and the savings accruing from the scrapping of useless posts.

(ii) The bodies run partly with the government grant shall be allowed as grant, from the budgetary provision, so much percentage of amount from the burden of additional expenses, contained in the proposal, as much percentage of amount that is being allowed by the state government as grant to such bodies and in order to examine whether the said body has sufficient resources or not to bear the remaining burden of expenses, the savings accruing from the scraping of non-useful posts shall also be taken into consideration.

(iii) Whether or not the bodies running with their own means have sufficient resources to bear the burden of expenses as contained in the aforesaid proposal.

(5) After ensuring the aforesaid arrangement the proposal along with the recommendation shall be referred to the concerned Finance (Expenditure Control) Section for their consent and approval from the Finance Department shall be obtained.

(6) On receipt of approval from the Finance (Expenditure Control) Department on the aforesaid proposal, consent from the Cabinet shall be obtained by the concerned Administrative Department for enhancement of age of superannuation of the employees/officers of the body from 58 years to 60 years and accordingly an order shall be issued with consent from the Finance Department."

13. It is, thus, evident that until the aforesaid procedure is completed and

pursuant thereto a decision is taken by Council of Ministers and approval of Finance Department is obtained and then an order is issued, till that date, the said Government Order would not have any effect of change in the age of superannuation and it would continue to be governed by the existing provisions. As and when new provision comes into existence, it will operate prospectively, unless made operative retrospectively.

14. In the present case, it is not the case of the petitioner that the aforesaid procedure has been followed and the decision has been taken by the Council of Ministers with the concurrence of Finance Department, as contemplated in para 6 of the aforesaid Government Order. So far as the employees, who are attaining age of superannuation in presenti, i.e., according to existing provision, they will continue to be governed by existing provision and are bound to retire accordingly. Whenever, decision will be taken and an order is issued, having the effect of change of present provision, subsequent retirements would be governed accordingly.

15. The question, whether, in case such a decision though taken, but not executed, lacking some procedure flaw, would confer any right to claim higher age of superannuation was considered in detail by a Division Bench of this Court (in which I was also a member) in Daya Shankar Singh Vs. State of U.P. and others 2008 (3) ADJ 21 (DB) wherein, in somewhat similar circumstances, it was held as under:

"A draft Regulation cannot be acted upon when the statutory Regulations made in accordance with the Act are already operative and holding the field. In Abraham Jacob Vs. Union of India 1998 (4) SCC 65 and Vimal Kumari Vs. State of Haryana 1998 (4) SCC 114, it was held that draft rules may be acted upon to meet urgent situations when no rule is operative.

In Union of India & another Vs. V. Ramakrishnan & others 2005 (8) SCC 394, the Apex Court considering almost a similar situation held :

"A rule validly made even if it has become unworkable unless repealed or replaced by another rule of amended, continues to be in force."

In Mahabir Vegetable Oils (P) Ltd. & another Vs. State of Haryana & others 2006 (3) SCC 620, the Apex Court in para-37 of the judgment observed :

"It is now well-settled principle of law that the draft rules can be invoked only when no rule is operative in the field."

The logical inference is that if a valid rule is already operative, a draft rule would have no application at all.

An interesting situation occurred in Alphonse Cazilingarayar & others Vs. Inspector General of Police & others 2000 (10) SCC 153 where the Central Administrative Tribunal (Madras Bench) declared Draft Recruitment Rules pertaining to the post of Radio Supervisor (Operations) Grade-I illegal and unconstitutional. In appeal, the Apex Court held that the judgment of the Tribunal setting aside Draft Rules as unconstitutional was totally uncalled for being premature since the Draft Rules were not approved by the State and remained only draft rules. It was open to

the Government/Appropriate Authority to consider either to approve draft rules or not or to frame fresh rules and, therefore, there was no cause of action available to anyone to challenge the draft rules. The same could not have the effect of affecting any right of the employees. Till the rules are amended as per the procedure prescribed, any order or decision taken by the authorities for amending or changing Regulations is only an administrative/executive order, which would not confer any right upon either of the parties contrary to the statutory provisions.

In Rajinder Singh Vs. State of Punjab 2001 (5) SCC 482 dealing with a similar situation, the Court held :

"The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence."

In Ashok Lanka & another Vs. Rishi Dixit & others 2005 (5) SCC 598 the Court held :

"We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act. (para- 57)

Very recently, a similar controversy with respect to the appointment of Heads of Department in State University came up for consideration before a Division Bench in which one of us (Hon'ble Sudhir Agarwal, J.) was also a member in Prof. Kalawati Shukla (Smt.) & others Vs. State of U.P. & others 2008 (1) ADJ 209. There statute 2.20 of Gorakhpur University framed in exercise of power under Section 50 of U.P. State Universities Act, 1973 provided that the senior most teacher in each department in the University shall be the Head of Department. State Government issued a G.O. dated 24.07.2007 providing that the Head of Departments in the University shall be by rotation and for the said purpose required Universities to take steps for amendment of the concerned Statutes. The statute, in fact, were not amended. The University acting as per the decision of the Government contained in the G.O. dated 24.7.2007 issued orders appointing Head of Departments by roaster instead of senior most teacher. This Court, following an earlier Division Bench decision in Ankur Yadav Vs. State of U.P. & others 2007 (10) ADJ 10 held that unless the statute is amended, no action could have been taken according to the Government Order dated 24.7.2007. The Court quoted the following observation of the Division Bench in Ankur Yadav (supra):

".....the Statutes of the University framed under the Act would govern the field and so long as the Statutes are not amended, no person can be appointed in the University governed by the act and the Statutes framed thereunder by ignoring the qualification prescribed thereunder. No amount of proposal, acceptance, waiver, acquiescence etc. either by the University or the State Government would have the effect of amending the Statutes unless the Statute as such is amended in accordance with the procedure prescribed under Section 50 of the Act.....

It is not disputed that the First Statute of the University was not amended in the manner provided under Section 50 of the Act till the date the petitioner was appointed and thus principle of estoppel, waiver or acquiescence would not apply against law ....."

If the contention of the learned Counsel for the petitioner is accepted that once the resolution has been passed by the Board of Directors, UPSWC for making amendment in the Regulations, the petitioners are entitled for the benefit as per the said resolution irrespective of the fact whether the said resolution is sanctioned by the State Government for the purpose of making amendment in the Regulations as it would amount to making the procedure prescribed under Section 42 redundant."

16. In view of above and looking to the facts and circumstances of the case, in my view, retirement of petitioner on 31.12.2013, on attaining the age of superannuation of 58 years, according to existing provision, does not warrant any interference. The Government Order dated 12.08.2013 would come into effect only when the entire procedure laid down in para 1 to 6 is completed and, thereafter, a decision is taken and order is issued having effect of amending present provision, extending age of superannuation from 58 to 60 years. Presently it is not the case in present writ petition.

17. The writ petition, therefore, lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

Civil Misc. Writ Petition No. 69581 of 2010

Laxman Prasad... Petitioner
Versus
Union of India and Ors.....Respondents

Counsel for the Petitioner:
Sri S.K. Tyagi

Counsel for the Respondents:
Sri Vivek Singh, S.C.

Constitution of India, Art.-226-Renewal of license to run stall on railway platform-petitioner being scheduled caste-under reserve category license given-application for renewal remained pending for long period-in between by circular dated 20.05.2009 the board clarified that with provision of renewal of old license and sc/st category-rejection on ground of dismissal of earlier petition-challenging procedure by inviting tender for fresh allotment-being different cause of action-can not come in way of consideration-petition allowed with direction.

Held: Para-9
Consequently, for the reasons stated aforesaid, the court is of the opinion that the action of the respondents in rejecting the petitioner's application for renewal of his licence was wholly arbitrary and based on non-existing grounds. The impugned order cannot be sustained and is quashed. Writ petition is allowed and a writ of mandamus is issued commanding the authority to pass appropriate orders for renewing the licence of the petitioner within six weeks from the date of production of a certified copy of this order.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard Sri S.K.Tyagi, learned counsel for the petitioner and Sri Vivek

Singh, the learned counsel for the Railways.

2. Petitioner is a scheduled caste and was granted a licence for running a Stall on the platform at Jhansi Railway station in the year 1970. Since then, the licence was being renewed from time to time.

3. In the year 1994, the Railway Board proposed to regulate the allotment of the licences through a policy decision and, based on such policy, the petitioner was again granted a licence in the year 1997 for a period of 3 years. An agreement was executed and the licence fee was required to be paid by the petitioner annually. In the year 2005, the policy was again revised and reservation was also provided for the allotment of stalls to scheduled caste, scheduled tribes and O.B.C. categories. In the year 2007 a new policy dated 17.12.2007 was enforced whereby the Railways thought it fit to allot the stalls through an open tender system. No provision was made for renewal of the existing licence as per the earlier policy. In this regard, the Railway authorities sought clarification from the Railway Board. A clarification dated 4.8.2008 was issued indicating that existing licence holders shall be allowed to continue till the period of the licence and that thereafter new licence would be issued as per the new policy of 2007. This clarification did not indicate renewal of the existing licencees in the reserved categories and, accordingly a fresh clarification was given by the Railway Board on 20.5.2009 indicating that the policy of 17.12.2007 does not prohibit the renewal of the licence of the existing licence holders belonging to the reserved categories. The Railway Board accordingly directed the authorities to consider such proposal pending with them for granting renewal of these licences. For facility, the extract of the clarification issued by the Railway Board dated 20.5.2009 is extracted hereunder :-

"3. In view of the above it is further advised that while taking any decision in such kind of matters they may consider the basic guidelines of Catering policy, 2005 dated 16.03.2005 and 21.12.2005 and subsequent clarifications on renewal of SMUs. As such, the Misc. stall/trolley policy guidelines dated 17.12.2007 do not prohibit railways for granting renewal to existing licensees belonging to reserved category. Hence, railway may consider all such proposals pending with them for granting renewal to the existing Misc. stall/trolley licensees belonging to reserved category subject to satisfactory performance and payment of all dues and also withdrawal of court cases, if any, filed by them before various courts of law. "

3. Since Railway authorities were in dilemma with regard to the procedure to be adopted for existing licence holders, the petitioner applied for renewal of his licence and deposited the licence fee upto the period 30.11.2008. Apparently no orders on his application for renewal was passed by the Railway authorities. Since no clarification came-forth from the Railway board, the petitioner sought continuance of his stall by applying for allotment of the stall under the general category through tender process. The petitioner's application was rejected and, being aggrieved by the non-grant of a stall, filed Writ Petition No. 59738 of 2008 which was dismissed by a judgment dated 21.11.2008.

4. When the clarification dated 20.5.2009 came the petitioner made a

representation that his earlier application for renewal may be processed and his licence be renewed and when no action was taken by the authorities, the petitioner approached the writ court by filing Writ Petition No. 18626 of 2010 which was disposed of by an order of the court dated 20.7.2010 directing the authorities to decide the representation.

5. Based on the aforesaid direction, the authority, by an order dated 17.2.2010, rejected the representation for renewal of his licence. The representation was rejected on the ground that no application for renewal was pending on the date when the clarification of the Railway Board dated 20.5.2009 was received by the authority and that the petitioner's writ petition for grant of an allotment of the stall was rejected by the High Court. The petitioner being aggrieved by the said order has filed the present writ petition.

6. Having heard the learned counsel for the parties at some length and having perused the record which have been annexed in the pleadings, the court is of the opinion that the action of the respondents in rejecting the application of the petitioner for renewal was based on non-existing ground. The contention of the respondents that the application for renewal was not pending as on the date of the clarification is patently erroneous. The clarification of the Railway Board dated 20.5.2009 indicates that there was no embargo upon the authority in not considering the renewal application of the existing licensees belonging to the reserved categories under the policy dated 17.12.2007. In the light of this direction indicated by the railway board the fault lay with the authority in not processing the renewal application of the petitioner in the year 2008 when an appropriate licence fee was deposited upto the period 30.11.2008. Had the authority processed the application at that stage the situation would not have arisen when the clarification came into existence on 20.5.2009.

7. Further, writ petition filed by the petitioner had nothing to do with regard to the renewal of his licence. The writ petition was with regard to the fresh allotment of a stall under the tender process which was rejected. The cause of action for the writ petition was totally different and distinct from the controversy involved in the present writ petition.

8. In a supplementary affidavit filed by the petitioner it has come on record that the stall allotted to the petitioner still is existing and has not been allotted to any other person. This fact has not been denied by the respondents.

9. Consequently, for the reasons stated aforesaid, the court is of the opinion that the action of the respondents in rejecting the petitioner's application for renewal of his licence was wholly arbitrary and based on non-existing grounds. The impugned order cannot be sustained and is quashed. Writ petition is allowed and a writ of mandamus is issued commanding the authority to pass appropriate orders for renewing the licence of the petitioner within six weeks from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 69631 of 2013

Ranjeet Kumar Gupta... Petitioner
Versus
State of U.P. and Anr.... ....Respondents

Counsel for the Petitioner:
Sri Rahul Srivastava

Counsel for the Respondents:
C.S.C.

Hindu Adoption and Maintenance Act 1956-Section-16 readwith U.P. Civil Laws(Reforms and Amendment Act 1976)made effective w.e.f. 01.01.1977-Section 35 adoption without giving and taking-without execution of adoption deed-without registration-presumption of adoption not available.

Held: Para-4
Petitioner has shown his age 24 years at the time of filing this writ petition and, therefore, by no stretch of imagination, his adoption could have taken place before 1.1.1977. Therefore, in view of above requirement of law and considering the fact that even before this Court, no document has been placed to establish the claim of petitioner with respect to his alleged adoption by the deceased employee, and, on the contrary, learned counsel for petitioner admits there does not appear to be executed any registered adoption deed, I do not find any infirmity, legal or otherwise, in the order impugned in this writ petition warranting interference.

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

1. Petitioner claims compassionate appointment after the death of Smt. Urmila Devi working on the post of Auxiliary Nurse and Midwife, contending that he is her adopted son, but the said claim has been rejected by Chief Medical Officer, Mirzapur by means of impugned order dated 25.7.2013 stating that petitioner did not produce any document to show that he is adopted son of deceased employee. Learned counsel for petitioner during the course of argument admitted that there does not appear to be executed any adoption deed and also could not show as to how and in what manner the adoption took place in accordance with procedure of adoption prescribed in Hindu Adoption and Maintenance Act, 1956 (hereinafter referred to as "Act, 1956").

2. Section 16 of Act, 1956, as it originally was, reads as under:

"16. Presumption as to registered documents relating to adoption.- Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

3. Vide Section 35 of U.P. Civil Laws (Reforms and Amendment) Act, 1976, Section Section 16 of Act, 1956 was amended with effect from 1.1.1977 as under:

"Renumber section 16 as sub-section (1) thereof and after sub-section (1) as so renumbered, the following sub-section (2) shall be inserted, namely:-

(2) In case of an adoption made on or after the 1st day of January, 1977 no court in Uttar Pradesh shall accept any evidence in proof of the giving and taking of the child in adoption, except a document recording an adoption, made and signed by the person giving and the person taking the child in adoption and registered under any law for the time being in force;

Provided that secondary evidence of such document shall be admitted in the circumstances and the manner laid down

in the Indian Evidence Act, 1872." (emphasis added)

4. Petitioner has shown his age 24 years at the time of filing this writ petition and, therefore, by no stretch of imagination, his adoption could have taken place before 1.1.1977. Therefore, in view of above requirement of law and considering the fact that even before this Court, no document has been placed to establish the claim of petitioner with respect to his alleged adoption by the deceased employee, and, on the contrary, learned counsel for petitioner admits there does not appear to be executed any registered adoption deed, I do not find any infirmity, legal or otherwise, in the order impugned in this writ petition warranting interference.

5. The writ petition lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2014

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

Civil Misc. Writ Petition No. 69747 Of 2013

Public Service Commission U.P...Petitioner
Versus
State Information Commission & Anr... Respondents

Counsel for the Petitioner:
Sri Indrajeet Singh Yadav, Sri U.N. Sharma

Counsel for the Respondents:
Sri M.C. Chaturvedi, Sri Balram Singh

Constitution of India, Art.-226-readwith right to information Act 2005-Section8(1)(e)-Commission seeking exemption- to supply the copy of answer sheet Math I of PCS examination 2007-being aggrieved to with order passed by Appellate authority-on ground if such request accepted-about 75 staff shall be required to supply information-and shall be flooded by of such application-held-in view of law developed by Apex Court in Aditya Bandopdhyay case-commission can not deny to supply the photocopy of desired answer sheet-apprehension of commission baseless-petition dismissed.

Held: Para-14
We, therefore, hold that in the light of the decision of the Supreme Court in Central Board of Secondary Education (Supra), the examining body does not hold the answer book in a fiduciary relationship and the exemption under Section 8 (1) (e) of the Act is not available. We, accordingly, do not find any error in the direction issued by the State Information Commission.

Case Law discussed:
(2011) 8 SCC 497; (1975) 4 SCC 428.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Respondent no.2 filed an application under the Right to Information Act, 2005 (hereinafter referred as the Act) requesting the Public Service Commission, U.P. (hereinafter referred as the Commission) to supply a photocopy of the mathematics Ist paper of P.C.S. Mains Examination, 2007. The Public Information Officer of the Commission gave a reply intimating respondent no.2 that he had already inspected the answer book and since there was no provision of revaluation of the answer book,as such photocopy of the answer book of the relevant paper could not be supplied.

2. Respondent no.2, being aggrieved by the response given by the Public Information Officer, filed an appeal

before the Ist Appellate Authority, which was rejected by an order dated 29.11.2012.

3. Respondent no.2 thereafter preferred a second appeal before the State Information Commission, who, after considering the matter, passed an order dated 12.11.2013 directing the Commission to furnish a photocopy of the answer sheet of the mathematics Ist paper. The Commission, being aggrieved by the said order, filed a review application, which was rejected by an order dated 28.11.2013. The Commission, being aggrieved, has filed the present writ petition.

4. Heard Sri Umesh Narain Sharma, the learned Senior Counsel, assisted by Sri Indrajeet Singh Yadav, for the petitioner and Sri Keshari Nath Tripathi, the learned Senior Counsel assisted by Sri Balram Singh, for respondent no.2.

5. The controversy involved in the present writ petition is, whether the Commission is obliged to furnish a certified copy of the answer book or photocopy thereof to the applicant? This issue has been squarely decided by a decision of the Supreme Court in Central Board of Secondary Education & Anr. Vs. Aditya Bandopadhyay & Ors., (2011) 8 SCC 497, wherein the Supreme Court held that where the answer book is evaluated by the examiner appointed by the examining body, the evaluated answer book is an "information" under the Act. The Supreme Court further held that the evaluated answer book does not fall under any of the categories of exempted information enumerated in clause (a) to (j) of sub-section (1) of section 8 of the Act and consequently, the examining body was bound to provide access to the information and that any applicant could not only inspect the document/record, take notes, extracts but could also obtain certified copies thereof.

6. The Supreme Court in the aforesaid decision further held that the examining body does not hold the evaluated answer book in the fiduciary relationship and that the exemption under Section 8(e) of the Act was not available to the examining body with reference to the evaluated answer book.

7. The object of the Act is to ensure maximum disclosure of the information and minimum exemptions from disclosure. The Act was enacted to ensure smoother, greater and more effective access to information and provide an effective framework for effectuating the right to information recognized under Article 19 of the Constitution. The Supreme Court in the aforesaid decision of Central Board of Secondary Education (Supra) has held that the right to information is a cherished right. The Right to Information Act, 2005 should be interpreted in a manner which would lead towards dissemination of information rather than withholding the same.

8. We are of the opinion, that this right to information flows from freedom of speech and that the people of this country have a right to know every public act that is done in a public way by the public functionary and are entitled to know the particulars of every public transaction in all its bearing as held by the Supreme Court in State of U.P. Vs. Raj Narain, (1975) 4 SCC 428.

9. The provisions of the Act make it clear that a right is given to a citizen to access information. At the same time,

there is an obligation of the public authority to maintain the records in the manner provided and disseminate the information in the manner provided. The Supreme Court in Central Board of Secondary Education (Supra) has held that the evaluated answer book is an information under Section 2(f) of the Act and consequently, such information is required to be disseminated if asked for. An applicant has a right to access such information held or under the control of a public authority.

10. The learned counsel for the petitioner submitted that if the order of the State Information Commission is allowed to stand, it will open the floodgates for similar demand and that such direction would become impracticable and counter productive and would adversely affect the efficiency of the administration. The learned counsel contended that the officers and staff of the Commission would get bogged down with such non-productive work and that 75% of the staff would be involved in furnishing such information to the candidates. The learned counsel consequently, submitted that the direction to supply photocopy of the answer sheet is patently erroneous and should be set aside.

11. As held by the Supreme Court in Central Board of Secondary Education (Supra), the candidate has a right to access the information under the Act. The answer sheet is an information under Section 2(f) of the Act and such information is required to be disseminated to the candidate. The Act provides that maximum disclosure of the information should be made. The Supreme Court has held that the exemption provided under the Act is not available to the examining body with regard to supply of the evaluated answer book. The Supreme Court has however, directed the examining body to hide the signatures and name of the examiner while supplying a photocopy or certified copy of the answer book.

12. In the instant case, the State Information Commission has taken care of this aspect while directing the Commission to supply the answer book.

13. The objections of the petitioner are untenable and are based on presumptions. There is nothing on record to indicate that a large demand has been made by the candidates for supplying copies of the answer sheets nor there is anything on record to suggest that 75% of the staff are presently involved in the work. This Court is of the opinion that supply of answer sheets cannot be denied on such surmises and conjectures.

14. We, therefore, hold that in the light of the decision of the Supreme Court in Central Board of Secondary Education (Supra), the examining body does not hold the answer book in a fiduciary relationship and the exemption under Section 8 (1) (e) of the Act is not available. We, accordingly, do not find any error in the direction issued by the State Information Commission.

15. For the reasons stated aforesaid, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ANIL KUMAR AGARWAL, J.

Civil Misc. Writ Petition No. 71103 of 2013

Subhash Kumar Saroj.... Petitioner
Versus
Indian Oil Corporation & Ors....Respondents

Counsel for the Petitioner:
Sri Rekha Singh, Sri Anand Prakash Paul
Sri B.B. Paul

Counsel for the Respondents:
C.S.C., Smt. Archana Singh

Constitution of India, Art.-226-Cancellation of dealership-for distribution of LPG-petitioner offered land-recorded with name of his mother-corporation canceled as mother in not defined with in definition of 'family unit' of guide lines-held-cancellation proper-being married-petitioner can not take advantage of her mother.

Held: Para-
In view of the said definition the petitioner, who is of the married status, will not be able to take advantage of his mother's land as she does not come with the definition of 'Family Unit' of the petitioner as aforesaid.

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

1. Heard Sri B.B. Paul, learned counsel for the petitioner at length and have also perused the supplementary affidavit filed today which is taken on record and Smt. Archana Singh for the Indian Oil Corporation.

2. The petitioner has come up before the Court questioning the correctness of the order passed by the respondent-Corporation on 6.12.2013 rejecting the application of the petitioner on the ground of non-availability of the requisite area of land for installation of L.P.G. distributorship under a particular scheme.

3. Sri Paul submits that the petitioner had offered additional land standing in the name of his mother for the purpose of rectifying the said area in order to obtain the said dealership as the same has been cancelled incorrectly. An application has also been filed before the respondent for reconsideration and review of the decision dated 6.12.2013.

4. Having considered the submissions raised and having perused the order, it is clear from the communication given to the petitioner that the additional land offered by the petitioner, which was recorded in the name of his mother, cannot be taken into account as the mother of the petitioner would not fall within the 'Family Unit' of the petitioner as defined under the guidelines promulgated and contained in the brochure of the respondent-Corporation which has been produced before the Court by Smt. Archana Singh.

5. The guideline categorically defines 'Family Unit' as follows:-

"Family Unit' in case of married person/applicant, shall consist of individual concerned, his/her Spouse and their unmarried son(s)/daughter(s). In case of unmarried person/applicant, 'Family Unit' shall consist of individual concerned, his/her parents and his/her unmarried brother(s) and unmarried sister(s). In case of divorcee, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s) whose custody is given to him/her. In case of widow/widower, 'Family Unit' shall consist of individual concerned, unmarried son(s)/unmarried daughter(s)."

6. In view of the said definition the petitioner, who is of the married status, will not be able to take advantage of his

mother's land as she does not come with the definition of 'Family Unit' of the petitioner as aforesaid.

7. Consequently, the additional land offered by the petitioner has been rightly not considered by the respondent-Corporation. There is no error in the impugned order dated 6.12.2013.

8. There is no merit in this writ petition. Rejected.
