APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II, J.

First Appeal No. 287 of 2005

Ravi Singhal & Ors. ...Appellants
Versus
Rajeev Goyal & Ors. Defendants

Counsel for the Appellants:
Sri Shailendra Kumar Johri, Sri Kshitij Shailendra

Counsel for the Defendants:
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C.P.C.-Section 96-Practice and Procedure-where Civil Court has no jurisdiction to try the suit-only way open to returned the plaint for presentation before appropriate Court/Authority-but can not either dismiss or pass any order affecting rights of parties on merit-appeal partly allowed.

Held: Para-11
In view of above exposition of law and considering the fact that Court below has correctly came to the conclusion that in respect to orders passed under the provisions of Act, 1972, Civil Court in a suit under Section 9 C.P.C., has no jurisdiction to declare orders passed by competent authority under Act, 1972 illegal, it had not authority to proceed to decide other issues on merits. In our view, the Court below has rightly held that it had no jurisdiction to try the suit. In these circumstances, the only way open to it was to return the plaint instead of proceeding to decide other issues on merits and dismiss the suit.

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

1. Heard Sri Kshitij Shailendra, learned counsel for appellant and perused the record. None appeared on behalf of respondents, though the case has been called in revised. In the circumstances, we proceed ex-parte to decide the appeal.

2. This appeal under Section 96 of Code of Civil Procedure has arisen from judgment and decree dated 31.1.2005 passed by Sri Dharam Singh, Additional District Judge, Court No. 3, Moradabad in Original Suit No. 617 of 2003.

3. The only point for determination for adjudicating this appeal is whether the Court below, when decided issue regarding jurisdiction holding that it has no jurisdiction to try the suit, whether could have proceeded to adjudicate other issues on merits and after deciding the same on merits, can pass a judgment and decree of dismissal of suit.

4. Brief facts giving rise to the present dispute are as under.

5. Plaintiffs-appellants instituted the aforesaid suit seeking a permanent injunction against defendants restraining them from interfering into possession of plaintiffs in respect to property in dispute, detailed and described in para 1, 2 and 6 of the plaint, on the basis of proceeding of P.A. Case No. 7 of 2001 (Kusum Lata Vs. Doris) and Execution Case No. 15 of 2001 before the Trial Court. Following 11 issues were formulated:

"(1) Whether the defendant Smt. Doris Herald Meyer executed statement on 29.1.88 in favour of Abdul Haq and Abdul Haq on the basis of the said statement executed sale deed on 2.8.2003 in respect of the constructions standing thereon and the land of 358.42 sq.M. In favour of plaintiffs, as alleged in the plaint?

(2) Whether the plaintiffs are leasee of 1453.60 sq.M. Land through registered lease deed dated 2.8.2003?

(3) Whether the ex parte order passed in petition No. 7 of 2001 of U.P. Act No. 13/72 is illegal and void, which is passed in favour of defendants No. 1 to 3 being in favour of defendants No. 1 to 3 being the heir of Sanjay Goyal and defendants want to evict the plaintiffs in Execution Case no. 15/01 on the basis of the said order, who are bona fide purchasers for the value?

(4) Whether late Chunna had let out the property on 31.5.1920 detailed in para 10 of W.S. to late A.D. Meyer for 10 years for raising constructions thereon, which later on extended on 2.6.1933 upto the year 1943 and it was agreed that after termination of tenancy constructions shall be removed otherwise on the basis of the written statement of Smt. Doris Herald Meyer dated 3.4.1937 and according to the provision of T.P. Act and section 29/A of U.P. Act 13, 72, lessor/owner shall become the owner of the constructions also?

(5) Whether there is no any compound of Ram Kumar Singhal and Abdul Haq defendant has got unauthorised possession of the land of defendants no. 1 to 3, as alleged in para 11 of the w.s. and the suit is bad for non-joinder of Ram Kumar Singhal and Jamila Khatoon?

(6) Whether there is any power of attorney in favour of Abuld Haq and in the title of suit, Abdul Haq defendant is wrongly shown the power of attorney holder?

(7) Whether the statement in favour of Abdul Haq is not registered nor it bears signatures of Smt. Doris Herald Meyer nor it has any signatures of the witnesses and the seal of the Notary is forged because Government of Switzerland uses Monogram of Notary?

(8) Whether Abdul Haq is not the Proprietor of the Alpex Traders and unauthorised has shown him as proprietor of the Alpex Traders?

(9) Whether the suit is time barred?

(10) Whether the Civil Court has no jurisdiction to try the suit?

(11) To what relief, if any, are the plaintiffs entitled?

6. As noted above, Issue No. 10 relates to very jurisdiction of the Civil Court to try the aforesaid suit. This issue has been decided by the Court below along with Issue No. 3 holding that Civil Court has no jurisdiction to try the suit and proceedings under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") and any order passed therein or in execution on account of the order passed therein, cannot be challenged in Civil Court. Having said so, Court below then proceeded further to decide other issues on merits and thereafter dismissed suit vide impugned judgment and decree.

7. Learned counsel for appellants submitted that once the Court finds that it has no jurisdiction to try the suit, it should have returned plaint and had no jurisdiction to dismiss the suit or proceed to decide the suit on merits and to that extent, judgment of Court below is nullity and without jurisdiction. He placed reliance on Supreme Court decision in R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd. AIR 1993 SC 2094, a Single Judge judgment of this Court in Ram Swaroop Vs. Kalicharan 1995 (2) ARC 370 and Bombay High Court's decision in Shreyans Industries Vs. State of U.P. 2004 (2) ICC 773.

8. The Apex Court in R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd (supra) has observed in para 7 as under:

"The Division Bench was totally wrong in passing an order of dismissal of the suit itself when it had arrived at the conclusion that the High Court had no jurisdiction to try the suit. The only course to be adopted in such circumstances was to return the plaint for presentation to the proper Court and not to dismiss the suit."

9. Similarly, in Ram Swaroop Vs. Kalicharan (supra), the Court held:

"Obviously, once it is found by the appellate court that the trial Court lacked jurisdiction to entertain the suit any further adjudication upon merit of other issues by it would be without jurisdiction and nullity.

The lower appellate court has categorically found that the revenue court alone had jurisdiction to take cognizance of the suit and it was not cognizable by the trial Court, namely, the Court of Munsif. After this finding and conclusion, only course open to the lower appellate court was to direct, after setting aside the decree and judgment of the trial court, the return of the plaint for presentation to the revenue court. It acted illegally in adjudicating upon other issues on merit and dismissing the suit." (emphasis added)

10. Similar view was taken in Shreyans Industries Vs. State of U.P. (supra), observing:

"Once the Court comes to the conclusion that it has no jurisdiction to entertain the suit, the only course open to the Court is to return the plaint to the plaintiff to be presented in the competent Court and any finding recorded on merits of the matter would be of no consequence. If plaint is returned for want of jurisdiction and the same Court also records findings on merits, such findings are without jurisdiction and null and void."

11. In view of above exposition of law and considering the fact that Court below has correctly came to the conclusion that in respect to orders passed under the provisions of Act, 1972, Civil Court in a suit under Section 9 C.P.C., has no jurisdiction to declare orders passed by competent authority under Act, 1972 illegal, it had not authority to proceed to decide other issues on merits. In our view, the Court below has rightly held that it had no jurisdiction to try the suit. In these circumstances, the only way open to it was to return the plaint instead of proceeding to decide other issues on merits and dismiss the suit.

12. In view of above, the appeal is allowed partly. The findings of Trial Court on issues, other than Issue No. 3 and 10, are hereby set aside. The impugned judgment and decree dated 31.1.2005 is modified to the extent that since original Suit No. 617 of 2003, in view of the finding recorded on issues no. 3 and 10, was not triable by Civil Court, the plaint shall be returned to plaintiffs for being presented in the Court of competent jurisdiction.

13. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.08.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Special Appeal Defective No. 360 of 2015

State of U.P. & Ors. ...Appellants
Versus
Ramesh Chandra Tiwari & Ors. ...Respondents

Counsel for the Appellants:
C.S.C.

Counsel for the Respondents:
Manoj Kumar Dwivedi

U.P. Basic Education Act-Rule 29-Age of superannuation-by G.O. 15.10.2014-academic session 2015-16-start from April to March 2016-such teachers retiring between mid session of academic session- entitled to continue upto 31.03.2016-G.O.-15.06.15 being contrary to proviso of Rule 29-quashed.

Held: Para-11
On the facts of the present special appeal, the dates of superannuation of the four respondent teachers would respectively be 1 June 2015, 27 May 2015, 4 June 2015 and 30 June 2015. All these teachers worked in academic session 2015-16 commencing from 1 April 2015 in the normal course, without taking the benefits of the proviso to Rule 29. Since the dates of their retirement fell in the midst of the academic session, they would plainly be entitled to continue in service until the end of the academic session, as envisaged in the proviso to Rule 29. The Secretary, Basic Education, Government of U P, who decided upon the issue on 15 June 2015 has taken a view clearly contrary to the mandate of the proviso to Rule 29.

Case Law discussed:
Special Appeal (D) No. 492 of 2015; Special Appeal No. 483 decided on 24 July 2015; Special Appeal No. 227 of 2015, decided on 9 June 2015.

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

1. The respondents, who are the original petitioners in writ proceedings instituted before the learned Single Judge under Article 226 of the Constitution, are working as Assistant Teachers or, as the case may be, Head Masters of primary institutions conducted and managed by the Uttar Pradesh Basic Education Board at Allahabad. The institutions are recognized under the Uttar Pradesh Basic Education Act, 19721. The Uttar Pradesh Basic Education Teachers Service Rules, 19812 framed under the Act, are applicable to teachers of primacy schools. Rule 29 provides as follows:

"29. Age of superannuation.- Every teacher shall retire from service in the afternoon of the last day of the month in which he attains the age of 62 years:

Provided that a teacher who retires during an academic session (July 1 to June 30) shall continue to work till the end of the academic session, that is, June 30 and such period of service will be deemed as extended period of employment."

2. For convenience of reference, we are referring to the parties by their description in the original writ petition. The dates of birth of the four petitioners are respectively 1 June 1953, 27 May 1953, 4 June 1953 and 30 June 1953. Consequently, the dates of retirement of the four teachers on attaining the age of superannuation of 62 years were 1 June

2015, 27 May 2015, 4 June 2015 and 30 June 2015. Until 2013-14, the academic session of primary schools and junior high schools conducted by the Uttar Pradesh Basic Education Board commenced on 1 July and would end on 30 June of the succeeding year. Under Rule 29, a teacher is liable to retire on the last day of the month in which he attains the age of 62 years. Consequently, the four teachers in question would have continued in the normal course until the last day of the respective months in which they attained the age of 62 years. However, the proviso to Rule 29 postulates that a teacher who retires during an academic session would continue to work till the end of the academic session. Since the academic session was between 1 July to 30 June, a teacher who attained the age of superannuation within that period would continue until the following 30 June and such period of service would be deemed to be an extended period of employment.

3. On 9 December 2014, a Government Order was issued by which it was resolved that with effect from academic year 2015-16, the academic session would commence from 1 April and would end on 31 March following year. The Government Order stipulated that the benefit of this would be available for the purposes of admission, promotion of students and for conducting the institutions. However, it was contemplated that this would not affect any change in the grant of 'sessional benefits' to teachers who, in consequence, would be granted the same benefit as before. The State Government issued another Government Order on 29 June 2015 clarifying certain directions which had been issued in the meantime on 15 June 2015 and 19 June 2015.

4. The teachers in the present case filed a writ petition3 in order to challenge a decision which was taken by the Secretary, Basic Education on 15 June 2015, relying upon the terms of the Government Order. The view of the Secretary, Basic Education was that the teachers in question would not be entitled to the sessional benefit beyond 30 June 2015. The learned Single Judge, by an interim order dated 30 June 2015 held that since the dates of superannuation of the petitioners were respectively on 1 June 2015, 27 May 2015, 4 June 2015 and 30 June 2015, which fell in the midst of the academic session that had commenced on 1 April 2015 and was to end on 31 March 2016, the petitioners would be allowed to continue till the end of the academic session, i e until 31 March 2016 subject to the verification of their dates of birth. The learned Single Judge noted that the petitioners in the present case had not already availed of the benefit of Rule 29 earlier. Accordingly, an interim order was passed in the aforesaid terms. The State is in appeal.

5. Since the issue which arose before the Court is a pure question of law and in the interest of rendering finality and certainty, we have by consent of all counsels taken up the writ petition for hearing and final disposal. No issue of fact is to be resolved in these proceedings and the entirety of the matter turns on an appreciation of the relevant Rules and Government Orders.

6. Rule 29 of the Rules provides that a teacher shall retire from service upon attaining the age of superannuation of 62 years on the last day of the month in which the age of superannuation is attained. However, the purpose of the

proviso to Rule 29 is to enable a teacher who has retired during the academic session to continue to work until the end of the academic session. The benefit of this extended period of employment under the proviso of Rule 29 is to ensure that the educational needs of students are not disturbed as a result of the retirement of a teacher in the midst of an academic session. Originally, the academic session was to commence from 1 July every year and to end on 30 June of the following year. Consequently, a teacher who attained the age of superannuation between 1 July and 30 June of the following year would continue in service until 30 June when the academic session would end. The State Government took a decision that with effect from 2015-16, the academic session would commence from 1 April (instead of 1 July) and would end on 31 March of the following year (instead of 30 June). The issue which arose before the Court in several cases was whether, and to what extent, teachers who had attained the age of superannuation in the previous academic session would be entitled to the sessional benefit upon the change in the academic session. This issue was considered by a Division Bench of this Court at Allahabad in two cases which arose in relation to intermediate institutions governed by the Uttar Pradesh Intermediate Education Act, 19214. On 12 June 2015, the State Government had amended Regulation 21 of Chapter III of the Regulations framed under the Act of 1921. As a result of the amendment, the academic session was similarly altered so as to commence in April and end on 31 March of the following year. In Bhajan Lal Diwakar Vs Bani Singh Thakurela5, the teacher in question had a date of birth of 12 July 1952 and would have attained the age of 62 years on 12 July 2014. Since the date of superannuation fell in the midst of academic session 2014-15, he was allowed to continue until 30 June 2015. The State Government issued a Government Order on 15 October 2014 by which the academic session was changed to 1 April-31 March. The teacher in that case contended that since he had been allowed to continue until 30 June 2015 which fell within the re-designated academic year of 1 April-31 March, he would be entitled to continue until 31 March 2016. Rejecting that contention, the Division Bench by its judgment dated 20 July 2015 observed as follows:

"In the present case, the first respondent attained the age of sixty two years in the month of July 2014. Under the unamended Regulation 21, since the date of retirement of the first respondent fell within the midst of the academic session, he was allowed to continue as a Lecturer until 30 June 2015. The first respondent continued on that basis until 30 June 2015. What the first respondent seeks, essentially is a further extension in service until 31 March 2016 which, in our opinion, would be impermissible. The benefit of such an extension under the amended regulation would clearly not be available to a teacher in the position of the first respondent who had already attained the age of superannuation prior to 1 April 2015. The first respondent had already availed of the continuance in service until the end of the academic session, which according to the unamended regulation, was to come to an end on 30 June 2015. The State Government by a Government Order dated 25 May 2015, clarified that such an employee would continue until 30 June 2015. In other words, the first respondent would not be entitled to a

further extension in service until 31 March 2016."

In that case, the learned Single Judge had granted an interim order allowing the teacher to continue to work until 31 March 2016. The petition was heard finally by the Division Bench since questions of law had arisen and both the State and the counsel for the petitioner had stated that the matter may be heard and disposed of finally. The principle which was laid down in the judgment of the Division Bench is that a teacher, who had already taken the benefit of an extended period of employment until 30 June 2015, would not be entitled to a further extension until 31 March 2016.

7. The same view was reiterated in another judgment of a Division Bench of this Court at Allahabad on 24 July 2015 in Dulare Lal Vs State of U P6. In that case also, Assistant Teachers of an intermediate college whose dates of birth were 3 January 1953 and 14 January 1953 attained the age of superannuation on 3 January 2015 and 14 January 2015. Since the dates of their superannuation fell in the midst of the academic session 2014-15, the teachers were allowed to continue until 30 June 2015 which was the end of the academic session 2014-15. In this background, the Division Bench held that having once availed of an extension of service until the end of the academic session, the teachers would not be entitled to a further extension until 31 March 2016. The Division Bench observed as follows:

"The basic issue before the Court is whether a person who had already attained the age of superannuation prior to 1 April 2015 and who had availed of an extension of service until the end of the academic session would be entitled to a further extension of service until 31 March 2016. In answer to this question, what must be emphasized is that the purpose of granting an extension of service until the end of the academic session is to protect the interest of education of the students so that the retirement of a teacher during the midst of an academic session does not result in disrupting the cause of education. This was also adverted to in a judgment of a Division Bench of this Court in Surendra Prasad Agnihotri vs. State of U.P. and ors.7 upon which reliance has been placed by the learned Single Judge.

In the case of the appellants, it is clear that they attained the age of superannuation in January 2015 during the midst of academic year 2014-15. Hence, they were granted an extension of service until the end of the academic session which then stood as 30 June 2015. The date of superannuation is not postponed as a result of Regulation 21 but employees are only granted an extension until the end of the academic session. Once having availed of the extension of service until 30 June, the appellants would not be entitled to a further extension of service until 31 March 2016. The appellants would not be entitled to claim that as a result of the change in the academic year now to 1 April - 31 March, their date of superannuation falls in the midst of the academic year thereby entitling them to a further extension of service. The appellants have already availed of an extension of service and there would be no occasion granting them a further extension."

8. The same view has been taken by a Division Bench of this Court at Lucknow in Krishna Chandra Pal Vs State

of U P8. In that case, the teachers had already attained the age of superannuation between 14 July 2014 and 31 December 2014 which was within the academic session 2014-15 and were, therefore, continued until 30 June 2015. The Division Bench held that Regulation 21 would not entitle them to a further extension until 31 March 2016.

9. Primary schools are governed by the provisions of the Uttar Pradesh Basic Education Act, 1972 and the service conditions of the teachers are governed by the Rules framed under the Act. Rule 29 lays down (i) the age of superannuation which is 62 years; (ii) the principle that a teacher who attains the age of 62 years will retire from service on the last day of the month in which the age of superannuation is attained; and (iii) the principle that a teacher who has retired during an academic session, shall continue to work till the end of the academic session and that such period of service will be deemed to be an extended period of employment. The proviso to Rule 29 enacts a legal fiction through the subordinate legislation, the effect of which is that though a teacher has attained the age of superannuation, the teacher, notwithstanding the fact that he or she had retired during the academic session, will continue to work until the end of the academic session and that such period of service will be deemed to be an extended period of employment. Rule 29 refers to the academic session as being 1 July to 30 June, since this was the academic session which prevailed right until academic session 2013-14. The reason why a special provision is made in the proviso to Rule 29 is to ensure that the educational needs of students are not disrupted by the retirement of a teacher in the midst of an academic session. In other words, the benefit is extended not so much for teachers (though the teachers would obviously also receive the benefit of an extended period of employment) but primarily to protect the students whose education would be disturbed by the absence of a teacher for the academic session. The State Government can certainly alter an academic session, as it has, to 1 April-31 March. The consequence, however, of a change in the academic session as provided under Rule 29 cannot be altered so long as the proviso to Rule 29 continues to hold the field. What the proviso enacts is that a teacher who retires during an academic session will continue to work until the end of the academic session on the basis of a deeming fiction, as we have noted above. Once the academic session has been changed, the principle which has been enunciated in the proviso to Rule 29 will apply to the newly altered academic session. All that really remains now is for the State to make a consequential change in the date of the new academic session under the proviso to Rule 29 but that part is merely clarificatory of the decision which has already been taken of the dates of commencement and conclusion of the academic session.

10. In the present case, we find from the diverse Government Orders which have been issued by the State Government that there has been a considerable degree of ambiguity and a lack of application of mind which could have best been avoided. The State Government issued a Government Order on 9 December 2014 stating that a decision has been taken to alter the academic session from the erstwhile 1 July-30 June to 1 April-31 March. This change in the academic

session was to take effect from 2015-16. In other words, on and from 1 April 2015, the new academic session has taken effect and which will continue until 31 March 2016. A teacher whose normal date of retirement upon attaining the age of superannuation of 62 years falls within the academic session would be entitled to the benefit of an extension of service until 31 March 2016. Obviously, as the two judgments of the Division Bench of this Court at Allahabad and the judgment of the Division Bench at Lucknow have held, a teacher who has continued in service until 30 June 2015 by virtue of the operation of the proviso to Rule 29 and who has already taken a benefit of the proviso, would not be entitled to a further extension of service till 31 March 2016. Consequently, as we have noted earlier, the teachers in the cases which were decided by the Division Bench at Allahabad had already attained the age of superannuation in July 2014 or, as the case may be, in January 2015. These teachers had been continued until 30 June 2015 which was the earlier academic session, in pursuance to the proviso to Regulation 21 (applicable in the case of intermediate institutions). However, a teacher who attains the age of superannuation during academic session 2015-16, as modified, and who has not taken the benefit of the proviso to Rule 29, would be entitled to continue in service until the end of the academic session which would be 31 March 2016. The Government Orders which have been issued from time to time, more particularly on 9 December 2014 and 29 June 2015 have to be necessarily brought in line with the mandatory requirements of the proviso to Rule 29. As we have observed earlier, the power to alter the academic year undoubtedly vests with the Government but having once altered the academic year, the consequence which is envisaged under the proviso to Rule 29 must ensue. The State Government cannot by a government order override the proviso to Rule 29. That is part of subordinate legislation which cannot be simply disregarded by an administrative order.

11. On the facts of the present special appeal, the dates of superannuation of the four respondent teachers would respectively be 1 June 2015, 27 May 2015, 4 June 2015 and 30 June 2015. All these teachers worked in academic session 2015-16 commencing from 1 April 2015 in the normal course, without taking the benefits of the proviso to Rule 29. Since the dates of their retirement fell in the midst of the academic session, they would plainly be entitled to continue in service until the end of the academic session, as envisaged in the proviso to Rule 29. The Secretary, Basic Education, Government of U P, who decided upon the issue on 15 June 2015 has taken a view clearly contrary to the mandate of the proviso to Rule 29.

12. For these reasons, the order dated 15 June 2015 passed by the Secretary, Basic Education shall accordingly stand quashed and set aside.

13. We have taken up the writ petition by consent for final hearing at this stage having due regard to the need to resolve the question of law and to ensure that a measure of certainty is established as a result of the alteration in the academic session as notified by the State. In that view of the matter, we have taken up Writ Petition No 3653 (S/S) of 2015 for hearing and final disposal. Since no

further issue would survive in the writ petition filed by the respondents (original petitioners), both the special appeal and the writ petition shall be governed by the present judgment and are accordingly disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.08.2015

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Consolidation No. 567 of 2015

Nand Lal ...Petitioner
Versus
D.D.C, Dist. Hardoi & Ors. Respondents

Counsel for the Petitioner:
Dharmendra Kumar Singh, Ankit Kumar Singh, Vinod Kumar

Counsel for the Respondents:
C.S.C., Yogendra Nath Yadav

U.P. Consolidation of Holdings Act-Jurisdiction of Consolidation Authorities-benefits of Section 122-B (4-f) of U.P.Z.A.L.R. Act-provision of Section 122-B-except Collector, the Consolidation authorities no jurisdiction-any direction conferring any rights-null and void.

Held: Para-12
Section 122-B 4 (f) of U.P.Z.A. & L.R. Act is in fact a proviso to Section 122-B of U.P.Z.A. & L.R. Act, it provides that where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe category is in occupation of the land veted in a Gaon Sabha under Section 117 having occupied it from before 13.05.2007 and the land so occupied does not exceed 1.26 hectares, then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer and he shall be admitted as bhumidhar with non-transferable rights of the land under Section 195.

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

1. The legal question involved in this writ petition, which requires consideration is whether consolidation authorities during consolidation proceedings have any power or authority to decide that a person is entitled to get the benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act and accordingly confer such benefit upon him.

2. Notice on behalf of opposite parties no.1 and 2 has been accepted by learned Chief Standing Counsel, whereas Mr. Yogendra Nath Yadav, Advocate has accepted notice on behalf of opposite party no.6.

3. For the orders proposed, there is no need to issue notice to opposite parties no.3 to 5, as such, notice to opposite parties no.3 to 5 have been dispensed with.

4. The instant writ petition has been filed challenging the impugned order dated 29.5.2015, passed by Deputy Director of Consolidation, Hardoi in Revision No.188/14-15 filed under Section 48 of U.P.C.H. Act and the order dated 3.10.2012 passed by Settlement Officer Consolidation in Appeal No.243, under Section 11 (1) of U.P.C.H. Act, as contained in Annexures-1 and 2 respectively to the writ petition.

5. As per given facts of the case in the writ petition when the consolidation proceedings were initiated in the village in question, the petitioner had preferred objection under Section 9-A (2) of U.P.C.H. Act before the Consolidation

Officer which was registered as Case No.466 TB. It was prayed that the petitioner may be declared as Asankramariya Bhumidhar under the provisions of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act regarding Gatas No.526, 536, 538/1, 544 and 548 measuring area 6 biswa, 7 biswa, 3 biswa and 3 biswa respectively, over which the petitioner is allegedly in possession from the last several years.

6. Learned Consolidation Officer vide order dated 19.4.1996 had allowed the objection filed by the petitioner and had given benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act to the petitioner as Asankramariya Bhumidhar over Gata No.526 Khata No.675 by deleting the entry Banjar and regarding Gata No.544 and 548 Khata No.671 by deleting the entry Prachin Parti. It is also stated that after approximately 8 years, father of opposite parties no.3 to 5 had preferred an appeal under Section 11 (1) of U.P.C.H. Act before the Settlement Officer Consolidation challenging the order dated 19.4.1996 claiming possession over the land in question. The said appeal was dismissed vide impugned order dated 3.10.2012, however, the order dated 19.4.1996 passed by the Consolidation Officer was set aside and land in question was directed to be recorded as 'Banjar' and 'Prachin Parti' in the revenue records. Thereafter, feeling aggrieved the petitioner had preferred revision under Section 48 of U.P.C.H. Act which has been dismissed.

7. Learned counsel for the petitioner submits that the petitioner was in possession over the land in question from last 30 years and, as such, was entitled to get the benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act which was rightly given to him by the order of the Consolidation Officer. It is also submitted that the Sub-Divisional Magistrate, Sandila vide order dated 9.12.2005 had declared the petitioner as Sankramariya Bhumidhar under the provisions of Section 131 Kha of U.P.Z.A. & L.R. Act. The said order was never challenged in any court of law.

8. Submission is that the appellate authority as well as the revisional authority has failed to properly consider the contentions raised by the petitioner as the revision preferred by the petitioner has been wrongly dismissed.

9. Learned Standing Counsel opposing the submissions made by learned counsel for the petitioner submits that learned Consolidation Officer has no jurisdiction or power to give benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act while deciding the objection filed under Section 9-A (2) of U.P.C.H. Act. He is not the competent authority to decide as to whether the petitioner is entitled to get the benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act or not. No competent authority has passed any order giving benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act in favour of the petitioner, as such, the order passed by the Consolidation Officer was patently erroneous, wrong and illegal. The appellate authority has rightly dismissed the appeal preferred by the respondents. The revisional authority has also rightly dismissed the revision preferred by the petitioner.

10. I have considered the submissions made by parties' counsel and gone through the records.

11. Section 122-B of U.P.Z.A. & L.R. Act relates to the power of Land Management Committee and the Collector which provides that where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or local authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed and the proceedings shall be held for dispossession from the land belonging to the Gaon Sabha.

12. Section 122-B 4 (f) of U.P.Z.A. & L.R. Act is in fact a proviso to Section 122-B of U.P.Z.A. & L.R. Act, it provides that where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe category is in occupation of the land veted in a Gaon Sabha under Section 117 having occupied it from before 13.05.2007 and the land so occupied does not exceed 1.26 hectares, then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer and he shall be admitted as bhumidhar with non-transferable rights of the land under Section 195.

13. The provisions of Section 122-B of U.P.Z.A. & L.R. Act clearly relates to powers of the Land Management Committee and the Collector for the purpose of dispossession of unauthorized persons from the land of Gaon Sabha. The benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act could not have been ordered in consolidation proceedings while deciding the objection filed under Section 9-A (2) of U.P.C.H. Act. In the present case the Consolidation Officer while deciding the objection filed under Section 9-A (2) of U.P.C.H. Act by the order dated 19.4.1996 had directed the land in question to be recorded in the name of petitioner, giving him benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act which was patently wrong and without jurisdiction.

14. The appeal preferred by private respondents claiming the land in question was although dismissed, however, the appellate authority i.e., the Settlement Officer Consolidation, Hardoi had rightly observed in its order that the Consolidation Officer has no authority or power to grant benefit of Section 122-B 4 (f) of U.P.Z.A. & L.R. Act to the petitioner and this order of the Consolidation Officer was without jurisdiction. The appellate authority had correctly directed the land in question shall be recorded in the name of Gaon Sabha as Banjar, Prachin Parti. The petitioner against the said appellate order had filed revision which has been dismissed by the Deputy Director of Consolidation by the impugned order dated 29.5.2015.

15. Needless to observe that the contention of the petitioner that the Sub-Divisional Magistrate, Sandila vide order dated 9.12.2005 declared the petitioner as Sankramariya Bhumidhar over the land in question under the provisions of Section 131 Kha of U.P.Z.A. & L.R. Act and the said order was never challenged in any Court of law, was not the matter considered by the Consolidation authorities under the aforesaid

proceedings, hence petitioner, at this stage, cannot be permitted to raise such a plea in order to challenge the impugned orders.

16. In view of above, I do not find any infirmity or illegality in the order impugned. The writ petition being devoid of merit is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.08.2015

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Consolidation No. 571 of 2015

Pateshwari Dutt Pandey .....Petitioner
Versus
D.D.C. Dist. Faizabad & Ors. Respondents

Counsel for the Petitioner:
Aditya Tiwari

Counsel for the Respondents:
C.S.C., Vijay Krishna

U.P. Consolidation of Holdings Act-Section 42-A read with 52(2) and Rule 109-A- correction of map-after 40 years of publication of notification under Section 52-whether can be entertained by consolidation authorities-held-on highly belated stage-can not be entertained by consolidation authorities-except the exceptional circumstance given in Ghamari case.

Held: Para-20
In view of above, it is, therefore, held that the application under Section 42-A of the Act for correction of final consolidation map will not lie before the Consolidation Courts after the close of consolidation operation in the unit after issuance of notification under Section 52 (1) of the Act except in exceptional circumstances as observed in the case of Ghamari Vs. Deputy Director of Consolidation, Ballia and others; [2003 (94) RD 90]. Such application will lie only before the authority under the U.P. Land Revenue Act under Section 28.

Case Law discussed:
[2008 (105) RD 469]; [2014 (32)LCD 1912]; 1979 RD 76 (DB); 1989 RD 281; [2003 (94) RD 90]; [2015 (1) JCLR 310 (All)]; [2003 (94) RD 90].

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

1. Notice on behalf of respondents no. 1 and 2 has been accepted by the learned Chief Standing Counsel. Mr. N.K. Seth, learned senior advocate assisted by Mr. Vijay Krishna has put in appearance on behalf of respondent no. 3.

2. For the order proposed to be passed, there is no need to issue notices to respondents no. 4 and 4, hence notices to them are hereby dispensed with.

3. Heard learned counsel for the parties.

4. The writ petition has been filed challenging the order dated 03.07.2015 passed by the Deputy Director of Consolidation, Faizabad in Reference No. 213 as contained in Annexure-1 to writ petition.

5. As per given facts of the case, Village Janaura, Pargana - Haveli Awadh was notified for consolidation operation under Section 41 U.P. Consolidation of Holdings Act (for short 'the Act') sometime in the year 1968. The Assistant Consolidation Officer during preparation of Khasra Chak bandi of each plot as well as revision of the map, found that there is a tube-well and temporary construction on one biswa land of old plot no. 639. He vide order

dated 24.11.1971 declared the said one biswa land of plot no. 639 as chak out. After completion of the consolidation proceedings, notification under Section 52 of the Act was issued sometime in the year 1975. The petitioner on 11.2.2013 had moved an application under Section 42-A of the Act before the Consolidation Officer for correction in the map. The Consolidation Officer vide order dated 17.02.2014 had made reference under Section 48 (3) of the Act before the Deputy Director of Consolidation as he was of the opinion that since notification under Section 52 of the Act has already been issued and a considerable long time has passed, as such, he has no jurisdiction to pass any order under Section 42-A of the Act.

6. Learned counsel for petitioner submits that in this regard the Assistant Consolidation Officer had submitted his report dated 24.1.2015 before the Consolidation Officer in which it was specifically mentioned that incorporation of one biswa land that was declared as abadi land by order dated 24.11.1971 shall be incorporated in Gata No. 195/1337, it was not correctly mentioned in the map. The reference was ultimately decided by the Deputy Director of Consolidation by the impugned order wherein he has rejected the same on the ground that after issuance of notification under Section 52 of the Act, 39-40 years have passed when the application was preferred which is highly time barred. The petitioner could get the necessary correction made by availing the remedy under Section 28 U.P. Land Revenue Act.

7. Submission is that there is no bar that application under Section 42-A of the Act cannot be entertained after issuance of notification under Section 52 of the Act. It is also submitted that there is no limitation prescribed to move the application under Section 42-A of the Act, as such, it cannot be termed as time barred.

8. In support of his submissions, learned counsel for petitioner relies on the judgment of this Court in the case of Pooran Singh Vs. Deputy Director of Consolidation, Meerut and others; [2008 (105) RD 469], particularly paragraph 8. He also relies on the judgment of this Court in the case of Dr. Sukhbeer Singh Vs. Commissioner, Meerut and Others; [2014 (32) LCD 1912] wherein it has been held that if the map is not according to the final order then it can be corrected either under Section 42-A read with Section 52 (2) and Rule 109-A of the Act or under Section 28 U.P. Land Revenue Act. The mistake cannot be permitted to continue in the revenue records.

9. Mr. N.K. Seth, learned senior advocate appearing for respondent no. 3 submits that the application preferred under Section 42-A of the Act for correction in the map by the petitioner was not maintainable, once the notification under Section 52 of the Act for denotifying the consolidation operation was issued. It is submitted that the law is well settled in this regard. The Division Bench of this Court in the case of Gafoor Vs. Addl. Commissioner, Lucknow and others; 1979 RD 76 (DB) has held that if a map is subsequently found incorrect and it is not in conformity with the document prepared by the consolidation authorities, the same can, in suitable cases, be corrected subsequent to the publication of the notification under Section 52 of the Act by the Collector in exercise of power under Section 28 of the

Land Revenue Act. The same view has been taken in the case of Hari Ram Vs. D.D.C. Azamgarh; 1989 RD 281. He also relies on the judgment of this Court in the case of Ghamari Vs. Deputy Director of Consolidation, Ballia and others; [2003 (94) RD 90] wherein the Court has laid down the criteria under which in exceptional circumstances no application under Section 42-A of the Act can be entertained after closing of consolidation operations and issuance of notification under Section 52 of the Act. He also relies on the judgment in the case of Sant Lal & Ors. Vs. Deputy Director of Consolidation, Allahabad & Ors.; [2015 (1) JCLR 310 (All)], wherein it has been held that the application under Section 42-A, filed almost two years after the consolidation operations closed was clearly not maintainable.

10. I have considered the submissions made by the parties' counsel and gone through the records.

11. After considering the submissions made by the parties' counsel, only a short legal question which evolves for consideration before this Court is whether the application preferred under Section 42-A of the Act by the petitioner in the given facts and circumstances, after issuance of notification under Section 52 of the Act was maintainable and in case such application was not maintainable whether the petitioner has any remedy of getting the alleged correction in the map under any other law.

12. The respondent no. 1 by the impugned order dated 03.07.2015 has recorded in its finding that after closing of consolidation operations and issuance of notification under Section 52 of the Act in the village Janaura which was near to the city a lot of development has taken place on and around the land in question. The application for correction was made after approximately 39-40 years of issuance of notification under Section 52 of the Act. In case there is any error in the map, the said error can be corrected under Section 28 U.P. Land Revenue Act, as such, there is no reason to entertain the application for correction moved by the petitioner. The petitioner can get the correction made in the map by moving application under Section 28 U.P. Land Revenue Act.

13. The legal position as come out on consideration of the above facts is as under: -

14. The Division Bench of this Court in the case of Gafoor (supra) has categorically held that if a map is subsequently found incorrect and it is not in conformity with the document prepared by the consolidation authorities, the same can in suitable cases be corrected subsequent to the publication of the notification under Section 52 of the Act by the Collector in exercise of power under Section 28 of the Land Revenue Act. Relevant paragraph 4 of the judgment on reproduction reads as under:

"4. Looking to the provision of the U.P. Consolidation of Holdings Act and the Land Revenue Act, we are in agreement with the view expressed in Mohammad Raza v. Board of Revenue (supra) and we hold that if a map is subsequently found incorrect and it is not in conformity with the document prepared by the consolidation authorities, the same can in suitable cases be corrected subsequent to the publication of the notification under Section 52 of the Act by

the Collector in exercise of power under Section 28 of the Land Revenue Act. Thus we are of the view that the law laid down in Ganga Glass Work (Private) Ltd., Balavali v. State of U.P. (supra) is not good law."

15. The same view has been taken by another Division Bench of this Court in the case of Hari Ram (supra).

16. In the case of Ghamari (supra) this Court has carved out exceptions to apply the maintainability of application under Section 42-A of the Act after issuance of notification under Section 52 of the Act. The Court has held that firstly the cases which were pending under Article 226 of the Constitution of India before the High Court at the time of notification and were decided after de-notification and secondly, the cases which were pending before the consolidation authorities at the time of the de-notification and judgment were rendered thereafter, only in such cases application under Section 42-A of the Act after issuance of notification under Section 52 of the Act is maintainable and in no other circumstance, the application under Section 42-A of the Act after closing of consolidation operations and issuance of Notification under Section 52 of the Act is maintainable. Relevant paragraph 5 of the judgment on reproduction reads as under:

"5. A reading of the abovenoted statutory provisions clearly reveals that only two types of cases are covered by the said sub-section (2) of Section 52 and by the Rule 109-A. Firstly, the cases which were pending under Article 226 of the Constitution of India before the High Court at the time of notification and were decided after de-notification and secondly, the cases which were pending before the consolidation authorities at the time of the de-notification and judgment were rendered thereafter. Sub-section (2) of Section 52 begins with a non-obstante clause meaning thereby whatever has been provided by sub-section (1) is irrelevant and is not to be looked into while dealing with the case under sub-section (2). In the instant case admittedly on the date of the de-notification neither the case was pending before the High Court nor before any authority under the Act. The decision was rendered on 16.1.1969 much before the de-notification on the basis of which the application under Section 42-A of the Act was filed. By means of the said application the contesting respondent wanted to give effect to the order passed on 16.1.1999 when it was legally not permissible as Rule 109-A had not application in the present case. The authorities below had no jurisdiction to entertain the application filed by the contesting respondent. They have acted illegally in entertaining the said application and deciding the same in his favour."

17. In the case of Sant Lal & Ors. (supra), the Court has held that once the notification under Section 52 of the Act has been issued and consolidation operations have come to a close, maintenance and correction of final consolidation map prepared by the Consolidation authorities shall be carried out by the Collector in accordance with the provisions as contained in U.P. Land Revenue Act. Relevant paragraphs of the judgment on reproduction read as under:

"11. It is clear from a bare reading of the provision itself that it specifically provides that once notification under section 52 of the Act has been issued and

consolidation operations have come to a close, maintenance and correction of final consolidation map prepared by the Consolidation authorities during consolidation shall be carried out by the Collector in accordance with the provisions as contained in the UP Land Revenue Act.

12. Since there is a specific provision in the Act itself providing for correction of map after de-notification of the village and after close of consolidation operations, the observations is the judgements relied upon by the contesting respondents, which state that section 42-A has overriding effect and there is nothing contrary in the Act which debars orders being passed under this section even after notification under section 52 has been issued, appears to be unjustified. It is evident that the provision contained in section 27(3) of the Act which provides specially that correction of map is to be made in accordance with the provisions of the UP Land Revenue Act, 1901, once consolidation operations has been closed, was not brought to the notice of the court while it was deciding the aforesaid cases.

13. The counsel for the respondents, therefore, is not entitled to any benefit under the judgements cited by him and I am constrained to hold to the judgements relied upon do not lay down the correct law having failed to notice the effect and import of section 27(3) of the Act.

14. It is, therefore, held that an application under section 42-A for correction of the final consolidation map will not lie before the Consolidation Courts under section 42-A after the close of consolidation operation in the unit by issuance of notification under section 52(1) of the Act and such an application will lie only before the authority as provided under the UP Land Revenue Act. Section 42-A of the UP Consolidation of Holdings Act can be invoked for correction of the map only till such time the consolidation operations have not been closed by issuance of a notification under section 52 of the Act. However the courts have jurisdiction to decide an application and order correction in the map under section 42-A even after a notification under section 52(1) has been issued only if such application for correction was filed before the notification was issued and was pending on that date."

18. So far as the judgment of this Court in the case of Pooran Singh (supra) reliance on which has been placed by the petitioner's counsel is concerned, in the said case the application preferred under Section 42-A of the Act for correction was allowed by the Consolidation Officer. The Court held that there is no absolute prohibition that such power cannot be exercised under Section 42-A of the Act after publication of Notification under Section 52 of the Act. In the case of Dr. Sukhbeer Singh (supra), the Court has observed that in case map is not according to the final order then it can be corrected either under Section 42-A read with Section 52 (2) Rule 109-A of the Act or under Section 28 U.P. Land Revenue Act. The mistake cannot be permitted to continue in the revenue records. Relevant paragraph 9 of the judgment on reproduction reads as under:

"9. In this case, the petitioner took the case that by the order dated 9.9.1980, passed in reference proceeding, the location of the chak road was shifted. Although, the order of Deputy Director of Consolidation was duly incorporated in other consolidation record, but the map has not been corrected according to it. Thus, the map which was prepared during consolidation operation, was not

according to the final order of Deputy Director of Consolidation and final consolidation records In case the map is not according to the final order, then it could be corrected, either under Section 42-A read with Section 52(2) and Rule 109-A of U.P. Consolidation of Holdings Act, or under Section 28 of the Act. The mistake cannot be permitted to continue in the revenue record."

19. Both these judgments in the given facts and circumstances of this case do not help the petitioner as they are not applicable.

20. In view of above, it is, therefore, held that the application under Section 42-A of the Act for correction of final consolidation map will not lie before the Consolidation Courts after the close of consolidation operation in the unit after issuance of notification under Section 52 (1) of the Act except in exceptional circumstances as observed in the case of Ghamari Vs. Deputy Director of Consolidation, Ballia and others; [2003 (94) RD 90]. Such application will lie only before the authority under the U.P. Land Revenue Act under Section 28.

21. As such, I am of the considered view that in the given facts and circumstances, as mentioned above, the application preferred by the petitioner under Section 42-A of the Act after issuance of notification under Section 52 of the Act was not maintainable. The view taken by the respondent no. 1, Deputy Director of Consolidation while deciding the reference is just and proper. The petitioner has a remedy of getting the correction made in the map by moving application under Section 28 U.P. Land Revenue Act before the concerning Collector.

22. The writ petition being devoid of merit is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.07.2015

BEFORE
THE HON'BLE VIPIN SINHA, J.

Government Appeal No. 666 of 1987

State of U.P. ...Appellant
Versus
Harish Chandra & Ors. ...Respondents

Counsel for the Appellant:
A.G.A.

Counsel for the Respondents:
Sri Vijendra Singh, Sri Virendra Singh

Govt. Appeal-against acquittal-offence u/s 3/7 E.C. Act-no illegality or perversity shown-nor can be disputed the view taken by Trail Court-no reasonable prudence of man can form such opinion-after laps of 25 years-can not be interfered-Appeal dismissed.

Held: Para-16
It is an established position of law that if the court below has taken a view which is a possible view in a reasonable manner, then the same shall not be interfered with and that too in view of the fact that more than 25 years have already elapsed.

Case Law discussed:
Criminal Appeal No. 791 of 2011; Criminal Appeal No.512 of 2014; Criminal Appeal No. 1508 of 2005.

(Delivered by Hon'ble Vipin Sinha, J.)

1. Heard learned Additional Government Advocate, learned counsel for the respondents and perused the record.

2. With the consent of learned counsel for the parties, the present government appeal is being heard finally.

3. The present government appeal arises out of the judgment and order dated 13.11.1986 passed by Special Judge (EC) Act, Badaun in criminal case no. 10 of 1984 whereby respondents, namely, Harish Chandra, Kailash Chandra and Ram Pal Singh have been acquitted for the offence under Section 3/7 of E.C. Act.

4. A perusal of the record shows that the court below has recorded categorical findings to the following effect that:-

"witnesses are not consistent regarding the paper which was obtained from the accused Kailash Chandra whether it was scribed over the spot or it was blank sheet of paper. Witnesses are also not consistent with their previous statements and their statements are self contradictory and self defeating."

5. The court below has further recorded a finding that "the witnesses are not consistent regarding the mode of lodging of the report. Those persons who could obtain signatures of one of the accused over blank sheet of paper and manufacture a writing thereon evidencing that accused have pleaded to forgive him for his misconduct could not be trusted regarding other aspect of the case."

6. The court below has further recorded a finding that "the FIR is not authenticated."

7. The court below after perusing of the evidence on record has concluded that "it is admitted case that all the three accused were licence holders. It was for the prosecution to prove that oil was sold in black market and for that accurate measurement was necessary but when witnesses themselves do not understand the mode of measurement and could not speak with certainty it would too much to trust their bare statement that shortage without requiring them to lay foundation to furnish date and possible result and mode of the measurement."

8. Thus on account of the aforesaid facts and circumstances of the case, the court below while acquitting the accused-respondents have concluded that "thus from this discussion I hold that the prosecuition miserably failed to prove the charge under section 3/7 of E.C. Act. All the three accused deserve to be acquitted."

9. Aggrieved against the acquittal of the accused-respondents, the present government appeal has been filed by learned A.G.A. and he has vehemently pressed the appeal on the ground that the judgment and order dated 13.11.1986 passed by Special Judge (EC) Act, Badaun is perversed and is against the weight of evidence on record and thus liable to be set aside and because minor contradictions in the statement of the prosecution witnesses in a trial which took place after a long lapse of time was natural.

10. Learned A.G.A. has not been able to point out any illegality and perversity with the findings as recorded by the court below and thus it cannot be said that the view taken by Trial Court is a perverse view. Learned A.G.A. has also failed to point out as to which of the findings is contrary to the evidence on record or is perversed.

11. However, the judgment of the trial court is duly substantiated by the evidence on record.

12. Regard may also be had to the consistent legal position with regard to the scope and interference by the High Court in the judgement and order of acquittal. The Apex Court in the case of Murlidhar @ Gidda & Anr. Vs. State of Karnataka decided on 09.04.2014 in Criminal Appeal No. 791 of 2011 has observed as under:

"The Supreme Court started by citing Lord Russell in Sheo Swarup highlighted the approach of the High Court as an appellate court hearing the appeal against acquittal. Lord Russell said,....."the High Court should and will always give proper weight and consideration to such matters as:

(1) The views of the trial Judge as to the credibility of the witnesses;

(2) The presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;

(3) The right of the accused to the benefit of any doubt; and

(4) The slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses." The opinion of the Lord Russell has been followed over the years.

11. As early as in 1952, this Court in Surajpal Singh[2] while dealing with the powers of the High Court in an appeal against acquittal under Section 417 of the Criminal Procedure Code observed, ".....the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

12. The approach of the appellate court in the appeal against acquittal has been dealt with by this Court in Tulsiram Kanu[3], Madan Mohan Singh[4], Atley[5] , Aher Raja Khima[6], Balbir Singh[7], M.G. Agarwal[8], Noor Khan[9], Khedu Mohton[10], Shivaji Sahabrao Bobade[11], Lekha Yadav[12], Khem Karan[13], Bishan Singh[14], Umedbhai Jadavbhai[15], K. Gopal Reddy[16], Tota Singh[17], Ram Kumar[18], Madan Lal[19], Sambasivan[20], Bhagwan Singh[21], Harijana Thirupala[22], C. Antony[23], K. Gopalakrishna[24], Sanjay Thakran[25] and Chandrappa[26]. It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following: (i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court, (ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal, (iii) Though, the power of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanor of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the

trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified, and (iv) Merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.

13. Reference may also be made to the case of Basappa Vs. State of Karnataka decided on 27.02.2014 passed in Criminal Appeal No. 512 of 2014, wherein the Apex Court has observed as under:

"8. The High Court in an appeal under Section 378 of Cr.PC is entitled to reappraise the evidence and conclusions drawn by the trial court, but the same is permissible only if the judgment of the trial court is perverse, as held by this Court in Gamini Bala Koteswara Rao and Others v. State of Andhra Pradesh through Secretary[1]. To quote: "14. We have considered the arguments advanced and heard the matter at great length. It is true, as contended by Mr Rao, that interference in an appeal against an acquittal recorded by the trial court should be rare and in exceptional circumstances. It is, however, well settled by now that it is open to the High Court to reappraise the evidence and conclusions drawn by the trial court but only in a case when the judgment of the trial court is stated to be perverse. The word "perverse" in terms as understood in law has been defined to mean "against the weight of evidence". We have to see accordingly as to whether the judgment of the trial court which has been found perverse by the High Court was in fact so." (Emphasis supplied)

9. It is also not the case of the prosecution that the judgment of the trial court is based on no material or that it suffered from any legal infirmity in the sense that there was non-consideration or misappreciation of the evidence on record. Only in such circumstances, reversal of the acquittal by the High Court would be justified. In K. Prakashan v. P.K. Surenderan [2], it has also been affirmed by this Court that the appellate court should not reverse the acquittal merely because another view is possible on the evidence. In T. Subramanian v. State of Tamil Nadu [3], it has further been held by this Court that if two views are reasonably possible on the very same evidence, it cannot be said that the prosecution has proved the case beyond reasonable doubt.

10. In Bhim Singh v. State of Haryana [4], it has been clarified that interference by the appellate court against an order of acquittal would be justified only if the view taken by the trial court is one which no reasonable person would in the given circumstances, take.

11. In Kallu alias Masih and others v. State of Madhya Pradesh [5], it has been held by this Court that if the view taken by the trial court is a plausible view, the High Court will not be justified in reversing it merely because a different view is possible. To quote: "8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing

appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further, if it decides to interfere, it should assign reasons for differing with the decision of the trial court." (Emphasis supplied)

12. In Ramesh Babulal Doshi v. State of Gujarat [6], this Court has taken the view that while considering the appeal against acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable and if the court answers the above question in negative, the acquittal cannot be disturbed.

14. The exercise of power under Section 378 of Cr.PC by the court is to prevent failure of justice or miscarriage of justice. There is miscarriage of justice if an innocent person is convicted; but there is failure of justice if the guilty is let scot-free. As cautioned by this Court in State of Punjab v. Karnail Singh [8]:

"6. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. ..."

14. Last but not the least, reference may also be made to the recent judgement of Supreme Court in the case of Ashok Rai Vs. State of U.P. & Ors. Decided on 15.04.2014 in Criminal Appeal No. 1508 of 2005.

" 8. Several Judgments of this court have been cited on the principles which should guide the court while dealing with an appeal against order of acquittal. The law is so well settled that it is not necessary to refer to those judgments. Suffice it to say that the appellate court has to be very cautious while reversing an order of acquittal because order of acquittal strengthens the presumption of innocence of the accused. If the view taken by the trial court is a reasonably possible view it should not be disturbed, because the appellate court feels that some other view is also possible. A perverse order of acquittal replete with gross errors of facts and law will have to be set aside to prevent miscarriage of justice, because just as the

court has to give due weight to the presumption of innocence and see that innocent person is not sentenced, it is equally the duty of the court to see that the guilty do not escape punishment. Unless the appellate court finds the order of acquittal to be clearly unreasonable and is convinced that there are substantial and compelling reasons to interfere with it, it should not interfere with it."

15. Thus in view of aforesaid consistent legal position as elaborated above and also in view of the fact that learned A.G.A. has failed to point out any illegality or perversity with the findings so recorded in the impugned order, no case for interference has been made out.

16. It is an established position of law that if the court below has taken a view which is a possible view in a reasonable manner, then the same shall not be interfered with and that too in view of the fact that more than 25 years have already elapsed.

17. Thus, on a bare perusal of the judgement and order dated 13.11.1986, it cannot be said that the view taken by the trial court is not a possible view or a feasible view that could be taken by a reasonable person. Moreover as no illegality or perversity has been pointed out, this Court refuses to grant any indulgence whatsoever to the appellant-State.

18. Another aspect which has to be appreciated is that a period of almost 25 years have already elapsed and the incident is allegedly of the year 1983.

19. In view of the aforesaid facts and circumstance of the case, the appeal is dismissed.

20. Consequences to follow.

21. Let a copy of this order be certified to the court concerned.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2015

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Second Appeal No. 700 of 2007

Shyam Singh & Ors. ...Appellants
Versus
Sarvadeo Singh & Ors. ...Respondents

Counsel for the Appellants:
Sri Hemant Kumar

Counsel for the Respondents:
Sri Raj Kumar Pandey, Sri P.K. Singh

C.P.C. Section-100-Second Appeal-substantial question of law-question of applicability of Section 49 of C.H. Act-Courts below recorded findings regarding-non applicability-can not be disturbed in Second Appeal-no substantial question of law involved-appeal dismissed.

Held: Para-12

In view of the aforesaid discussions and findings that there was no adjudication of the defendant-appellant by the consolidation court in respect of the land in dispute, substantial question formulated and noticed above would have no applicability in the facts of the present case and the suit filed by the plaintiff-respondent would not be barred under Section 49 of the U.P. Consolidation of Holdings Act. This Court in exercise of jurisdiction under section 100 of the Civil Procedure Code is not required to re-appraise the evidence, which has come on record and has already been noticed above. The finding that defendant was not recorded over 16 decimal of land in question and that plaintiff was recorded in the basic year

entry, is based upon material, which cannot be said to be perverse or erroneous. No substantial question of law therefore arises for consideration in the present appeal, which consequently fails and dismissed.

(Delivered by Hon'ble Ashwani Kumar Mishra, J.)

1. Plaintiff-respondent filed a suit for permanent injunction in respect of 16 decimal land of plot No. 420 against the defendant with the allegation that plaintiff is recorded over the land and the defendant without any legal authority is attempting to interfere. Defendant, who is the appellant before this Court, contested the suit by saying that plot No. 420 corresponds to previous plot No. 617, in respect of which the dispute between the parties had traveled upto the Court of Deputy Director of Consolidation, and the rights of the defendant over 16 decimal land of plot No. 617 had been recognized. It was therefore submitted that once the issue stands resolved by the consolidation court, thereafter the original suit was not maintainable before the civil court as the bar of section 49 of U.P. Consolidation of Holdings Act (hereinafter referred to as the 'Act') would operate and the suit as such be dismissed.

2. On the basis of respective pleas set up by the parties in the pleadings, trial court proceeded to frame as many as 9 issues. Parties led their oral and documentary evidence in support of their respective cases. Plaintiff filed Khatauni i.e. the record of right, in respect of the land in order to contend that in the basic year entry as well as in all subsequent entries the plaintiffs were recorded over the disputed plot as such the bar of section 49 would not operate. It was also stated that the decision of Deputy Director of Consolidation relied upon by the defendant would otherwise not come to their rescue as the Deputy Director of Consolidation had merely allowed the revision filed by the plaintiff in respect of other part of Khasra No. 617, and there was no adjudication in respect of 16 decimal land of suit.

3. Trial court on the basis of oral and documentary evidence proceeded to decree the plaintiffs' suit by holding that the plaintiffs were recorded in the basic year entry and through-out thereafter over the suit property measuring 16 decimal land and the defendants had no right over suit property. The decree of the trial court was assailed by the defendants in appeal. Appellate court considered the grounds urged before it in appeal and came to a conclusion that suit was rightly decreed on the basis of evidence brought on record. Aggrieved by the judgment and decree of the courts below, defendant appellant has filed the instant second appeal under Sec. 100 of Civil Procedure Code.

4. Learned counsel for the appellant submits that in view of the order passed by the Deputy Director of Consolidation in revision No. 1153 dated 21.1.1964, the defendants were recognized as owners of plot No. 617, area 16 decimal, and contrary view taken by the civil court is impermissible. It is also stated that the suit itself was barred under Section 49 of the Act and the decree of the courts below is without jurisdiction.

5. Learned counsel for the plaintiffs-respondents defends the judgment and decree of the courts below on the ground that the Deputy Director of Consolidation

had not adjudicated rights of the parties in respect of suit property and decree of the civil court is not in conflict with the judgment of the Deputy Director of Consolidation dated 21.1.1964. It is also contended that the findings returned by the civil court that the defendant in the suit was not recorded in the basic year is a finding based on perusal of evidence and records, which is not liable to be reappraised in the present appeal. Learned counsel also submits that in case what is contended by defendants-appellants is true, then the defendant ought to have applied for correction/mutation of his name in the records maintained by the consolidation authority, but no such action having been taken by the defendant for nearly 20 years clearly shows that defendant in fact was not recorded in the basic year entry.

6. The appeal at the time of initial hearing was admitted on the following substantial questions of law:-

"(1) Whether the court below have committed an error of law in not accepting right and title of the defendant - appellant which have been settled about 20 years prior to the filing of the suit by the Consolidation Court in favour of the defendant - appellant in respect of the land in dispute ?

(2) Whether the suit filed by plaintiff-respondent is barred by section 49 of U.P. Consolidation of Holdings Act?"

7. Parties have made their submissions essentially based upon import of the order passed by the Deputy Director of Consolidation and, therefore, it would be relevant to examine the same. It transpires from the order of the Deputy Director of Consolidation that plot No. 617 consisted of two parts i.e. plot Nos. 617/1 and 617/2. Plot No. 617/1 consisted of an area of 16 decimal whereas the other part i.e. 617/2 was of 12.03 acers. While noticing the facts of the case, Deputy Director of Consolidation in his order observed that defendant-appellant was recorded in the basic year entry upon 16 decimal land of plot No. 617/1, whereas, the revisionist (plaintiff-respondent in the present appeal) were recorded over plot No. 617/2. The defendant-appellant, therefore, filed an objection under Section 9 of the Act, claiming exclusive tenancy right on the whole of plot No. 617 by way of adverse possession. Objection of the defendant-appellant was rejected by the consolidation officer on the ground that there was no evidence of his possession. Appeal, however, filed by the defendant-appellant was allowed and the claim was decreed in appeal. A revision was, therefore, filed by the plaintiff-respondent, which was allowed by the Deputy Director of Consolidation under Section 48 of the Act vide his order dated 21.1.1964. The Deputy Director of Consolidation held that there was no justification to dispute the basic year entries as it stood recorded, and the claim of the defendant-appellant was repelled. The operative portion of the order of the Deputy Director of Consolidation merely rejects the revision filed by the defendant-appellant and there is no adjudication in respect of 16 decimal land of plot No. 617/1 therein. The operative portion of the order of the Deputy Director of Consolidation reads as Under:-

"for the reasons given above, the order of the learned ASOC is set aside and the revision is allowed. The entries in the basic year records will continue".

8. It is settled that only the operative portion of the order constitutes decree which alone binds the parties. There is, thus, no adjudication of claim in respect of plot No.617/1 in the order of the Deputy Director of Consolidation.

9. From the perusal of the order of the Deputy Director of Consolidation, it does appear that the defendant-appellant was recorded in the basic year entry over 16 decimal land, but a deeper examination of the order of the Deputy Director of Consolidation would reveal that such recital made in the order was by way of noticing facts of the case only. The Deputy Director of Consolidation in its operative portion merely directed the basic year entries to be maintained. The original entries of the basic year have not been brought on record and are reported to be not available. The records consists of the certified copy of the basic year entries, in which the defendant is not recorded. The findings therefore returned by the civil court that the defendant was not recorded over 16 decimal land is based upon the materials available before it and the same cannot be said to be perverse or erroneous.

10. While admitting the appeal, lower court record had been summoned. Parties are not at issue that only the certified copy of the basic year entry is available on record being Paper No. 27-C according to which, the plaintiffs-respondents were recorded over 16 decimal land of plot No. 617/1. Appellate court, in its order under challenge, has noticed that certified copy of the basic year entry of 16 decimal land of plot No. 617/1 had been filed by the plaintiffs according to which plaintiffs were recorded. An endorsement, however, was made that original entry is not traceable. It was for this reason that the appellate court on a previous occasion remitted the matter for adducing further evidence by the parties in this regard. The trial court, pursuant to such remand, summoned the original records from the record room maintained in the collectorate. The appellate court, in this order has recorded that paper No.27-C was produced as being the basic year entry before the Civil Court and as the records were apparently very old, no exception was taken to the original not being available. Relying upon the statement of the concerned clerk of the record room of collectorate, the lower appellate court has returned a categorical finding that as per the records available, it was the plaintiff who was recorded in the revenue records. In view of the finding returned by the civil court, based upon the perusal of the record that plaintiff-respondent was, in fact, recorded in the basic year entry over the suit property the conclusion drawn by the civil court cannot be said to be vitiated by any error of law.

11. One of the other important aspect, which arises for consideration in the present appeal is that in case the contention of the defendant-appellant based upon the interpretation of the order of the Deputy Director of Consolidation is taken to be correct then there was apparently no justification for the defendant not to have got himself recorded in the consolidation records over 16 decimal of land in question. Nearly 20 years had intervened between the order of Deputy Director of consolidation and the filing of the suit. It was open for the defendants to have got themselves recorded in the consolidation records, but no such endeavor at any point of time was apparently made. Learned counsel for the appellant merely states that some note

was prepared by the Tehsildar for correction stating that the entries as had existed were incorrect, but no order based upon such note was actually passed by the revenue authorities, rather the Sub Divisional Magistrate rejected the note prepared by the Tehsildar by observing that such long entry are not required to be corrected. In such factual scenario whatever doubts were generated on the strength of the interpretation of the order of the Deputy Director of Consolidation stands clarified by the orders passed by the trial court as well as the lower appellate court, while returning a categorical finding that the defendant was not recorded in the basic year entry.

12. In view of the aforesaid discussions and findings that there was no adjudication of the defendant-appellant by the consolidation court in respect of the land in dispute, substantial question formulated and noticed above would have no applicability in the facts of the present case and the suit filed by the plaintiff-respondent would not be barred under Section 49 of the U.P. Consolidation of Holdings Act. This Court in exercise of jurisdiction under section 100 of the Civil Procedure Code is not required to re-appraise the evidence, which has come on record and has already been noticed above. The finding that defendant was not recorded over 16 decimal of land in question and that plaintiff was recorded in the basic year entry, is based upon material, which cannot be said to be perverse or erroneous. No substantial question of law therefore arises for consideration in the present appeal, which consequently fails and dismissed.

13. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2015

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE SHAMSHER BAHADUR SINGH, J.

Special Appeal No. 1905 of 2010

Mahendra Kumar Gaud ...Appellant
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Appellant:
Sri O.P. Singh, Sri S.K. Rao, Sri Awadh Narayan Rai

Counsel for the Respondents:
C.S.C.

U.P.Police Officers of the subordinate ranks (Punishment & Appeal) Rule 1991-Rule 8(2)-Dismissal from service-considering conduct of employee-on conviction-after stay and suspension of conviction in criminal appeal-can be basis for review by decision making authority-but reinstatement can be only after acquittal in Appeal-held-Single Judge rightly dismissed the petition.

Held: Para-9(16)
In the circumstances, it cannot be held that the respondents could not have taken recourse to regulation 39(4) of regulation of 1956 considering the conduct led to conviction of a criminal charge. The submission of the learned counsel for the petitioner, therefore, is rejected.

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

1. Heard Sri O.P. Singh, Senior Advocate, assisted by Sri S.K. Rao, learned counsel for the appellant and learned Standing Counsel for the respondents.

2. This is an appeal against the order of the learned Single Judge dated 20.7.2010 passed in Writ Petition No. 70001 of 2009 whereby the writ petition filed by the appellant has been dismissed.

3. The appellant was a Constable in Police Department. Admittedly, he had been convicted by the trial court for the murder committed by him and punishment of life imprisonment has been awarded. By order dated 7.9.2002, the appellant had been dismissed from service under Rule 8 (2)(a) of the U.P. Police Officers of the Sub-ordinate Ranks (Punishment & Appeal) Rules, 1991 (hereinafter referred to 'Rules, 1991').

4. Being aggrieved, the appellant filed writ petition, which has been dismissed. The learned Single Judge held that the issue involved is squarely covered by the judgment of this Court in the case of Brahma Dev Vs. Life Insurance Corporation of India, 2006 (3) ALJ, 710, which is based on the decision of the Apex Court in the case of Deputy Director of Collegiate Education (Administration), Madras Vs. S. Nagoor Meera, reported in AIR 1995 SC, 1364.

5. Learned counsel for the appellant submitted that against the order of the trial court convicting the appellant, an appeal has been filed wherein the sentence has been stayed and, therefore, the dismissal order is liable to be set aside and the appellant is entitled to be reinstated in service.

6. We do not find substance in the argument of learned counsel for the appellant.

7. Rule 8(2) of the Rules, 1991 reads as follows:

"Rule 8 Dismissal and removal:-

1-No Police Officer shall be dismissed or removed from service by an authority subordinate to the appointing authority.

2-No Police Officer shall be dismissed, removed or reduced in rank except after inquiry and disciplinary proceeding as contemplated by these rules.

Provided that this rule 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"

8. A bare perusal of proviso of Rule 8 makes it clear that the Police personnel can be dismissed or removed on the ground of conduct which has led to his conviction on criminal charges even without any disciplinary proceeding being contemplated. Therefore, exercise of power dismissing the appellant on the ground of conduct which has led to his conviction on criminal charges cannot be said to be illegal.

9. In the case of Brahma Dev Vs. Life Insurance Corporation of India (supra) not only the sentence but even the order of conviction was stayed in appeal and effect thereof was considered. It would be useful to reproduce paragraphs 11 to 16 of the said judgment as under:-

"11. Now coming to question no.1, in my view the power under regulation 39(4) can be exercised even if the order of conviction and sentence passed by the criminal court is stayed in appeal. A perusal of regulation 39 (4) shows that the factum of conviction on a criminal charge is sufficient to empower the Disciplinary Authority to consider the circumstances

of the case and pass such orders as it may deem fit. Whether the order of conviction is operating or not or whether it is executable or not is of not much relevance for exercise of power under Regulation 39(4) of the Regulations of 1956.

12. A similar question came up for consideration before the Apex Court in the case of Deputy Director of Collegiate Eduction (Administration), Madras Vs, S.Nagoor Meera, AIR 1995 Supreme Court, 1364. The Apex Court considered the pari materia provisions contained in Article 311(2), second proviso, clause (a) of the Constitution of India and said that what is relevant for exercise of power thereunder is the conduct which has led to conviction in criminal charge and not the conviction itself. There is no question of suspending the conduct of an employee when he has been convicted and in any appeal, the same is stayed. Since the Disciplinary Authority has to exercise power considering the conduct of the employee, which has led to his conviction on a criminal charge and since conduct is not stayed, therefore, even if the conviction has been stayed in appeal, the power can be exercised by the Disciplinary Authority on the basis of the conduct which has led to conviction on criminal charge.

13. The relevant observations of the Apex Court as contained in para 8 are reproduced as under:

" We need not, however, concern ourselves any more with the power of the appellate court under the Code of Criminal Procedure for the reason that what is relevant for clause (a) of the second proviso to Article 311(2) is the "conduct which has laid to his conviction on a criminal charge" and there can be no question of suspending the conduct. We are, therefore, of the opinion that taking proceedings for and passing orders of dismissal, removal or reduction in rank of a government servant who has been convicted by a criminal court is not barred merely because the sentence or order is suspended by the appellate court or on the ground that the said government servant-accused has been released on bail pending the appeal."

14. It has also been held by the Apex Court in the same judgment that in cases where an employee is convicted on a criminal charge, the, appropriate course would be in all such cases to take action and not to wait for the result of the appeal or revision as the case may be. It is always open to the authorities to revise its order and reinstate the Government Servant with all the benefits if in appeal or other proceedings the Government Servant accused is acquitted.

15. Similar view has been taken by a Division Bench of this Court in the case of Mohal Lal Vs. State of U.P., 1998 (78) FLR 987: (1998 All LJ 987) and relying on Nagoor Meera Case: (AIR 1995 SC 1364) (supra) this Court in para 7 held as under:-

" Taking proceedings for and passing orders of dismissal, removal or reduction in rank of a Government servant who has been convicted by a criminal court is not barred merely because the sentence and order is suspended by the Appellate Court or on the ground that the said Government servant-accused has been released on bail pending the appeal. In view of this authoritative pronouncement, the order dismissing the appellant from service cannot be set aside on the ground that the operation of the judgment by which the appellant had been convicted under Section 304, Part -I IPC has been stayed in the Criminal Appeal preferred by him."

16. In the circumstances, it cannot be held that the respondents could not have taken recourse to regulation 39(4) of regulation of 1956 considering the conduct led to conviction of a criminal charge. The submission of the learned counsel for the petitioner, therefore, is rejected."

10. The Apex Court in the case of Deputy Inspector General of Police and another Vs. S. Samuthiram, (2013) 1 SCC 598 has held as follows :

"This Court in Southern Railway Oficers Assn. v. Union of India, reported in (2009) 9 SCC 24 held that acquittal in a criminal case by itself cannot be a ground for interfering with an order of punishment imposed by the disciplinary authority. The Court reiterated that the order of dismissal can be passed even if the delinquent officer had been acquitted of the criminal charge.

In State Bank of Hyderabad v. P. Kata Rao, reported in (2008) 15 SCC 657 (SCC p. 662, para 18) this Court held that there cannot be any doubt whatsoever that the jurisdiction of the superior courts in interfering with the finding of fact arrived at by the enquiry officer is limited and that the High Court would also ordinarily not interfere with the quantum of punishment and there cannot be any doubt or dispute that only because the delinquent employee who was also facing a criminal charge stands acquitted, the same, by itself, would not debar the disciplinary authority in initiating a fresh departmental proceeding and/or where the departmental proceedings had already been initiated, to continue therewith. In that judgment, this Court further held as follows: (SCC p. 662, para 20)

"20. The legal principle enunciated to the effect that on the same set of facts the delinquent shall not be proceeded in a departmental proceedings and in a criminal case simultaneously, has, however, been deviated from. The dicta of this Court in Capt. M. Paul Anthony v. Bharat Gold Mines Ltd. however remains unshaken although the applicability thereof had been found to be dependent on the fact situation obtaining in each case."

11. In Karnataka SRTC v. M.G. Vittal Rao, reported in (2012) 1 SCC 442, the Apex Court after a detailed survey of various judgments rendered by this Court on the issue with regard to the effect of criminal proceedings on the departmental enquiry, held that the disciplinary authority imposing the punishment of dismissal from service cannot be held to be disproportionate or non-commensurate to the delinquency."

12. The Apex Court further held as follows:

"As we have already indicated, in the absence of any provision in the service rules for reinstatement, if an employee is honourably acquitted by a criminal court, no right is conferred on the employee to claim any benefit including reinstatement. Reason is that the standard of proof required for holding a person guilty by a criminal court and the enquiry conducted by way of disciplinary proceeding is entirely different. In a criminal case, the onus of establishing the guilt of the accused is on the prosecution and if it fails to establish the guilt beyond reasonable doubt, the accused is assumed to be innocent. It is settled law that that the strict burden of proof required to

establish guilt in a criminal court is not required in a disciplinary proceedings and preponderance of probabilities is sufficient. There may be cases where a person is acquitted for technical reasons or the prosecution giving up other witnesses since few of the other witnesses turned hostile, etc. In the case on hand the prosecution did not take steps to examine many of the crucial witnesses on the ground that the complainant and his wife turned hostile. The court, therefore, acquitted the accused giving the benefit of doubt. We are not prepared to say that in the instant case, the respondent was honourably acquitted by the criminal court and even if it is so, he is not entitled to claim reinstatement since the Tamil Nadu Service Rules do not provide so."

13. In the case of Baldev Singh Vs. Union of India and others, reported in 2006 SCC (L&S) , the Apex Court has held as follows :

"As the factual position noted clearly indicates, the appellant was not in actual for the period he was in custody. Merely because there has been an acquittal does not automatically entitle him to get salary for the period concerned. This is more so, on the logic of no work no pay. It is to be noted that the appellant was terminated from service because of the conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service. The aforesaid position was clearly stated in Ranchhodji Chaturji Thakore v. Supdt. Engineer, Gujarat Electricity Board, reported in (1996) 11 SCC 603."

14. In view of the above, we do not find any error in the impugned order, which requires interference by this Court.

15. The Special Appeal fails and is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 05.08.2015

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

U/S 482/378/407 No. 1994 of 2011

Jawahar Lal @ Jawahar Lal Jalaj Applicant
Versus
The State of U.P. ...Opp. Party

Counsel for the Applicant:
Nandit Srivastava, Kuldeep Srivastava

Counsel for the Opp. Party:
Bireshwar Nath

Cr.P.C. Section-482-Inherent power of Court-application dismissed in default-can not be termed as judgment-illness of Counsel not disputed by C.B.I.-held-bar of Section 362 Cr.P.C.-not available-dismissal order can not be recalled.

Held: Para-29 & 30

29. The views expressed by the various High Courts in the aforesaid decisions are in favour of the restoration of such petition, which has been dismissed in default in exercise of powers under section 482 of the code of criminal procedure with a view to secure the ends of justice and I am also in respectful agreement with the views expressed by the various High Courts in the aforesaid decisions.

30. Therefore, I am of the view that if any petition has been dismissed in default and the application for recall is made, then it will not come within the meaning of words 'alter' or 'review' as expressed in Section 362 of the Code. Accordingly, such orders may be recalled or set aside provided the intention of the parties is bonafide i.e. party who has

moved the application for recall or restoration is not unnecessary lingering on the proceedings malafidely or that interim order or stay order, if any, is not being misused.

Case Law discussed:
2011(74) ACC 609 SC; 1987 CRI.L.J. 1856 & AIR 1987 SCC 1500; AIR 1981 SC 1400; 1990 CRI.L.J. 2735 (All.); 2001 (3) PLJR 728; 1994 GLH (1) 447;AIR 1957 Patna 33 & 1957 Cri.L.J. 82; 2001 SCC (Cri) 113; 2012 Cri.L.J. 1001 SC.

(Delivered by Hon'ble Aditya Nath Mittal, J.)

1. Crl. Misc. Application No.51760 of 2015 - Application for Restoration of the Petition and the Recall of the order dated 29.04.2015.

2. Heard learned counsel for the applicant-petitioner, learned AGA as well as learned counsel appearing on behalf of the CBI and perused the pleadings.

3. This application for recall of the order dated 29.04.2015 has been filed with the prayer to restore the Criminal Misc. Case No.1994 of 2011 (U/s 482 Cr.P.C.) (Jawahar Lal @ Jawahar Lal Jalaj vs. The State Of U.P Thru CBI/ACB Lucknow) at its original number and status.

4. Learned counsel for the applicant has submitted that on 29.04.2015 the counsel for the petitioner all of sudden around 11.30 am developed heaviness and restlessness and rushed to the High Court Dispensary where his blood-pressure was found to be 160/110, upon which the doctor advised him for complete rest and due to this reason, he could not attend the court and could not mention for adjournment of the case, consequently, the petition was dismissed for want of prosecution. In support of this contentions, learned counsel for the petitioner has relied upon the various judgements, which shall be taken into consideration later on.

4. It has also been submitted that although, there is no provision in the Code of Criminal Procedure for restoration of a criminal case like Order IX of the CPC. It has further been submitted that Section 362 Cr.P.C. prohibits the court to alter or review the judgement but if any case is dismissed in default, it cannot be said to be a judgement. Therefore, the bar of Section 362 Cr.P.C. is not applicable. It has also been submitted that where the party to the proceedings is deprived of being heard and if in the interest of justice, opportunity of hearing is expedient than such opportunity must be given. It has also been submitted that if there is no provision in the Cr.P.C. for restoration of a petition unlike Order IX of CPC then there is no restriction in the Cr.P.C. to recall and set aside such order, which has been passed in absence of the petitioner.

5. Learned counsel appearing for the CBI has not raised any objection to the state of health of the counsel for petitioner on 29.04.2015 and has also conceded that if any petition is dismissed for default, then it is neither a judgement in view of Section 353 and 465. He has further submitted that the court can exercise its inherent power to restore such petition. It has also been submitted that if any judgement has been passed without application of mind or where no reasons have been assigned or where it has been dismissed in default, such order can be set aside exercising the powers under section 482 Cr.P.C.

6. The main question for consideration is that whether a petition under section 482 Cr.P.C., which has been dismissed for want of prosecution can be restored to its original number or not and whether the prohibition as provided by Section 362 Cr.P.C. will apply or not?

Section 362 Cr.P.C. provides as under :

"362. Court not to alter judgement - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

Section 353 Cr.P.C. defines the judgment as under :

"353. Judgment -

1. The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced in open Court by the Presiding officer immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders:-

(a) by delivering the whole of the judgment; or

(b) by reading out the whole of the judgment; or

(c) by reading out the operative part of the judgment and explaining the substance of the judgment in a language which is understood by the accused or his pleader.

2. Where the judgment is delivered under clause (a) of sub- section (1), the presiding officer shall cause it to be taken down in short- hand, sign the transcript and every page thereof as soon as it is made ready, and write on it the date of the delivery of the judgment in open Court.

3. Where the judgment or the operative part thereof is read out under clause (b) or clause (c) of sub- section (1), as the case may be, it shall be dated and signed by the presiding officer in open Court, and if it is not written with his own hand, every page of the judgment shall be signed by him.

4. Where the judgment is pronounced in the manner specified in clause (c) of sub- section (1), the whole judgment or a copy thereof shall be immediately made available for the perusal of the parties or their pleaders free of cost.

5. If the accused is in custody, he shall be brought up to hear the judgment pronounced.

6. If the accused is not in custody, he shall be required by the Court to attend to hear the judgment pronounced, except where his personal attendance during the trial has been dispensed with and the sentence is one of fine only or he is acquitted: Provided that, where there are more accused than one, and one or more of them do not attend the Court on the date on which the judgment is to be pronounced, the presiding officer may, in order to avoid undue delay in the disposal of the case, pronounce the judgment notwithstanding their absence.

7. No judgment delivered by any Criminal Court shall be deemed to be invalid by reason only of the absence of any party or his pleader on the day or from the place notified for the delivery thereof, or of any omission to serve, or defect in serving, on the parties or their pleaders, or any of them, the notice of such day and place.

8. Nothing in this section shall be construed to limit in any way the extent of the provisions of section 465."

7. The exception to the aforesaid section has been enumerated in sub-clause

8 of Section 353 as contained in Section 465, which reads as under:

8. Section 482 Cr.P.C. is quoted below as under:

"482. Saving of inherent power 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."

9. Learned counsel for the petitioner has emphasized the word "secure the ends of justice".

10. As far as the contention of the learned counsel for the petitioner that the opportunity of being heard was not given to him has a different cannotation with the word 'opportunity of being heard' has been availed or not. The case was listed for 29.04.2015, therefore, it cannot be said that the opportunity of being heard was not extended to the applicant. However, the said opportunity of hearing was not availed by the applicant for the reason that his counsel had suddenly fallen ill and he had to leave the court in the mid day and he could not mention it before the court. It is also settled principle that the party should not suffer for the fault or latches of the counsel.

11. In Vishnu Agarwal vs. State of Uttar Pradesh; 2011 (74) ACC 609 SC, Hon'ble Suprme Court has held as under :

It often happens that sometimes a case is not noted by the Counsel or his clerk in the cause list, and hence, the Counsel does not appear. This is a human mistake and can happen to anyone. Hence, the High Court recalled the order dated 2.9.2003 and directed the case to be listed for fresh hearing. The aforesaid order recalling the order dated 2.9.2003 has been challenged before us in this appeal.

Learned Counsel for the appellant has relied on the decision of this Court in Hari Singh Mann Vs. Harbhajan Singh Bajwa AIR 2001 SC 43. Para 10 of the said judgment states:

" Section 362 of the Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (AIR 1958 SC 376)(supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561A(Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the

High Court on 7.1.1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment."

"In our opinion, Section 362 cannot be considered in a rigid and over technical manner to defeat the ends of justice. As Brahaspati has observed :

"Kevalam Shastram Ashritya Na Kartavyo Vinirnayah Yuktiheeney Vichare tu Dharmahaani Prajayate"

which means:

"The Court should not give its decision based only on the letter of the law. For if the decision is wholly unreasonable, injustice will follow."

12. In Asit Kumar Kar vs. State of West Bengal and others; (2009) 1 SCC (Cri) 851, Hon'ble the Supreme Court has held as under :

"There is a distinction between a petition under Article 32, a review petition and a recall petition. While in a review petition the Court considers on merits where there is an error apparent on the face of the record, in a recall petition the Court does not go into the merits but simply recalls an order which was passed without giving an opportunity of hearing to an affected party.

We are treating this petition under Article 32 as a recall petition because the order passed in the decision in All Bengal Licensees Association v. Raghabendra Singh & Ors. [2007 (11) SCC 374] cancelling certain licences was passed without giving opportunity of hearing to the persons who had been granted licences.

In these circumstances, we recall the directions in paragraph 40 of the aforesaid judgment. However, if anybody has a grievance against the grant of licences or in the policy of the State Government, he will be at liberty to challenge it in appropriate proceedings before the appropriate Court. The writ petitions are disposed of with these directions."

13. In Ram Naresh Yadav and others vs. State of Bihar; 1987 CRI.L.J. 1856 & AIR 1987 SCC 1500, Hon'ble the Apex Court has held as under :

"It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants. Since the order of conviction and sentence in the present matter has been confirmed without hearing either the appellants or counsel for the appellants, the order must

be set aside and the matter must be sent back to the High Court for passing an appropriate order in accordance with law after hearing the appellants or their counsel and on their failure to engage counsel, after hearing counsel appointed by the Court to argue on their behalf. As the matter is being remanded to the High Court, no orders can be passed on the bail application. The appellants, if so advised, may approach the High Court for bail"

14. In Rafiq and another vs. Munshi Lal and another; AIR 1981 SC 1400, Hon'ble the Apex Court has held as under :

"The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed. It is no part of his job. Mr. A.K. Sanghi stated that a practice has grown up in the High Court of Allahabad amongst the lawyers that they remain absent when they do not like a particular Bench. Maybe he is better informed on this matter. Ignorance in this behalf is our bliss. Even if we do not put our seal of imprimatur on the alleged practice by dismissing this matter which may discourage such a tendency, would it not bring justice delivery system into disrepute. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr. A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. Maybe that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted. Therefore, we allow this appeal, set aside the order of the High Court both dismissing the appeal and refusing to recall that order. We direct that the appeal be restored to its original number in the High Court and be disposed of according to law. If there is a stay of dispossession it will continue till the disposal of the matter by the High Court. There remains the question as to who shall pay the costs of the respondent here. As we feel that the party is not responsible because he has done whatever was possible and was in his power to do, the costs amounting to

Rs.200/- should be recovered from the advocate who absented himself. The right to execute that order is reserved with the party represented by Mr. A.K.Sanghi."

15. In Raghuvera and others vs. State of U.P.; 1990 CRI.L.J. 2735 (All.), this Hon'ble Court has held as under :

"It is no doubt true that Section 362 Cr. P.C. debars the court from altering or reviewing any final order or judgment given by a court except to correct the clerical or arithmetical error. But the question arises whether an order dismissing an application for revision for default of the counsel as not pressed can be termed as a judgment or final order? The term "Judgment" has not been defined in the Criminal Procedure Code but a judgment means the expression of the opinion of the Court arrived at after due consideration of the entire material on record, including the arguments, if any, advanced at the Bar. A final order or judgment can only be passed in a criminal court when the court applies its mind to the merit of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or a judgment. Thus Section 362 Cr. P.C. is no bar to review ore alter the order dated 14th March 1990. The order in question was passed without going into the merit of the case and is without jurisdiction and as such it has to be set aside."

16. In K. G. Keralakumaran Nair vs. State of Kerala and other; 1995 CRI. L. J. 2319, the Kerala High Court has held as under:

"That leads us to the further question whether an appeal or other criminal proceeding dismissed by this Court can be restored to file. The contention is that this Court has no power by virtue of Section 362 of the Code which reads:

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

The Section relates only to judgment or final order disposing of a case. What is a judgment or a final order is not seen defined in the Code But the word 'judgment' is understood to mean an order in a trial terminating in either conviction or acquittal of the accused. It has also been held that judgment means the expression of opinion of the Court arrived at after due consideration of the evidence and all the arguments. Understood in this light, every order under the provisions of the Code cannot be considered to be a judgment within the meaning of Section 353 or coming under the scope of Section 362, of the Code. In short, there must be an investigation of the merits on evidence and after hearing arguments in order to constitute a judgment. In the case of an appeal, such judgment has to be one rendered on merits after hearing counsel for appellant or the appellant, as the case may be, and Public Prosecutor or counsel appearing for respondent.

15. Whether an order dismissing an appeal for default amounts to a judgment or a final order coming within the scope of Section 362 of the Code is the next aspect that requires consideration. The Calcutta High Court in the decision in Bibhuty Mohun Roy v. Dasimoni Dassi (1909) 10 Cri LJ 287, held that in India a Court cannot review or alter its own judgment in a criminal case, but it has jurisdiction to hear and determine a

criminal case which has not been heard and determined on the merits. It was further held that where the Court discharged a rule because no one appeared, it has power to re-open it.

16. In Sahadeo v. Jagannath, AIR 1950 Nagpur 77: (1950 (51) Cri LJ 662), the appeal was dismissed for non-filing of a copy of the judgment. It was held that the order rejecting the appeal cannot be held to be an order amounting to a judgment within the meaning of Section 369 of the Code of 1898 and there was no bar to the consideration of the appeal on its merits.

17. The question whether a criminal Court has inherent power to revive a complaint in a warrant case which was dismissed under Section 259 of the Code of 1898 for the absence of the complainant on the date of commencement of the preliminary enquiry came up for consideration in W.T. Singh v. C.A. Singh, AIR 1961 Manipur 34 : (1961 (2) Cri LJ 352). While holding that such dismissal of the complaint or discharge of the accused will not amount to an acquittal within the meaning of Section 403, of the Code, it was observed that such an order of dismissal, is not a judgment within Section 366, and therefore Section 369, would not apply. It is also observed that the absence of any provision on a particular matter in the Code does not mean that the Court has no such power and the Court may act on the principle that every procedure should be understood as permissible till it is shown to be prohibited by law.

18. The Andhra Pradesh High Court has gone to , the extent of holding that there should be no objection to the maintainability of a second petition for revision when the first one had failed not on the merits but by default. In Satyanarayana v. Narayanaswami AIR 1961 Andh. Pra. 18 (1961) (2) Cri LJ 37), it was held that there is no question of the High Court becoming functus officio by reason of an order of dismissal for default passed by it on a petition by a private party, who has really no right but a mere concession in the matter of moving the High Court in revision.

19. The Mysore High Court had occasion to consider whether a revision application dismissed for default can be restored in the decision in Madiah v. State of Mysore, AIR 1963 Mysore 191 : (1963(2) Cri LJ 23). That was a case of a dismissal of a revision by the High Court. It was held that subject , to the provisions contained in the Code, a judgment , delivered or an order passed on merits is final after it is duly signed by Court. The inherent power of a High Court cannot be exercised in matters specifically covered by the provisions of the Code. Where the Code is silent about the power of the High Court in respect of any, matter arising before it, it can pass suitable orders in exercise of its inherent powers to give effect to any order passed under the Code or to prevent the abuse of the process of any Court or to secure the ends of justice. It was held that this power can also be exercised to reconsider orders of dismissal of an appeal or application passed without jurisdiction or in default of appearance, where reconsideration is necessary to secure the ends of justice.

20. The Bombay High Court in the decision in Deepak v. State of Maharashtra 1985 Cri LJ 23, observed that the High Court in exercise of its inherent powers can review or revise its judgment if such judgment is pronounced without giving an opportunity of being heard to a party who is entitled to a hearing and that party is not at fault, the

reason being that a party cannot suffer for the mistake of the Court. In that case, the hearing was adjourned to 13th February but the adjourned date was inadvertently marked as 8th February on which date the petitioner and his counsel were absent. The High Court on going through the record passed the order dismissing the petition. It was held that since the petitioner was entitled to a hearing, it could be said that the Court acted without jurisdiction and in violation of the principles of natural justice and in the circumstances the review petition must he allowed.

21. A Division Bench of this Court in Padmachandran v. Radhakrishnan (1984 Ker LT 416), was considering the question whether the inherent powers of this Court under Section 482, can be exercised to restore a revision dismissed for default. In that case, the revision was decided in the absence of the counsel. Request was made for re-hearing the revision. The Division Bench held that the earlier order dismissing the revision was really a disposal for default, counsel for petitioner being absent. For the purpose of securing the ends of justice it was found necessary that the Criminal Revision should be heard afresh,

22. The question whether dismissal of a Criminal Revision petition as not pressed amounts to a final order coming within the scope of Section 362, of the Code arose for consideration before the Allahabad High Court in Raghuvira v. State of U. P. (1990) 3 Crimes 225 : (1990 Cri LJ 2735). If was held that a final order or judgment can only be passed by a criminal Court when the Court applies its mind to the merits of the case. In case the order is passed in a criminal proceeding and the application for revision is dismissed for default as not pressed, the said order cannot be taken as either final order or judgment. It was held that Section 362, of the Code is no bar to review or alter the order of dismissal.

*23. The same view was expressed by the Karnataka High Court in Ibrahimsab v. Faridabi (1986) 2 Kant LJ 65. It was held that the expression "final order disposing of the ease" means a considered order on merits and not an order of dismissal for default and the provision contained in Section 362, does not come in the way of the Court recalling such order and restoring the revision dismissed for default. *

The decision in Chandran's case ((1989) 2 Ker LJ 845) (supra) did not also consider the scope of the inherent power of this Court under Section 482, of the Code and power of this Court to dismiss an appeal or any other criminal proceeding in exercise of that power or the power of restoration. Having considered those matters in detail in the light of the pronouncements of the various High Courts. I am of the considered view that this Court has all the inherent powers to make any order to prevent the abuse of the process of Court or for the ends of justice or to enforce discipline by invoking the powers under Section 482, of the Code, Section 386 of the Code notwithstanding. The provision contained in Section 386 cannot therefore have any application to the exclusion of those inherent powers. Viewed from this angle and in the light of the principle laid down in Ram Naresh Yadav's case (1987 Cri LJ 1856) (SC). I hold that this Court has power to dismiss an appeal or any other criminal proceeding for default and this Court has also the power to restore such proceeding on sufficient grounds being shown for non-appearance. But the right of dismissal and the power of restoration

can be exercised only by this Court, and that too in exercise of the powers under Section 482 of the Code, and not by any of the Courts subordinate to this Court since those courts have no inherent powers envisaged under Section 482 of the Code.

The point formulated is answered thus:-

i. A Criminal Appeal shall be disposed of only after perusing the record and hearing the appellant or his pleader, if he appears and the Public Prosecutor, if he appears.

ii. A criminal appeal can be decided on merits, only after hearing the appellant or his counsel.

iii. The High Court has powers under Section 482 of the Code of Criminal Procedure to dismiss an appeal or revision or any other criminal proceeding for default or non-prosecution.

iv. The High Court has also inherent power to restore any matter dismissed for default or non-prosecution on sufficient reason being shown.

v. The power of dismissal for default and the power of restoration inhere only in the High Court and cannot be exercised by the Courts subordinate to the High Court since they do not possess the inherent powers under Section 482 of the Code.

17. In Giridharilal and others vs. Pratap Rai Mehta and another; 1989 CRI. L.J. 2382, the Karnataka High Court has held as under :

Section 362 puts a complete bar for altering or reviewing of a judgment or final order on merits and the only power given to the Courts is that it can correct a clerical or arithmetical error. The said Section does not impose any prohibition for recalling an order.

22. When a judgment or final order is recalled it would result in complete abrogation as if there was no judgment or final order at all. The alteration or review pre-supposes continuing of the initial judgment or final order with the effectuation of some changes or re-examination and reconsideration of the judgment or final order.

23. There appears to be no bar contained in S. 362 or any other Sections of the Code for recalling an order.

24. In this view of the matter, it is my considered view that the grant of prayer made by the petitioners would not offend the salutary principle embodied in S. 362 of the Code.

25. It is the contention of the petitioners that the order dated 4-11-1988 passed in non-compliance with S. 401(2) of the Code needs to be recalled to secure the ends of justice and that therefore they can invoke the inherent jurisdiction of this Court.

26. In the case of Habu v. State of Rajasthan, a Full Bench of Rajasthan High Court while answering a reference wherein the question framed was :

"Whether the judgment given in absence of the appellant or his Counsel but the case decided on merits, can be recalled by the Court in its inherent powers under S. 482, Cr.P.C."

On an exhaustive review of the decisions of the Supreme Court and the various High Courts, held (at p. 101) :

"There are two available on the point. According to one view S. 362, Cr.P.C., has been held to be mandatory and puts complete bar and it has been therefore, held that S. 482, Cr.P.C., can also not be invoked for the purposes of reviewing or altering the judgment. The other view is that recalling is different than reviewing and altering and if the

Court is of the opinion that gross injustice has been done, then S. 482, Cr.P.C. should be invoked to recall the judgment and rehear the case. In fact the earlier view has impliedly been done away with by their Lordships of the Supreme Court in Sankatha Singh's case. Their Lordships have held that the appellate Court had no power to review or restore an appeal which has been disposed of under Ss. 424 and 369, Cr.P.C. (old). Similar was the view taken in State of Orissa v. Ram Chandra, . Sankatha Singh's case has been referred to in Sooraj Devi's case, , wherein also their Lordships have held that inherent powers cannot be invoked when there is a complete bar. Scope of S. 482, Cr.P.C. was then considered by their Lordships in Manohar Nathu Sao Samarth v. Marot Rao, . Thus on one side as mentioned above the principles which have been laid down by their Lordships of the Supreme Court can be summarised as under :-

1. That the powers to deal with the case must flow from the statute.

2. That the powers given under S. 362, Cr.P.C. (S. 369, Cr.P.C., old) given to the Court for reviewing or altering is limited only for correcting an arithmetical or clerical error and specifically prohibits Courts from touching the judgment by taking away the powers altering or reviewing the judgment or the final order and as such principle of functus officio has been accepted.

3. That the prohibition contained in S. 362, Cr.P.C. (S. 369, Cr.P.C. old) is not only restricted to the trial Court but also extends to appellate Court or the revisional Court.

4. That the inherent powers of the Court cannot be invoked where there is express prohibition and in other words S. 482, Cr.P.C. cannot be invoked.

As against this the analogical deduction which comes out from another set of cases is -

i. Right of the accused to be heard is his valuable right which cannot be taken away by any provision of law,

ii. If the accused has not been given an opportunity of being heard is not provided with the counsel when not duly represented it will be violative of principles of natural justice as well as Art. 21 of the Constitution.

iii. That to provide defence counsel in case the accused is not in a position to engage is fundamental duty of the State and has throughout been recognized and now incorporated in S. 304, Cr.P.C., and in Art. 39A of the Constitution.

iv. That bar of review or alter is different than the power of recall;

v. That inherent powers given under S. 482, Cr.P.C. (S. 561-A, Cr.P.C. Old) are wide enough to cover any type of cases if three conditions mentioned therein so warrant, namely -

(a) for the purpose of giving effect to any order passed under

the Code of Criminal Procedure;

(b) for the purposes of preventing the abuse of the process of any Court; and

(c) for securing the ends of justice.

vi. The principle of audi alteram partem shall be violated if right of hearing is taken away.

vii. That when the judgment is recalled it is a complete obliteration/abrogation of the earlier judgment and the Appeal or the Revision, as the case may be, has to be heard and decided afresh,

viii. That a Court subordinate to High Court cannot exercise the inherent powers and the Code restricts it to the High Court alone.

ix. That no fixed parameters can be fixed and hard and fast rule also cannot be laid down and Court in appropriate cases where it is specified that one of the three conditions of S. 482, Cr.P.C., are attracted should interfere."

The reference was answered by the Full Bench in the following terms :

i. That the power of recall is different than the power of altering or reviewing the judgment.

ii. That powers under S. 482, Cr.P.C., can be and should be exercised by this Court for recalling the judgment in case the hearing is not given to the accused and the case falls within one of the three conditions laid down under S. 482, Cr.P.C."

I am in respectful agreement with the law, laid down by the Rajasthan High Court in the decision rendered by the Full Bench.

18. In Uma Shanker Jha vs. State of Bihar: 2001 (3) PLJR 728, the Patna High Court has held as under :

"It is well known dictum that justice has not only to be done but it should also appear to have been done and therefore, whenever a litigant comes before the Court it is essential that he must go having full faith in his mind and the Court has done justice with his case and he must at least have the satisfaction that he has been heard by Court. The position of a litigant is also helpless because he has to depend upon his lawyer and mercy of others. He has full confidence on his counsel that he will do his best in his interest. It is well settled that if due to carelessness or laches on the part of lawyer, a case is dismissed the litigant should not be made to suffer. In the instant case the admitted position is that the counsel appearing for the Petitioner was not present on any date when the case was fixed for hearing and through the aid of his colleague adjournments were prayed for which were allowed by the court on three occasions but ultimately the court was compelled to reject the similar prayer since the matter had become too old and the stay was granted in this case. Eventually, the matter was heard ex parte and revision preferred by the Petitioner was dismissed after perusing the order passed by the trial court. It would, therefore, appear that no detail hearing was done in the case and the Petitioner could not get the opportunity of, detail hearing. The counsel for the Petitioner has, therefore, submitted that the Petitioner was highly prejudiced because his case was not argued due to which the revision application was dismissed and the Petitioner did not get justice. There was lapse on the part of conducting lawyer which has made him to suffer. It was, therefore, submitted that ill the ends of justice the Petitioner should, be afforded an opportunity of hearing which will be in conformity with the principles of natural justice and the court has inherent powers under Sections 482 of the Code of Criminal Procedure to recall the order for securing the ends of justice.

19. In Ibrahimsab vs. Faridabi; ILR 1986 Karnataka 2251, the Karnataka High Court has held as under :

"Section 362 Cr.P.C. contemplates judgment and final order disposing of the case. The expressions 'final order disposing of the case' mean a considered order on merits and not an order of dismissal for default and the provisions, therefore, do not come in the way of the

Court (Sessions Judge) recalling such order and restoring the revision dismissed for default. The Sessions Judge was, therefore, not justified in dismissing the application made for re-admitting the revision dismissed for default. The petitioner has given satisfactory explanation for not being present on the particular date when the revision came up for hearing.

The application made before the Sessions Judge is allowed and the Criminal Revision Petition No. 78/83 before the Sessions Judge, Dharwad, is restored and it is ordered that the revision shall be disposed of in accordance with law."

20. In Ayubbhai Abdulbhai Shah vs. Gabha Bechar and others: 1994 GLH (1) 447, the Gujara High Court, has held as under:

"The aforesaid discussion from the Supreme Court decision read along with the reference to Halsbury's Laws of England makes it quite clear that the order dismissing the matter for default is not a decision on merits. The judgment in nothing if not a decision given by a competent Court on merits of a case in respect of a lis between the parties.

8. There are several authorities starting with Jbrahim v. Emperor AIR 1928 Rangoon 288 holding that order of dismissal for default can be reviewed inspite of Section 369 of the Code of Criminal Procedure, 1898. There it has been clearly held that 'judgment' contemplated by Section 369 is only a decision on merits. Dismissal for default of appearance therefore, is not a judgment and High Court has power to review dismissal order for default of appearance passed in its appellate jurisdiction.

9. On the same line is Raju v. Emperor AIR 1928 Lahore 462. The matter therein was decided with reference to Section 561A and Section 369 of 1898 Code. It is held therein that the High Court has no inherent power to alter or review its own judgment except in case of default, for want of jurisdiction. To the absence of inherent power with regard to alteration or review of its own judgment, obviously there is a specific provision in the said Section 369 of 1898 Code corresponding to Section 362 of the new Code quoted hereinabove. In other words, the learned Judges of the Lahore High Court have adopted the same reasoning as adopted in Rangoon decision. Dismissal for default not being a decision on merits, Section 369 corresponding to new Section 362 will not be a bar.

10. In re Wasudev Narayan Phadnis relates to a case before a Magistrate who in exercise of his power under Section 259 of 1898 Code had discharged the accused persons on account of the absence of the complainant pointing out that it did not amount to applying his mind to the evidence. In the case the Magistrate has done nothing else but resorted to me procedural consequence and therefore, it being not a judgment he can certainly review that order and restore the complaint. In the case before the learned Judges of the Bombay High Court the Magistrate while so doing had not issued notice to the accused that was termed as mere irregularity not vitiating the proceedings.

11. Sahadeo and Ors. v. Jaganath Kashinath and Ors. AIR 1950 Nagpur 77. In this decision, the learned Judges has taken the same view while dealing with a case under Sections 369, 419 and 421 of 1898 Code. An appeal was dismissed for non-filing of judgment copy. It was held to

be a rejection and a dismissal of appeal and therefore, it was held that there is no bar to consider the appeal on merits. The case was therefore, remanded in revision. The reasoning was that the said order cannot be said to be a judgment within the meaning of Section 369.

12. Madiah v. State of Mysore AIR 1963 Mysore 191. In this decision with reference Section 369 and Section 561A of the Code of Criminal Procedure, it is held by the learned Judge of the Court that where a revision application was dismissed for default of appearance, Court can review its order, if necessary, to secure the ends of justice. Section 369 of 1898 Code is not held to be a bar.

13. The head note of a decision of Gauhati High Court reported in Smt. Tulsi Devi v. Bhagat Ram 1983 Cri.LJ 72 also indicates that Section 362 does contain the words 'save as otherwise provided by this Code or any other law for the time being in force. It does not take away the inherent power of the High Court. If a revision application is dismissed for default of appearance, it cannot be treated as a final order disposing of the case within the meaning of Section 362 and, therefore, that order can be set aside by the High Court under Section 482.

14. Raghubans Prasad v. State : In this decision the learned single Judge of that Court has held that order of discharge is not a judgment within the meaning of Section 369 and can be reviewed by the trial Court eventhough not set aside by superior Court. The learned Judge has further pointed out in paras 3, 10 and 13 of the judgment that in order to constitute a judgment within the meaning of Section 369, mere must be an investigation on the merits of the case on evidence and after hearing the arguments, where, however the order is passed summarily without consideration of the entire evidence, as in the case of the order of discharge, it will not obviously amount to a judgment.

15. On the same line is one more decision of the High Court rendered by its Division Bench reported in Ramballabh Jha v. State of Bihar . In that case, the name of the Counsel was not shown in the daily list of cases. The appeal came to be dismissed without the Counsel being heard. Referring to Sections 561 A, 369 and 421 of 1898 Code, the learned Judges were pleased to hold that the judgment can be set aside for rehearing under Section 561A holding that the judgment rendered in appeal was without any opportunity being given to the appellant or his Advocate within the meaning of Section 421 and it was liable to be set aside and appeal could be ordered to be reheard in exercise of power under Section 461A.

16. The decision reported in Rajendra Laldas Acharya v. State 1993 (2) GLH 22 : 1993 (2) GLR 1259 is also on the same line wherein also the learned Judges have held that the right of rehearing, when the case was decided without giving an opportunity of hearing was accepted by the Supreme Court and by invoking the inherent powers by the High Court rehearing could be done.

17. Obviously, the aforesaid Patna decision is in keeping with the well-known position of the administration of justice that an act of the Court shall not prejudice any party.

18. My learned brother Justice J.N. Bhatt had an opportunity to deal with an identical question in Misc. Criminal Application No. 3225 of 1993. The Gujarat Electricity Board, its Officer being the original complainant, had filed

a complaint before the learned J.M.F.C., Mansa. The accused came to be acquitted. Against that Cri. Appeal No. 924 of 1985 was filed which came to be dismissed for default on 25-2-1993. Pointing out that the Advocate of the original-appellant was unaware of the matter and raising other grounds as well, request for restoration was made. This was opposed to by the original-accused on the ground that Section 362 would come in the way. After referring to the provision of Section 362, my learned colleague straightway resorted to powers under Section 482 of the Code and decided to exercise inherent power reserved thereunder and restored the matter.

19. The result of the discussion so far is clearly to the effect that under the Old Code, the inherent powers reserved under Section 561A corresponding to Section 482 of the New Code are always available in such a case. However, I would like to state here that Section 362 of the Code will be attracted only and only if there is a final order as understood in contradistinction of the word "interlocutory" discussed above. With reference to the judgment also I definitely say that an order would be a judgment only if rights of the parties are decided after taking into consideration the entire material on record which will include oral evidence and documentary evidence, if any and all other materials that might have been placed on record.

19.1. Dismissing a matter for default being not an order of either of these 2 natures, obviously, there is no question of provisions of Section 362 coming in the way. The Court can certainly restore the same, if necessary, by invoking its inherent power under Section 482.

21. In Ramautar Thakur and others vs. State of Bihar; AIR 1957 Patna 33 & 1957 Cri. L.J. 82, the Patna High Court has held as under :

"There is no statutory provision for such a restoration. The power to restore a case dismissed for default, if it exists, must, therefore, be an inherent power, which is saved by- the provisions of Section 561 A, Criminal P. C., This section was inserted in the Criminal Procedure Code by the Amendment Act of 1923. It is merely a saving clause which does not confer a new power on the High Court. The decisions of the High Courts prior to this amendment are, therefore, still applicable,

The Criminal Procedure Code, unlike the Civil Procedure Code, does not define 'Judgment' A 'judgment' means the expression of the opinion of the Court arrived at after, a due consideration of the evidence and all the arguments. The above meaning of the word 'Judgment', as is to be found in Full Bench decisions of the Madras High Court in Re Chinna Kaliappa Goundan, ILR 29 Mad 126 (Q), of the Bombay High Court in Emperor v. Nan-dial Chunilal, 48 Bom LR 41: (AIR 1946 Bom 276) (FB) (R), and of the Calcutta High Court in Damu Senapati v. Shridhar Rajwar, ILR 21 Cal 121 (S), was approved by their Lordships Bhagwati and Imam JJ., in the Supreme Court case just mentioned.

Their Lordships mentioned that the observations of the Madras High Court in its Full Bench decision, just referred to, were quoted with approval by Sulaiman J., in Dr. Hori Ram Singh v. Emperor, AIR 1939 FC 43 (T), in which his Lordships Sulaiman J., observed that the Criminal Procedure Code did not define a 'judgment', but various sections pf the Code suggested what it meant His Lordship then discussed those sections

and concluded that 'judgment' in the Code meant a judgment of conviction or acquittal.

The question, therefore, for our consideration is, is the order of dismissal for default a 'judgment' ?

For the reasons given above, I hold that this Court has got powers to restore Cri. Revn. No. 198 of 1956, which stood dismissed for default, by force of the order of this Court dated 10-2-1956, in the exercise of its inherent jurisdiction under Section 561A, Criminal P. C."

22. In the case of Hari Singh Mann vs. Harbhajan Singh Bajwa; 2001 SCC (Cri) 113, Hon'ble the Apex Court has held as under :

"We have noted with disgust that the impugned orders were passed completely ignoring the basic principles of criminal law. No review of an order is contemplated under the Code of Criminal Procedure. After the disposal of the main petition on 7.1.1999, there was no lis pending in the High Court wherein the respondent could have filed any miscellaneous petition. The filing of a miscellaneous petition not referable to any provision of Code of Criminal Procedure or the rules of the Court, cannot be resorted to as a substitute of fresh litigation. The record of the proceedings produced before us shows that directions in the case filed by the respondents were issued apparently without notice to any of the respondents in the petition. Merely because the respondent NO.1 was an Advocate, did not justify the issuance of directions at his request without notice of the other side. The impugned orders dated 30th April, 1999 and 21st July, 1999 could not have been passed by the High Court under its inherent power under Section 482 of the Code of Criminal Procedure. The practice of filing miscellaneous petitions after the disposal of the main case and issuance of fresh directions in such miscellaneous petitions by the High Court are unwarranted, not referable to any statutory provision and in substance the abuse of the process of the court.

Section 362 of the Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provision becomes functus officio and disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a court of competent jurisdiction in a manner prescribed by law. The court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondent on Talab Haji Hussain's case (supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561A (Section 482 of the new Code) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the section itself. It is not disputed that the petition filed under Section 482 of the Code had been finally disposed of by the High Court on 7.1.1999. The new Section 362 of the Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission

and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders other than the judgment."

23. In the case of State of Punjab vs. Davinder Pal Singh Bhullar and others; 2012 Cri. L. J. 1001 SC, Hon'ble the Apex Court has held as under :

"If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 Cr.P.C. would not operate. In such eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault"

24. From the aforesaid judgments of Hon'ble the Apex Court as well as of various High Courts, it is clear that prohibition of Section 362 Cr.P.C. is absolute and when the judgment has been signed, even the High Court in exercise of its inherent power under section 482 Cr.P.C. has no authority or jurisdiction to alter or review the same.

25. Certainly, if any petition has been dismissed for want of prosecution or in default of the petitioner and the reasons for decision have not been rendered after applying the mind to the pleadings of the case as well as the grounds of petition, that order of dismiss in default cannot be termed as 'Judgment' because the judgement should contain not only the facts and pleadings of the case but also the documentary as well as oral evidence. In the judgment, it is required that there should be marshalling of the facts as well as appreciation of the evidence in respect of the determination of the matter in issue. The judge is also required to give reasons for its decision after looking into the various probabilities as well as cogent reasons for relying or not relying the contention and evidence of either party.

26. The process of judgment involves the following stages:

I. Collection of Facts;
II. Time Sequencing of Facts
III. Shifting facts from opinions
IV. Marshalling of Facts
V. Find out the Problems (Charge/Issues)
VI. What is the main problem (Charge/Issue)
VII. Record of Evidence
VIII. Churning of Evidence
IX . Shifting of Evidence
X. Weighing the different alternatives
XI. Apply Precedents
XII. Look into Prohibitions
XIII. Findings and Conclusions
XIV. Order.

27. In the present case, the petition has been dismissed for want of prosecution, although opportunity of hearing was given but that opportunity of hearing could not be availed due to sudden illness of the counsel.

The inherent power under section 482 Cr.P.C. can be exercised to give effect to any order under Cr.P.C. or to prevent the abuse of the process of any court or otherwise to secure the ends of justice. Certainly, if the application has been dismissed for default, that cannot be termed as 'judgement'.

28. Accordingly, the bar as provided by section 362 Cr. P.C. shall not be applicable. This court has power to dismiss in default any application or writ petition and at the same time has also power to restore such proceedings on sufficient grounds being shown for non-appearance provided it appears to the court that default was not wilful and it was accidental. There are instances, where either legal advise is given or due to shrewd character of the litigant malafide efforts are adopted with a view to delay the proceedings of the case, such tactics are also adopted to get the case dismissed in default and then to move application for restoration and thus, lingering on the proceedings. Certainly, such practice must be carved out and should not be permitted to continue.

29. The views expressed by the various High Courts in the aforesaid decisions are in favour of the restoration of such petition, which has been dismissed in default in exercise of powers under section 482 of the code of criminal procedure with a view to secure the ends of justice and I am also in respectful agreement with the views expressed by the various High Courts in the aforesaid decisions.

30. Therefore, I am of the view that if any petition has been dismissed in default and the application for recall is made, then it will not come within the meaning of words 'alter' or 'review' as expressed in Section 362 of the Code. Accordingly, such orders may be recalled or set aside provided the intention of the parties is bonafide i.e. party who has moved the application for recall or restoration is not unnecessary lingering on the proceedings malafidely or that interim order or stay order, if any, is not being misused.

31. Accordingly, the application for restoration or recall of the order is maintainable and the prohibition of Section 362 Cr.P.C. do not apply in the petitions, which have been dismissed in default without discussing the merits of the case because it do not come within the prohibition of 'alter' or 'review' of judgment, which has entirely a different meaning.

32. In the present case, the petition was dismissed for want of prosecution because the counsel for the petitioner could not appear due to sudden illness for which the learned counsel for the CBI also has raised no objection.

33. Accordingly, the application for recall is allowed.

34. The order dated 29.04.2015 is recalled. The petition is restored to its original number and status.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

First Appeal From Order No. 2174 of 2014

United India Insurance Co. Ltd., Saharanpur ...Appellant

Versus

Smt. Shashi Prabha Sharma & Ors. ...Respondents

Counsel for the Appellant:
Sri Vishesh Kumar Gupta

Counsel for the Respondents:
Sri S.D. Ojha

Motor Vehicle Act-1988-Section 173- whether the Tribunal right in shifting the liability of compensation upon insurer-where the vehicle owner has been held responsible for payment?-if 'yes' how the interest of insurer could be protected?-held-vehicle owner to furnish security of amount paid by insurer-insurer not required to file separate suit for recovery-execution Court to exercise all power available to balance in payment of compensation to claimant but at same time to protect the concern of insurer-in case of default by vehicle owner-execution court empowered to realize the said amount from any other property of the vehicle owner.

Held: Para-39

In these circumstances, we hold that where the insurer is directed to pay the amount in the first instance despite having been held not to be under a legal liability to pay the awarded amount, while permitting the insurer to recover the amount from the owner, the procedure which has been laid down in Challa Upendra Rao (supra) would have to be followed. This would envisage that before the amount is released to the claimant, the owner of the offending vehicle shall furnish security for the amount which the insurer has to pay to the claimants. The offending vehicle is to be attached as a part of the security for the purpose of recovering the amount from the insured. The insurer shall not be required to file a suit and may initiate a proceeding before the executing Court. The executing Court may pass appropriate orders in accordance with law as to the manner in which the insured, namely the owner of the vehicle, shall make payment to the insurer. In the event that there is any default, it is open to the executing Court to direct realisation by the disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle. In the event that the person on whose behalf payment has been made by the insurer, does not furnish security or is not in a position to furnish security to the insurer, the insurer should promptly move the executing Court. The executing Court shall then duly ensure that it exercises all its available powers in execution in accordance with law so that while on one hand payment is made to the person to whom it is due, the concerns of the insurer are duly balanced. We may only add here that all necessary and proper steps should be taken by the executing Court to ensure that the intent and object of the legislature in enacting the beneficial provisions of the Act is duly preserved and are expeditiously implemented.

Case Law discussed:

AIR 2002 SC 3350; (1998) 3 SCC 140; (2011) 10 SCC 509; 2013 (4) TAC 22 (SC); (1996) 5 SCC 21; AIR 2004 SC 1531; (1960) 1 SCR 168; AIR 2004 SC 1630; (2004) 2 SCC 1; (2013) 2 SCC 41; SLP © No. 5699 of 2006; (2009) 8 SCC 785.

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

1. During the course of the hearing of a First Appeal From Order1 arising out of a decision of the Motor Accident Claims Tribunal at Saharanpur dated 6 May 2014, a Division Bench of this Court formulated the following questions for consideration by a Full Bench2:

(i) Where on account of a breach of an insurance policy, the owner of an offending vehicle has been held liable to pay compensation (the insurer having been held not to be liable) but a direction is issued to the insurer to pay the

compensation awarded to the claimant and to recover it from the owner of the offending vehicle, does the insurer have a right to appeal under Section 173 of the Motor Vehicles Act, 19883?

(ii) If question (i) above is answered in the affirmative, to what extent and on what grounds will the insurer have the right to challenge an order of the Tribunal?

(iii) In a situation where the Motor Accident Claims Tribunal4 has fastened the liability to pay compensation only on the owner of the offending vehicle but the insurer has been directed to pay the compensation to the claimant and recover it from the owner subject to the owner furnishing security to the extent of the compensation awarded and if the owner fails to furnish security, either due to incapability or for any other reason, should the award be allowed to be frustrated for want of security, thereby defeating the object of the legislature to protect the right of third parties?

2. The incident which had led to the proceedings before the Division Bench in an FAFO took place at 6.30 pm on 24 December 2010 when Surya Prakash Sharma boarded a tempo at Saharanpur. During the course of the journey, the tempo collided with a tractor and trolley coming from the opposite direction. Surya Prakash Sharma sustained multiple injuries and was declared dead at the District Hospital at Saharanpur. The place of the occurrence was before the Air Station Sarsawa, near Sourana on the Saharanpur Sarsawa road.

3. The claim petition was filed before the Tribunal at Saharanpur by the widow on her behalf and for three minor children who were respectively of the ages of one, fourteen and sixteen. United India Insurance Company Limited5, the appellant, was impleaded as a party to the claim petition. The Tribunal held that the insurance company was not liable to pay compensation on the ground that (i) the driver did not have a valid and effective driving licence on the date of the accident and there was a violation of the conditions of the insurance policy; and (ii) the tempo was being driven in violation of its route permit. The Tribunal came to the conclusion that the accident took place because of the rash and negligent manner in which the tempo was being driven. The claim for compensation was allowed in the amount of Rs 19,10,665/- together with interest at the rate of seven percent per annum. The insurance company was directed to satisfy the award by paying the compensation awarded to the claimants subject to its right to recover the amount from the insured.

4. We will now proceed to analyse the three questions which have been referred to the Full Bench for being considered.

Re Questions (i) and (ii)

5. Section 173 of the Act provides as follows:

"173. Appeals.-(1) Subject to the provisions of sub-section (2), any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court:

Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he

has deposited with it twenty-five thousand rupees or fifty per cent of the amount so awarded, whichever is less, in the manner directed by the High Court:

Provided further that the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

6. A right of appeal against an award of the Tribunal has been made available by sub-section (1) of Section 173 to 'any person aggrieved' by the award subject to the amount in dispute in the appeal being above the threshold specified in sub-section (2). The issue before the Court is whether the insurance company is a person aggrieved within the meaning of sub-section (1). If it is, the further question that needs to be addressed is in regard to the scope of the appellate remedy.

7. Chapter XII of the Act provides for Claims Tribunals. Section 165 provides for the establishment of a Tribunal to adjudicate upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Section 166 provides for an application for compensation. The Tribunal can be moved either upon an application for compensation under sub-section (1) of Section 166 or even upon proceedings initiated suo motu by treating a report of an accident forwarded to the Tribunal under Section 158 (6) as an application for compensation under Section 166 (4). Under sub-section (1) of Section 168, on receipt of an application for compensation under Section 166, the Tribunal, after furnishing a notice of the application to the insurer and after allowing the parties including the insurer, an opportunity of being heard, is required to enquire into the claim. The Tribunal has to make an award (i) determining the amount of compensation which appears to it to be just; (ii) specifying the person or persons to whom the compensation shall be paid; and (iii) specifying the amount to be paid by the insurer or owner or driver of the vehicle involved in the accident or by all the three of them, as the case may be. Under sub-section (3) of Section 168, the person who is required to pay any amount in terms of the award, has to deposit the entire amount awarded in the manner in which the Tribunal may direct, within thirty days from the date of the award. In making its enquiry, the Tribunal under sub-section (1) of Section 169 has to follow a summary procedure as it thinks fit.

8. Where a claim is brought before the Tribunal under Section 166, the driver and owner have to be impleaded as respondents. The claimant may or may not implead the insurer as a party to the proceedings. However, sub-section (2) of Section 149 provides that no sum shall be payable by the insurer under sub-section (1) in respect of a judgment or award unless, before the commencement of the proceedings, the insurer had notice of the proceedings. The insurer to whom a notice of the proceedings is given, shall be entitled to be made a party thereto. Section 149 forms a component of Chapter XI which provides for insurance

of motor vehicles against third party risks. Section 146 makes it obligatory to obtain an insurance policy covering third party risks. No person can allow or cause to allow a motor vehicle to be used in a public place without an insurance policy being in force in accordance with the requirements of the Chapter. Section 147 defines the requirements of such a policy and the limits of liability. If a judgment or award in respect of the liability which has to be covered under Section 147 (3) (b) is obtained against the insured, after a certificate of insurance is obtained, the insurer is obligated to pay the compensation payable to the person to whom the benefit of the decree enures, even though the insurer is entitled to or has actually cancelled or avoided the policy.

9. Sub-section (2) of Section 149 provides the grounds on which an insurer to whom notice of the bringing of the proceedings is given, can defend the action. Sub-sections (1) and (2) of Section 149 provide as follows:

"(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) 6[or under the provisions of Section 163-A] is obtained against any person insured by the policy then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this Section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

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

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

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

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

(b) for organised racing and speed testing, or

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

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

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

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

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

10. Section 170 of the Act provides for the impleadment of the insurer in certain cases and is as follows:

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

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

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

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

11. Two eventualities are contemplated in Section 170 in which the Tribunal may, in the course of its enquiry, direct that the insurer who may be liable in respect of the claim, shall be impleaded as a party to the proceedings. The first is, where the Tribunal is satisfied that there is a collusion between the claimant and the person against whom the claim is made. The second is, where the person against whom the claim has been made, has failed to contest the claim. Upon being impleaded, the insurer shall have, without prejudice to the provisions of sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

12. A Bench three learned Judges of the Supreme Court in National Insurance Co Ltd Vs Nicolletta Rohtagi7, considered the question whether, in a situation where the insured had not preferred an appeal under Section 173, it would be open to the insurer to prefer an appeal against an award of the Tribunal questioning the quantum of compensation as well as the finding in regard to the negligence of the offending vehicle. The Supreme Court observed that under the provisions of Section 149 (2), the insurer was conferred the right to be made a party to the case and to defend it. The right being a creature of the statute, its content would depend upon the statutory provision. In that context, the Supreme Court observed as follows:

"...After the insurer has been made a party to a case or claim, the question arises what are the defences available to it under the statute. The language employed in enacting sub-section (2) of Section 149 appears to be plain and simple and there is no ambiguity in it. It shows that when an insurer is impleaded and has been given notice of the case, he is entitled to defend the action on grounds enumerated in the sub-section, namely, sub-section (2) of Section 149 of 1988 Act, and no other ground is available to him. The insurer is not allowed to contest the claim of the injured or heirs of the deceased on other ground which is available to an insured or

breach of any other conditions of the policy which do not find place in sub-section (2) of Section 149 of 1988 Act. If an insurer is permitted to contest the claim on other grounds it would mean adding more grounds of contest to the insurer than what the statute has specifically provided for."8 (emphasis supplied)

13. The Supreme Court held that the insurer could not avoid its liability on any ground except those mentioned in sub-section (2) of Section 149:

"...the statutory defences which are available to the insurer to contest a claim are confined to what are provided in sub-section (2) of Section 149 of 1988 Act and not more and for that reason if an insurer is to file an appeal, the challenge in the appeal would confine to only those grounds."9

14. The Supreme Court adverted to its decision in Shankarayya Vs United India Insurance Co Ltd10, where it was laid down that an insurance company which is impleaded as a party by the Court could be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 were satisfied and for that, the insurer would have to obtain an order in writing from the Tribunal. Unless this procedure was followed, the insurer would not have a wider defence on merits than what was available by way of statutory defences under Section 149 (2). In the absence of the conditions precedent mentioned in Section 170 existing, the insurer was not entitled to file an appeal on merits questioning the quantum of compensation. The Supreme Court, adverting to the earlier decisions, held as follows:

"...Thus, unless an order is passed by the tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in Section 170 is satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Sections 149, 170 and 173 are part of one Scheme and if we give any different interpretation to Section 172 of the 1988 Act, the same would go contrary to the scheme and object of the Act."11

15. The Supreme Court observed that the main object of enacting Chapter XI was to protect the interest of victims of motor vehicle accidents and it was for that reason the insurance of all motor vehicles has been made statutorily compulsory. The Act was enacted to protect the interest of persons travelling on or using roads from the risks attendant upon the use of motor vehicles. The judgment in Nicolletta Rohtagi (supra), therefore, laid down that unless the conditions which are prescribed in Section 170 are satisfied, an insurer had no right of appeal to challenge the award on merits. In a situation where the Tribunal does not implead the insurer though the conditions specified in Section 170 are fulfilled, it is open to an insurer to seek the permission of the Tribunal to contest the claim on grounds available to

the insured or those available to the person against whom the claim is made. If permission is granted and the insurer is allowed to contest the claim on merits, it would be open to it to file an appeal against the award on merits. However, if the Tribunal has rejected the application for permission erroneously, it would be open to the insurer to challenge that part of the order while filing an appeal on the grounds specified in Section 149 (2).

16. In 2011, a Bench of three learned Judges of the Supreme Court in United India Insurance Co Ltd Vs Shila Datta12 considered the ambit of the provisions of Section 149 (2) and Section 173 in a reference made on the correctness of the three Judge Bench decision in Nicolletta Rohtagi (supra). The following questions were formulated for consideration:

"(i) Whether the insurer can contest a motor accident claim on merits, in particular, in regard to the quantum, in addition to the grounds mentioned in Section 149 (2) of the Act for avoiding liability under the policy of insurance; and

(ii) Whether an insurer can prefer an appeal under Section 173 of the Motor Vehicles Act, 1988, against an award of the Motor Accident Claims Tribunal, questioning the quantum of compensation awarded."13

17. Five submissions were urged before the Supreme Court on behalf of the Insurance Companies, these being:

"(i) There is a significant difference between insurer as a `noticee' (a person to whom a notice is served as required by Section 149 (2) of the Act) in a claim proceeding and an insurer as a party-respondent in a claim proceeding. Where an insurer is impleaded by the claimants as a party, it can contest the claim on all grounds, as there are no restrictions or limitations in regard to contest. But where an insurer is not impleaded by the claimant as a party, but is only issued a statutory notice under Section 149 (2) of the Act by the Tribunal requiring it to meet the liability, it is entitled to be made a party to deny the liability on the grounds mentioned in Section 149 (2).

(ii) When the owner of the vehicle (insured) and the insurer are aggrieved by the award of the Tribunal, and jointly file an appeal challenging the quantum, the mere presence of the insurer as a co-appellant will not render the appeal, as not maintainable. When insurer is the person to pay the compensation, any interpretation to say that it is not a `person aggrieved' by the quantum of compensation determined, would be absurd and anomalous.

(iii) When an insurer is aggrieved by the quantum of compensation, it is not seeking to avoid or exclude its liability, but merely wants determination of the extent of its liability. The restrictions imposed upon the insurers to defend the action by the claimant or file an appeal against the judgment and award of the Tribunal will apply, only if it wants to file an appeal to avoid liability and not when it admits its liability to pay the amount awarded, but only seeks proper determination of the quantum of compensation to be paid.

(iv) Appeal is a continuation of the original claim proceedings. Section 170 provides that if the person against whom the claim is made, fails to contest the claim, the insurer may be permitted to resist the claim on merits. If and when an award is made by the Tribunal which is

excessive, arbitrary or erroneous, the owner of the vehicle has to challenge the same by filing an appeal before the High Court. If the insured (owner of the vehicle) fails to challenge an award even when it is erroneous or arbitrary or fanciful, it can be considered that the insured has failed to contest the same and consequently under Section 170, the High Court or the Tribunal may permit the insurer to file an appeal and contest the award on merits.

(v) The Act creates a liability upon the insurer to satisfy the judgments and awards against the insured. The Act expressly restricts the right of the insurer to avoid the liability as insurer, only to the grounds specified in Section 149 (2) of the Act. Though it is impermissible to add to the grounds mentioned in the statute, the insurer has a right, if it has reserved such a right in the policy, to defend the action in the name of the insured. If it opts to step into the shoes of the insured, it can defend the action in the name of the insured and all defences open to the insured will be available to it and can be urged by it. Its position contesting a claim under Section 149 (2) of the Act is distinct and different, when it is contesting the claim in the name of or on behalf of the insured owner of the vehicle. In cases, where it is authorized by the policy to defend any claim in the name of the insured, and the insurer does so, it can not be restricted to the grounds mentioned in Section 149 (2) of the Act, as the defence is on behalf of the owner of the vehicle."14

18. The Supreme Court observed that issues (i) and (ii) did not arise for consideration in Nicolletta Rohtagi (supra) nor were they considered. Since the Bench hearing Shila Datta's case was also a Bench of three Hon'ble Judges, issues (i) and (ii) were resolved since they had not been considered in the earlier decision of three learned Judges in Nicolletta Rohtagi (supra). Issues (iii), (iv) and (v) would require reconsideration of the decision in Nicolletta Rohtagi and were referred to a larger Bench. For the purpose of the present reference, the law laid down in issue (i) in Shila Datta assumes significance. Though issues (iii), (iv) and (v) have been referred to a larger Bench, Nicolletta Rohtagi will in the meantime continue to be a precedent laying down binding principles. Presently we turn to the decision in Shila Datta on issue (i) which has a bearing on this reference.

19. The Supreme Court held in Shila Datta (supra) that there is a distinction between (i) a case where merely a notice has been issued to the insurer under Section 149 (2); and (ii) a case where the insurer is a respondent to the proceedings. If the insurer is merely furnished with a notice under Section 149 (2), the only ground which would be available to the insurer would be the statutory grounds provided in that sub-section. However, if the insurer has been impleaded as a respondent to the proceedings, it can raise not only the statutory defences available under Section 149 (2) but all other grounds available to a person against whom the claim is made. The insurer may be impleaded as a party upon the conditions specified in Section 170 being fulfilled. Upon this happening the insurer has open a full range of defences which were available to a person against whom a claim is brought, apart from the defences under Section 149 (2). Moreover, if a claimant impleads the insurer as a party to the proceedings for whatever reason, the

insurer would be entitled to urge all contentions and grounds as may be available to it. If the insurer is already a party to the proceedings, having been impleaded, it is not necessary for it to seek the permission of the Tribunal under Section 170 to raise grounds other than those mentioned in Section 149 (2).

20. Chapters XI and XII envisage that a claim petition may be brought only against an owner and driver, and the Tribunal issues a notice under Section 149 (2) to the insurer so that it can be made liable to pay the amount awarded and, if necessary, to deny the liability by availing of a statutory defence under Section 149 (2). If only a notice has been issued to the insurer under Section 149 (2), it can defend the claim on one of the statutory defences available under sub-section (2) and no more. Where, however, the insurer is a respondent to the proceedings either because it has been impleaded under Section 170 by the Tribunal upon the conditions precedent set out therein being satisfied or has been impleaded by the claimant as a respondent to the claim petition voluntarily, it would be open to the insurer to contest the matter on all counts without being restricted to the statutory defences under Section 149 (2).

21. This position is enunciated in the following observations of the Supreme Court in Shila Datta:

"Therefore, where the insurer is a party-respondent, either on account of being impleaded as a party by the Tribunal under Section 170 or being impleaded as a party-respondent by the claimants in the claim petition voluntarily, it will be entitled to contest the matter by raising all grounds, without being restricted to the grounds available under Section 149 (2) of the Act. The claim petition is maintainable against the owner and driver without impleading the insurer as a party.

When a statutory notice is issued under Section 149 (2) by the Tribunal, it is clear that such notice is issued not to implead the insurer as a party-respondent but merely to put it on notice that a claim has been made in regard to a policy issued by it and that it will have to bear the liability as and when an award is made in regard to such claim. Therefore, it cannot, as of right, require that it should be impleaded as a party-respondent. But it can however be made a party-respondent either by the claimants voluntarily in the claim petition or by the direction of the Tribunal under Section 170 of the Act. Whatever be the reason or ground for the insurer being impleaded as a party, once it is a party-respondent, it can raise all contentions that are available to resist the claim."15

22. In a recent judgment of a Bench of two learned Judges of the Supreme Court in Josphine James Vs United India Insurance Co Ltd16, the Supreme Court held that the insurance company was not entitled to file an appeal questioning the quantum of compensation awarded but had only a limited defence as provided in Section 149 (2). The case was, therefore, covered by the principle laid down in Nicolletta Rohtagi where, evidently, no permission had been obtained under Section 170. The Supreme Court also held that in the absence of permission obtained under Section 170 (b) by the insurance company from the Tribunal to avail of the defence of the insured, the insurer was not permitted to contest the case on merits as held in Nicolletta Rohtagi (supra).

23. The position as it emerges from the decisions of the two three Judge Bench judgments of the Supreme Court in Nicolletta Rohtagi and Shila Datta (supra) is as follows:

(I) Where the insurer has not been impleaded as a respondent to the claim proceedings and a notice is issued by the Tribunal as required by Section 149 (2), the position of the insurer is that of a mere noticee who can contest the proceeding only on one of the grounds available under sub-section (2);

(II) Under Section 170, the Tribunal can implead the insurer where, in the course of its enquiry, it is satisfied that (i) there is a collusion between the person making the claim and the person against whom the claim is made; or (ii) the person against whom the claim is made, has failed to contest the claim;

(III) Once the insurer is impleaded by the Tribunal on the satisfaction of the conditions specified in Section 170, the insurer has a right to contest the claim on grounds which are available to the insured or to a person against whom the claim has been made. In such a situation, where the award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the award on all available grounds including the issue of negligence or contributory negligence of the offending vehicle as well as on the quantum of compensation even if the insured has not filed an appeal. In such a situation, the insurer is not confined to contesting the appeal only on the statutory defences available under Section 149 (2); and

(IV) Where the insurance company has already been impleaded as a respondent, either by virtue of its being impleaded as a party by the Tribunal under Section 170 [covered by (II) and (III) above] or as a party respondent by the claimants in the claim petition, it would be entitled to contest the claim petition by raising all grounds without being restricted to the statutory defences under Section 149 (2). Whatever be the reason or ground for the insurer being impleaded as a party, it is entitled to raise all contentions that are available to resist the claim, once it is a party respondent to the proceedings. Consequently, in the appeal, the insurer would not be restricted to contesting the award only on the basis of the statutory defences available under Section 149 (2) but can challenge the award on all grounds available to the insured or the person against whom the claim has been made.

Questions (i) and (ii) are answered accordingly.

Re Question (iii)

24. Chapter XI of the Act was legislated by Parliament to provide for insurance of motor vehicles against third party risks. Section 146 (1) provides that no person shall use, except as a passenger, or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, a policy of insurance which complies with the requirements of the Chapter. Section 147 lays down the requirements which a policy of insurance has to fulfill in order to comply with the provisions of the Chapter and the limits of liability. Clause (b) of sub-section (1) of Section 147 requires the policy to ensure against the following risks:

"(b) ...

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person 17[, including owner of the goods or his authorised representative carried in the vehicle] or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:"

25. Sub-section (1) of Section 149 stipulates that after a certificate of insurance has been issued under Section 147 (3) and a judgment or award in respect of a liability required to be covered by Section 147 (1) (b) is obtained against a person insured by the policy then, even if the insurer is entitled to avoid or cancel the policy or has avoided or cancelled the policy, it shall pay to the person entitled to the benefit of the decree, a sum not exceeding the sum assured as if he was the judgment debtor. Section 149 (1) obligates the insurer to satisfy the award against a person insured by the policy. This obligation is predicated upon three conditions: first, that a certificate of insurance has been issued under Section 147 (3); second, that the judgment or award is in respect of a liability required to be covered by Section 147 (1) (b) and third, that the judgment or award is against the person insured by the policy. The insurer is made liable on the basis of a legal fiction which is that the insurer must pay "as if" he is the judgment debtor. The insurer must pay even if it is entitled to cancel or avoid the policy or has cancelled or avoided it. Sub-section (4) of Section 149 provides as follows:

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

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

26. The proviso to sub-section (4) enables the insurer to recover any sum paid by it towards the discharge of a liability of any person covered by the policy, from that person. The proviso provides a statutory recourse to the insurer against the discharge of whose liability an insurer has paid the amount due under a judgment or award.

27. The provisions contained in Chapter XI were introduced by Parliament, conscious as the legislature was, of the plight of the victims of accidents. Dangers inherent in the use of roads and the growth of road traffic seriously impinges upon the lives, safety and property of third parties. Beneficial provisions were introduced by Parliament to protect the interests of claimants so as to enable them to claim compensation from the owner or insurance company in connection with the accident (See in this connection Sohan Lal Passi Vs P Sesh Reddy18).

28. In National Insurance Co Ltd Vs Swaran Singh19, a Bench of three learned Judges of the Supreme Court explained

the rationale for introducing the beneficial provisions contained in the Act to cover third party risks. The Supreme Court dealt with the provisions of Section 149 (2) thus:

"Furthermore, the insurance company with a view to avoid its liabilities is not only required to show that the conditions laid down under Section 149 (2) (a) or (b) are satisfied but is further required to establish that there has been a breach on the part of the insured. By reason of the provisions contained in the 1988 Act, a more extensive remedy has been conferred upon those who have obtained judgment against the user of a vehicle and after a certificate of insurance is delivered in terms of Section 147 (3) a third party has obtained a judgment against any person insured by the policy in respect of a liability required to be covered by Section 145, the same must be satisfied by the insurer, notwithstanding that the insurer may be entitled to avoid or to cancel the policy or may in fact have done so. The same obligation applies in respect of a judgment against a person not insured by the policy in respect of such a liability, but who would have been covered if the policy had covered the liability of all persons, except that in respect of liability for death or bodily injury."20

29. The Supreme Court held that the provisions of Section 149 indicated that once the assured proved that the accident was covered by the compulsory insurance clause, it was for the insurer to prove that it falls within an exception. The liability of the insurer was held to be statutory and its liability to satisfy the decree passed in favour of the third party was also held to be of the same character. The Supreme Court held that in this background, sub-sections (4) and (5) of Section 149 may be considered as the liability of the insurer to satisfy the decree in the first instance.

30. In Swaran Singh (supra), the Bench of three learned Judges noted that the social need of a victim who is to be compensated had been elucidated as far back as in 1959 by another Bench of three learned Judges of the Supreme Court in British India General Insurance Co Ltd Vs Captain Itbar Singh21. In the earlier decision, it was emphasised that if the insurer was made to pay something which, under the contract of insurance, he was not bound to pay, it was open to him to recover it from the assured:

"...Secondly, if he has been made to pay something which on the contract of the policy he was not bound to pay, he can under the proviso to sub-section (3) and under sub-section (4) recover it from the assured. It was said that the assured might be a man of straw and the insurer might not be able to recover anything from him. But the answer to that is that it is the insurer's bad luck. In such circumstances the injured person also would not have been able to recover the damages suffered by him from the assured, the person causing the injuries..."22 (emphasis supplied)

31. Again, this principle was emphasised in the following observations:

"...The insurance company may not be liable to satisfy the decree and, therefore, its liability may be zero but it does mean that it did not have initial liability at all. Thus, if the insurance company is made liable to pay any amount, it can recover the entire amount

paid to the third party on behalf of the assured. If this interpretation is not given to the beneficent provisions of the Act having regard to its purport and object, we fail to see a situation where beneficent provisions can be given effect to. ...The right to avoid liability in terms of sub-section (2) of Section 149 is restricted as has been discussed herein before. It is one thing to say that the insurance companies are entitled to raise a defence but it is another thing to say that despite the fact that its defence has been accepted having regard to the facts and circumstances of the case, the Tribunal has power to direct them to satisfy the decree at the first instance and then direct recovery of the same from the owner. These two matters stand apart and require contextual reading."23 (emphasis supplied)

32. These observations indicate that there are two distinct aspects which have to be borne in mind. The first is the defence which the insurance company is entitled to raise under sub-section (2) of Section 149. The second is that even if the defence is accepted, the Tribunal would have the power to direct the insurer to satisfy the decree in the first instance by permitting recovery of the amount which was paid from the owner. These are two separate issues. The first attaches to the availability of a statutory defence. The second attaches an obligation to pay in the first instance and allows a remedy to recover from the person upon whom the liability has actually fallen. The Supreme Court in its conclusions, held that the liability of the insurance company to satisfy the decree in the first instance and to recover the awarded amount from the owner or driver had held the field for a long time and the doctrine of stare decisis mandated that it should not be deviated from. However, it was held that a discretion is vested in the Tribunal and the Court so that if a direction is issued to the insurer to pay the amount awarded in the first instance, despite the fact that the insurer had been able to establish that there was a breach of the contract of insurance, the insurer would be entitled to realise the awarded amount from the owner or driver of the vehicle in execution of the award in view of the provisions of Sections 165 and 168 of the Act. In this context, the Supreme Court observed thus:

"We may, however, hasten to add that the Tribunal and the Court must, however, exercise their jurisdiction to issue such a direction upon consideration of the facts and circumstances of each case and in the event such a direction has been issued despite arriving at a finding of fact to the effect that the insurer has been able to establish that the insured has committed a breach of contract of insurance as envisaged under sub-clause (ii) of clause (a) of sub-section (2) of Section 149 of the Act, the insurance company shall be entitled to realise the awarded amount from the owner or driver and the vehicle, as the case may be, in execution of the same award having regard to the provisions of Sections 165 and 168 of the Act..."24

33. Sections 165 and Section 168 empower the Tribunal to adjudicate upon all claims in respect of accidents involving death or bodily injury or damage to the property of a third party, arising out of the use of a motor vehicle. This power of the Tribunal is held not only to be restricted to decide claims inter se between the claimant on the one hand, and the insured, insurer and the driver on the other. In the course of adjudicating the claim for

compensation, and while deciding upon the availability of defences to the insurer, the Tribunal has power and jurisdiction to decide disputes inter se between the insurer and the insured. Where the insurer has satisfactorily proved its defence under Section 149 (2), the Tribunal could direct the insurer to be reimbursed by insured for the compensation which it was required to be paid under the authority of the Tribunal. Such a determination would be enforceable and the moneys found due to the insurer from the insured would be recoverable on a certificate issued by the Tribunal to the Collector as arrears of land revenue under Section 174:

"Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Section 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the Tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the Tribunal."25

34. In several decisions of the Supreme Court thereafter, it has been held that where the insurer is directed to satisfy the award despite the absence of a legal liability, it could be left open to the insurer to initiate a proceeding before the executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue had been decided against owner. In National Insurance Co Ltd Vs Challa Upendra Rao26, the Supreme Court observed as follows:

"...Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering

the quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."27 (Emphasis supplied)

35. The same principle was adopted in the decision of the Supreme Court in Oriental Insurance Co Ltd Vs Nanjappan28 in which the Supreme Court issued following directions:

"...For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realization by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured..."29

36. A similar direction was issued in National Insurance Co Ltd Vs Baljit Kaur30.

37. These judgments have been followed in a more recent judgment of the Supreme Court in Manager, National Insurance Co Ltd Vs Saju P Paul31 where the Supreme Court has noted that by an order dated 19 January 2007 in National Insurance Co Vs Roshan Lal32, in the light of an argument raised before a two-Judge Bench that a direction ought not to be issued to the insurance company to discharge the liability under the award first and then recover it from the owner, the matter has been referred to a larger Bench. Similarly in National Insurance Co Ltd Vs Parvathneni33, the following two questions were referred to a larger Bench for consideration:

"(1) If an Insurance Company can prove that it does not have any liability to pay any amount in law to the claimants under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.

(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142?"34

38. In Saju P Paul (supra), the Supreme Court has held that the pendency of consideration of the above questions by a larger Bench did not mean that the course that was followed in Baljit Kaur and Challa Upendra Rao (supra) should not be followed particularly in the facts of that case. Accordingly, the insurance company was permitted to recover the amount paid from the owner by following the procedure laid down in Challa Upendra Rao. Undoubtedly, the issue as to whether a direction can be issued to the insurance company to pay the amount in the first instance and to recover it

thereafter from the owner, following the procedure which is laid down in Challa Upendra Rao is a matter which is pending reconsideration before a larger Bench of the Supreme Court. However, as the Supreme Court has held, the pendency of the reference to a larger Bench by itself does not mean that the same course should not be followed in the meantime.

39. In these circumstances, we hold that where the insurer is directed to pay the amount in the first instance despite having been held not to be under a legal liability to pay the awarded amount, while permitting the insurer to recover the amount from the owner, the procedure which has been laid down in Challa Upendra Rao (supra) would have to be followed. This would envisage that before the amount is released to the claimant, the owner of the offending vehicle shall furnish security for the amount which the insurer has to pay to the claimants. The offending vehicle is to be attached as a part of the security for the purpose of recovering the amount from the insured. The insurer shall not be required to file a suit and may initiate a proceeding before the executing Court. The executing Court may pass appropriate orders in accordance with law as to the manner in which the insured, namely the owner of the vehicle, shall make payment to the insurer. In the event that there is any default, it is open to the executing Court to direct realisation by the disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle. In the event that the person on whose behalf payment has been made by the insurer, does not furnish security or is not in a position to furnish security to the insurer, the insurer should promptly move the executing Court. The executing Court shall then duly ensure that it exercises all its available powers in execution in accordance with law so that while on one hand payment is made to the person to whom it is due, the concerns of the insurer are duly balanced. We may only add here that all necessary and proper steps should be taken by the executing Court to ensure that the intent and object of the legislature in enacting the beneficial provisions of the Act is duly preserved and are expeditiously implemented.

40. The reference is answered in the aforesaid terms. The FAFO shall now be placed before the appropriate Bench according to the roster of work for disposal in the light of the answers furnished above.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2015

BEFORE
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Revision No. 2317 of 2015

Udai Narayan Awasthi ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Sri Babu Lal Ram

Counsel for the Opp. Parties:
Govt. Advocate

Criminal Revision-Against order of interim maintenance-ground that order passed without opportunity-apparently incorrect as revisionist prayed for mediation-even against interlocutory order-revision not maintainable.

Held:Para-7

So far as the order impugned in the present revision is concerned, in view of the aforesaid definition of interlocutory order, it cannot be said that even if the revision is allowed the proceedings under Section 125 Cr.P.C. would culminate as a whole.

Case Law discussed:
AIR 2001 SC 3625

(Delivered by Hon'ble Mrs. Vijay Lakshmi, J.)

1. Heard learned counsel for the revisionist and the learned A.G.A. Perused the records.

2. This criminal revision has been preferred against the judgment and order dated 11.6.2015 passed by Principal Judge, Family Court, Kanpur Nagar in Case No. 939 of 2012 under Section 125 Cr.P.C., Police Station Kalyanpur, District Kanpur Nagar whereby the court below while partly allowing the application moved by the wife praying for interim maintenance has directed the revisionist/husband to pay Rs. 1500/- per month to his wife and Rs. 1000/- per month to his minor daughter (opposite party no. 3).

3. The revisionist has assailed the impugned order mainly on the ground that the court below has not considered the objection filed by the revisionist during the proceedings in the lower court.

4. A perusal of the impugned order shows that the court below has recorded a clear finding that the opposite party/husband has appeared in the case on 6.1.2015 but despite having ample time and opportunity, he has not filed any objection against the application. The order impugned also shows that on the date of order, the husband was present in the court and he had moved an application for sending the matter to mediation centre. Hence it cannot be said that the revisionist was not given any opportunity of hearing and as such there appears no force in the contention of learned counsel for the revisionist.

5. Moreover the impugned order is clearly an interlocutory order passed at an interim stage of the case whereby some amount has been awarded to the destitute wife and minor child to enable them to survive and contest their case during its pendency.

6. What is an interlocutory order is defined by Hon'ble Apex Court in a catena of judgments as under :-

"The safe test to decide if the impugned order is an interlocutory or not has been laid down by the Apex Court through a series of decisions, and that is whether the criminal proceedings challenged in revision would culminate has a whole if the revision is allowed. If yes, then the order is not interlocutory although if crosspassed at any interlocutory stage of the proceeding."

(Bhaskar Industries Ltd. V. Bhiwani Denim and Apparels Ltd.; AIR 2001 SC 3625)

7. So far as the order impugned in the present revision is concerned, in view of the aforesaid definition of interlocutory order, it cannot be said that even if the revision is allowed the proceedings under Section 125 Cr.P.C. would culminate as a whole.

8. For the aforesaid reasons, the instant revision which has been preferred against an interlocutory order is liable to be dismissed at the admission stage itself.

9. Accordingly the revision is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE BRIJESH KUMAR SRIVASTAVA-II, J.

C.M.W.P. No. 2738 of 2011

Dr. Tarun Rajput ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-311(2)(3)- Dismissal on ground of unauthorized absence from duty-denying protection of holding departmental proceeding not practicable-on ground due to unauthorized absence-general public suffering as no fresh incumbent could be appointed-held-factually incorrect-in short period absence with permission of authority cannot be treated unauthorise absence-nor such ground available for refusal to hold departmental enquiry under Rule 1999-dismissal order quashed.

Held: Para-13
Even impugned order of termination was served upon him while he was serving at the aforesaid center. In the circumstances, it cannot be said that departmental enquiry has been dispensed with validly and the constitutional protection available to petitioner has been done away in the manner permitted under Article 311(2) second proviso (b). In fact, the aforesaid provision is not at all attracted in the case in hand and without application of mind, the appointing authority has resorted to said power. In a wholly illegal and unconstitutional manner, it has terminated the petitioner. The correct way would have been to initiate a departmental enquiry against petitioner, serve a charge-sheet upon him for alleged unauthorized absence, if any, and thereafter to take appropriate action in the light of findings recorded by enquiry officer in a regular disciplinary proceeding held in accordance with Rules, 1999. Non compliance of aforesaid procedure of holding of departmental enquiry, and, instead, dispensation thereof in an illegal manner renders the impugned order wholly unconstitutional and void-ab-initio.

Case Law discussed:
(1985) 2 SCC 398; (1991) 1 SCC 362; AIR 2014 SC 2922

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

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

2. This writ petition is directed against the order dated 03.05.2010 whereby petitioner along with other officers working in Provincial Medical and Health Service Cadre (hereinafter referred to as "PHMS") has been terminated by exercising power under Article 311(2) and (3) of the Constitution of India on the ground that he has been continuously absent from service and for this reason, neither the medical services are being rendered to needy people, nor any other person can be appointed, nor even departmental enquiry is practicable since the petitioner is continuously absent and his whereabouts are not known.

3. Shri Ashok Khare, learned counsel appearing for petitioner submitted that the fact, that petitioner is continuously absent and his whereabouts were not known is factually incorrect, as the petitioner was working and discharging his duties at

Community Health Center, Patiali, District Kanshiram Nagar, and when the impugned order of termination was communicated, Superintendent of the aforesaid Community Health Center actually relieved petitioner vide order dated 22.05.2010. He drew attention of this Court to para 9 and 10 of writ petition and stated that for short duration and from time to time, he had proceeded on leave which were duly sanctioned in due course of time. In any case when the impugned order was passed, he was actually discharging duties at Community Health Centre, Patiali, District Kanshiram Nagar. He further contended that though petitioner was actually discharging his duties in the aforesaid Community Health Centre, still in the impugned order, reason for his termination has been given that departmental enquiry is not practicable since whereabouts of the petitioner were not known, which is contrary to record and non est.

4. A counter affidavit is filed, sworn by one Dr. Sarvesh Kumar, Medical Superintendent, Kanshiram Nagar, wherein, it is stated that petitioner was continuously absent from duty from 15.01.2009 without any information or application, and in this regard a complaint was made by Chief Medical Officer, Kanshiram Nagar to Director (Admin.), Medical and Health Services, U.P., Lucknow vide letter dated 09.03.2009. Then in para 6 of the aforesaid counter affidavit, all the details of absence of petitioner are given, which reads as under:

"In reply thereto it is submitted that the petitioner was absent from duty from 2.6.2009 to 20.7.2009, 1.10.2009 to 4.10.2009, 9.10.2009 to 13.10.2009, 16.10.2009 to 18.12.2009, 25.12.2009 to 28.12.2009 and 3.1.2010 to 22.1.2010 without any intimation to the department. Even during the election period, he was not performing his duties in the election. In this regard an FIR was lodged against the petitioner at Police Station Kotwali, Katiyali, District Kanshiram Nagar." *(Emphasis added.)*

5. It is also stated that petitioner has never submitted any application for grant of leave, hence no question has arisen for sanction of leave on the ground of medical or marriage.

6. Be that as it may, the reply given by respondents in the counter affidavit, makes it very clear that after 22.01.2010 and onwards, petitioner is not absent. It proves the case of petitioner that he was discharging duties at Community Health Centre, Patiali, District Kanshiram Nagar. Moreover, period of absence of petitioner given in para 6 of the aforesaid counter affidavit shows that he was absent intermittently from 02.06.2009 till January, 2010, for a total 116 days:

Sl. No.	Period	No. of absence
1	June-July, 2009	19 days.
2	October, 2009	25 days.
3	November,2009	30 days.
4	December, 2009	22 days.
5	January, 2010	20 days.
Total		**116days.**

But after 22.01.2010, as per own version of respondents also, the petitioner came on duty.

7. Thus, it is clear that on 03.05.2010 and even much before thereto petitioner was actually discharging duties. Factually it cannot be said that petitioner was not working at all and his whereabouts were not known. It is a different case that petitioner was absent unauthorizedly and illegally for some

times, and hence, appropriate enquiry could have been conducted under the Rules.

8. Another question is, whether Article 311(2) second proviso read with 3, was resorted validly in passing the impugned order.

9. Holding of departmental enquiry before dismissal or removal, is mandatory under Article 311(2). This case is sought to be covered by second proviso to Article 311(2) read with procedure prescribed under U.P. Government Servants (Discipline and Appeal) Rules, 1999 (hereinafter referred to as "Rules, 1999). A heavy onus lay upon respondent to show that from all the angle the case is covered by one of the grounds on which departmental enquiry may not be held or dispense with i.e. when it is not "reasonably practicable".

10. Article 311 (2)(b) was considered by a Constitution Bench in Union of India and another Vs. Tulsiram Patel (1985) 3 SCC 398, and the Court said:

"130. The condition precedent for the application of Clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by Clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform: capable of being put into practice, done or accomplished: feasible". Further, the words used are not "not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by Clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation."
(Emphasis added.)

11. Again Court explained circumstances in which departmental enquiry can be dispensed with by resorting to Article 311(2)(b) in Jaswant Singh Vs. State of Punjab and Ors. (1991) 1 SCC 362. This decision has been followed very recently in Risal Singh Vs. State of Haryana and others AIR 2014 SC 2922. Therein following a sting operation by a Television channel in which appellant Police Officer was found indulged in an act of corruption, he was dismissed from service without any enquiry by resorting to Article 311 (2) second proviso (b). The Court held that before resorting to Article 311(2) second proviso (b), appropriate and valid reasons have to be recorded, as contemplated in the Constitution. Dispensation of departmental enquiry, a constitutional protection available to civil servant, cannot be taken away or denied on whims and caprices of appointing authority or the disciplinary authority.

12. In the case in hand, the only reason assigned is that petitioner is continuously absent and his whereabouts are not known. Both these facts are factually incorrect and non est. The petitioner was actually discharging his duties at Community Health Center, Patiali, District Kanshiram Nagar as per the own version of respondents, evident from para 6 of counter affidavit since, after 22.01.2010. There was no absence on the part of petitioner and he was in actual duty from 23.01.2010 till the date of termination.

13. Even impugned order of termination was served upon him while he was serving at the aforesaid center. In the circumstances, it cannot be said that departmental enquiry has been dispensed with validly and the constitutional protection available to petitioner has been done away in the manner permitted under Article 311(2) second proviso (b). In fact, the aforesaid provision is not at all attracted in the case in hand and without application of mind, the appointing authority has resorted to said power. In a wholly illegal and unconstitutional manner, it has terminated the petitioner. The correct way would have been to initiate a departmental enquiry against petitioner, serve a charge-sheet upon him for alleged unauthorized absence, if any, and thereafter to take appropriate action in the light of findings recorded by enquiry officer in a regular disciplinary proceeding held in accordance with Rules, 1999. Non compliance of aforesaid procedure of holding of departmental enquiry, and, instead, dispensation thereof in an illegal manner renders the impugned order wholly unconstitutional and void-ab-initio.

14. In the result, the writ petition is allowed. Impugned order of termination dated 03.05.2010, insofar as it relates to petitioner, is hereby quashed. Petitioner shall be entitled to all consequential benefits.

15. However, this order shall not be preclude the respondents from taking action against petitioner for any act of misconduct, including absence and misconduct, by taking action in accordance with law.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.08.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Criminal Appeal No. 3411 of 2006

Gopal ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Prakash Dwivedi, Sri I.M. Khan, Sri Sudeep Dwivedi

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

Criminal Appeal-Against conviction of life imprisonment with fine Rs. 5000/-on ground-no weapon used upon deceased-inspite of tenancy dispute-no previous altercation took place-considering weak mental status appellant may be guilty of culpable homicide not amounting to murder under Section 304 IPC-held-punishment of life imprisonment much excessive and inappropriate-can not be more than 10 years-while appellant already been under imprisonment for 24 years-hence sentenced reduced for the period already undergone-appeal disposed of.

Held: Para-27

When we apply the settled principles of law which has been enumerated in the aforementioned cases, the sentence of life imprisonment of the appellant under Section 304 IPC appears to be excessive and inappropriate. In the present case after considering the circumstances presented before the Sessions Judge and before us during hearing of appeal, it appears appropriate that, in the present case the sentence should not exceed more than 10 years' imprisonment. But since he has already been under imprisonment for about 24 years, therefore we are of the view that ends of justice would be met if he be sentenced for the period already undergone.

Case Law discussed:
(2008) 15 SCC 753; (2013) 9 SCC 516; (1994) 6 SCC 727; (2015) 6 SCC 1; (1976) 1 SCC 281; (2009)15 SCC 635.

(Delivered by Hon'ble Pramod Kumar Srivastava, J.)

1. This appeal has been preferred against the judgment of conviction dated 27.04.2006 and of sentence dated 28.04.2006 passed by Additional Sessions Judge, Court No. 4 Mirzapur in S.T. No. 26 of 1993 (State Vs. Gopal) under Section 307, 323 and 302 IPC in case crime no. 331 of 1991, p.s.-Kotwali Katra, Mirzapur by which accused-appellant Gopal had been convicted for the charge under Section 302 IPC and sentenced with imprisonment for life and fine of Rs. 5000/- (in default of payment further imprisonment for six months) and for the charge under Section 323 IPC with imprisonment for six months; and it was directed that both the sentences would run concurrently.

2. The prosecution case in brief was that appellant Gopal was landlord of the house in which informant's father Fakir Chand was tenant and was living with his family. They had tenancy disputes for which litigation was pending. In the night of 17/18-7-91 at about 3:00 am, Fakir Chand was sleeping outside his house, when accused Gopal came and started beating Fakir Chand with a "paati" (wooden arm of a cot), then on alarm of Fakir Chand, informant and other persons came there. Accused Gopal had inflicted many injuries on Fakir Chand, and when Bhaggu Mallah, his daughter-in-law, his wife and children came there then accused had also injured them with the same "paati". At the time of incident, witnesses Vijay Kumar, Kallu Khan came there and saw the incident. After this incident, accused Gopal fled away from the spot. Fakir Chand was taken to the hospital and on the way he succumbed to his injuries. After this, informant Raj Narayan reported this matter at the police station in the morning of 18.07.1991 at 06.10 am., on the basis of which case crime no. 331 of 1991 u/s 302 IPC was registered. After completition of investigation, charge-sheet was submitted against Gopal for the offence u/s 304 IPC, on the basis of which Sessions Trial No. 26 of 1993 was registered.

3. In sessions trial, accused Gopal was charged for offences under Section 302, 307, 323 IPC, which he denied and claimed to be tried. The prosecution examined PW-1, Vijay Kumar, PW-2 Bhagggu Lal, PW-3 Kallu, PW-4 Dr. Dinesh Swarup , PW-5 Raj Narayan, PW-6 Narendra Prasad Singh, PW-7 Constable Israrul Hasan and PW-8 Dr. K.P.Singh. These witnesses had proved the documentary evidence as well as material exhibits of the prosecution side.

4. After closure of the prosecution evidence, statement of accused was recorded in which he had denied the

prosecution evidence and stated that he had been a person of unsound mind since his childhood for a long period and had suffered from fits of insanity. He does not remember any incident of the day of the charged incident. In support of his defence version, he also stated during trial that he was in jail. During his incarceration he was sent by the Chief Medical Officer (CMO), through the Court, to Mental Hospital, Varanasi, where his treatment was carried out for one year. Thereafter, he had returned to face the trial in custody, and then again he became insane and was sent again to the Mental Hospital, Varanasi. When he came back from there after treatment, then his trial resumed. He had no enmity with injured/victims of this case. He had filed documents relating to the treatment showing that at the time of the incident, he was not in his senses.

5. Accused had also examined defence witnesses DW-1 Dr. Kashi Prasad, DW-2 Dr. Dr. Amrendra, DW-3 Dr. C.P. Singh and DW-4 Kalam, who had proved the defence documents including registers relating to the treatment of the accused for his mental illness.

6. After closure of evidence of both sides and after affording opportunity of hearing the lower court passed the impugned judgment dated 27.04.2006/ 28.04.2006, by which accused Gopal was convicted as mentioned above, against which, he has preferred the present appeal.

7. Sri Sudeep Dwivedi, learned counsel for the appellant argued that he is not challenging the fact of charge of causing death of the deceased Fakir Chand by accused appellant, but from the evidence, appellant appears to be entitled to the benefit of Section 84 IPC because he had been under treatment for his unsoundness of mind at the time of the charged incident. In the alternative, he has fairly contended that if his plea by defence under Section 84 IPC is not accepted in that case also the incident in question is not an offence of murder punishable u/s 302 IPC, but is a culpable homicide not amounting to murder. Therefore the punishment awarded may be mitigated. It was also contended that the appellant's family was dependent on him. He being the only bread winner of his family, this being his first guilt and his hailing from a poor family, the award of life sentence and fine of Rs. 5,000/-, in default to undergo further imprisonment for six months is very excessive. He urged that these points were raised by the appellant's counsel during arguments before the trial Court, but were not properly considered because of his conviction u/s 302 IPC. His alternative argument is that in any case, considering the plea of unsoundness of the mind at the time of the charged incident as well as the circumstances that the appellant accused had no previous intention or pre-planning to cause death, and suddenly caused injuries without using any formal weapon, and used only a "paati" (that is wooden arm of a cot) which in no way is a weapon but a thing of domestic use his sentence should be mitigated. Had he fostered any intention to cause death and pre-planned the same, he would have used any weapon at least a stick or anything like that during the incident.

8. Learned counsel for the appellant also pointed out that from evidence, it is proved that at the time of the incident and

before, the appellant was a man of unsound mind and even at the time of incident, he had caused injuries not only to informant's father Fakir Chand but also to many other individuals. It was argued that in these circumstances the sentence of the appellant Gopal should be mitigated and converted u/s 304 IPC, and his punishment should be reduced to the period already undergone or any other period because he is in jail from the time of incident since 1991.

9. Learned AGA appearing for the respondent State submitted that though there is evidence of prosecution and defence witnesses regarding intermittent and periodical unsoundness of mind of the appellant, but it has not been proved beyond doubt that at the time of the charged incident the appellant was under the state of unsoundness of mind. He contended that had the appellant been a person of unsound mind then apart from causing injuries to other persons he would have tried to cause injuries to himself also. In alternative, learned AGA has fairly submitted that the Court is at liberty to impose an appropriate sentence on the appellant.

10. We have given our consideration to the rival submissions and perused the material and evidence available on record.

11. This fact relating to charge was not challenged by the learned counsel for the appellant that on the date of charged incident, accused Gopal had inflicted injuries on the body of sleeping Fakir Chand and also on the body of several other persons who had came there to protect Fakir Chand. It was also admitted that those injuries were caused by a "paati" (wooden arm of a cot). It was not challenged by the appellant that due to injuries caused by him, informant's father Fakir Chand got injured and died. Thus, it is proved that at the time of incident no weapon was used by the appellant for injuring sleeping Fakir Chand or other witnesses who came to rescue him. Though, there was some dispute between the appellant and deceased relating to a tenancy issue but for that a litigation was already pending and no earlier serious altercation had happened. It is also proved that other witnesses, namely, Hari Shankar Singh, Ram Sewak Singh, Bhaggu, Kumari Sumari had also sustained simple injuries of the "paati" when they came to protect the deceased and these witnesses had no enmity with the accused appellant. These facts prove that at the time of the charged incident accused appellant had started inflicting injuries on the deceased as well as every person who came near him and many persons had sustained injuries without any reason or enmity. Such acts are not committed by a person of normal prudence. The defence witnesses DW-2 and DW-3 are doctors and they had proved unsoundness of mind and of insanity of the appellant Gopal during his period of detention in jail. We are in agreement that the believable evidence of these two defence witnesses, namely, DW-2 and DW-3 are evidence of unsoundness of mind of the appellant after the date of incident.

12. Ex-Ka-43 is a letter dated 22.07.1991 sent by the Superintendent District Jail, Mirzapur to the CJM Mirzapur in which he had mentioned that accused Gopal was admitted in the jail on 19.07.1991 (since the next day of charged incident dated 18.07.1991) and from the time of his entry in the jail, his mental

condition is bad, he involves himself in violent activities like injuring other prisoners, injuring his own head against the wall, dipping his head in water; therefore he is kept in of solitary barrack under medical observation. Jail Superintendent has requested that the accused may be sent before a Medical Board for examination and treatment. On this letter of the Jail Superintendent, CJM, Mirzapur had sent him before the CMO and thereafter he was sent to the mental hospital. This fact proved that immediately after the charged incident the activities of the appellant Gopal were not of a normal man and he was behaving abnormally and used to indulge in violent activities including injuring himself also. DW-2 and DW-3 were doctors who had proved that during his custody, he was found mentally ill due to Mechanical Depression Psychosis and after treatment, he was cured. But the evidence could not be proved beyond doubt that on the date of the charged incident the appellant was under influence of insanity.

13. DW-1 Kashi Prasad had proved that before the charged incident accused Gopal was under fits of madness several times, for which he was being treated. At the time of the charged incident, he was not in his senses. DW-4 Kalam is also one of those persons who were injured with deceased Fakir Chand at the time of charged incident. He had stated that at the time of incident, accused Gopal was under influence of madness at about 3:00 am at night and for that reason he had inflicted injuries on many persons including him, due to which he had sustained injuries on his right shoulder. Apart from him 8 to 10 person were injured due to injuries caused by the accused Gopal and one of them was Fakir who had succumbed to the injuries inflicted by appellant accused. But Gopal had not injured him or deceased Fakir or any other person due to any enmity. He was not in his senses due to insanity. Then the police had taken Gopal in custody. During and after the incident, he was insane. This statement of DW-4 has been found to be correct and was supported by other oral and documentary evidence.

14. Prosecution witnesses PW-1 Vijay Kumar had supported the prosecution case but during cross-examination, he admitted that before the incident in question, there was no dispute between accused Gopal and the deceased or his son. He admitted that in the night of charged incident, Gopal had injured not only Fakir Chand, but 5 to 6 persons of the family of Bhaggu also and had caused injuries to the students, who were sleeping at the temple at the time of incident. Gopal was beating everyone who met him. PW-2 Bhaggu Lal is also an injured witness of this case who had admitted during cross-examination that though he was injured by accused Gopal but had no enmity with him. He was informed that Gopal used to go mad from time to time. He had admitted from his knowledge that before the charged incident, once Gopal was under the influence of madness and was sent for treatment to a mental hospital. PW-2 had also admitted that before and after the charged incident, Gopal was insane. The evidence of the prosecution has supported the argument of the learned counsel for the appellant that the appellant had been a person of unsound mind from time to time just before and just after the charged incident and at those times he was incapable of knowing the nature of his

acts or that he was doing anything right or wrong. From the above discussion, it is also proved that the charged act was committed by the appellant without intention of murder, without use of any formal weapon and without any pre-planning. From the evidence, it appears probable that the appellant had willfully caused injures to every person who was found near him and these injures were inflicted indiscriminately without properly knowing as to whether they may cause death or not. Therefore, in such circumstances, it has to be well thought out as to whether the act causing injuries to Fakir Chand resulting in his death was murder or whether it was a culpable homicide not amounting to murder.

15. Culpable homicide is a murder if act which causes death is done with the intention of causing death or is done with intention of causing a bodily injury and injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. All murder is culpable homicide but not vice versa. This is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree.

16. In "Kesar Singh v. State of Haryana, (2008) 15 SCC 753" Hon'ble Apex had held :

"To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 "Thirdly":

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; these are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

Once these three elements are proved to be present, the enquiry proceeds further and,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.

Once these four elements are established by the prosecution (and, indisputably, the burden is on the prosecution throughout) the offence is murder under Section 300 "Thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury is actually found to be proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced that the injury was accidental or otherwise unintentional."

17. In the matter in hand it is proved from the evidence that the charged act was committed by the appellant without intention of murder, without use of any formal weapon and without any pre-planning. From the evidence, it appears probable that the appellant had willfully caused injuries to every person who was found near him and these injuries were inflicted indiscriminately without properly knowing as to whether they may cause death or not. Though the injuries caused by him were grievous but there was every possibility of the deceased's survival. Apparently knowing these facts fully well the appellant Gopal had inflicted blows on the deceased and after that he had caused injuries to others also without any motive or reason. It is also proved that the appellant had inflicted injuries without discriminating between vital and non-vital parts of the bodies of injured. The unsoundness of the mind of appellant at the time of the charged incident is not proved beyond doubt, but it is apparent that he had been a man of a comparitively weak mental status. These facts are proof of the facts for the death of injured Fakir Chand that was caused due to the act committed without premeditation and due to all of a sudden provocation after seeing Fakir Chand, who was a tenant and had been retaining his house without paying rent for a long time. This matter comes within exception 1 of Section 300 IPC. Therefore the appellant is found guilty of an act of culpable homicide not amounting to murder which is punishable under section 304 IPC.

18. It is settled law that the courts are obliged to respect the legislative mandate in the matter of awarding of sentences in all such cases. In "Hazara Singh v. Raj Kumar, (2013) 9 SCC 516" Hon'b'e Apex Curt had held that :

"it is clear that the maximum punishment provided therein is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the Judges in arriving at a fair and impartial verdict."

"17. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment."

19. Only because Section 304 IPC provides the life imprisonment as the maximum sentence, does not mean that Court should mechanically proceed to impose the maximum sentences, more particularly when the incident had occurred suddenly, during the heat and passion of quarrel.

20. In Hem Chand v. State of Haryana, (1994) 6 SCC 727 Hon'ble Apex Court had held that :

"As mentioned above, Section 304-B IPC only raises presumption and lays down that minimum sentence should be seven years but it may extend to imprisonment for life. Therefore awarding extreme punishment of imprisonment for life should be in rare cases and not in every case."

21. In Devidas Ramachandra Tuljapurkar v. State of Maharashtra, (2015) 6 SCC 1 Hon'ble Apex Court had held :

"While we see no reason to differ with the concurrent findings recorded by the trial court and the High Court, we do see some substance in the argument raised on behalf of the appellants that keeping in view the prosecution evidence, the attendant circumstances, the age of the accused and the fact that they have already been in jail for a considerable period, the Court may take lenient view as far as the quantum of sentence is concerned. The offences having been proved against the accused and keeping in view the attendant circumstances, we are of the considered view that ends of justice would be met, if the punishment awarded to the appellants is reduced."

22. In 'Ramashraya Chakravarti v. State of M.P., (1976) 1 SCC 281' Hon'ble Apex Court had observed :

"To adjust the duration of imprisonment to the gravity of a particular offence is not always an easy task. Sentencing involves an element of guessing but often settles down to practice obtaining in a particular court with inevitable differences arising in the context of the times and events in the light of social imperatives. It is always a matter of judicial discretion subject to any mandatory minimum prescribed by law."

"In judging the adequacy of a sentence the nature of the offence, the circumstances of its commission, the age and character of the offender, injury to individuals or to society, effect of the punishment on the offender, eye to correction and reformation of the offender, are some amongst many other factors which would be ordinarily taken into consideration by courts trial courts in this country already overburdened with work have hardly any time to set apart for sentencing reflection. This aspect is missed or deliberately ignored by the accused lest a possible plea for reduction of sentence may be considered as weakening his defence. In a good system of administration of criminal justice pre-sentence investigation may be of great sociological value."

23. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. For sentencing an accused on proof of crime the courts have evolved certain principles; the twin objective of the sentencing policy is deterrence and correction. It lies within the discretion of the court to choose a particular sentence within the available range from minimum to maximum. What sentence would meet the

ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances.

24. In considering the adequacy of the sentence which neither be too severe nor too lenient the court has, therefore, to keep in mind the motive and magnitude of the offence, the circumstances in which it was committed and the age and character (including his antecedents) and situation in life of the offender.

25. In Gurmukh Singh v. State of Haryana, (2009) 15 SCC 635 Hon'ble Apex Court had discussed points to be taken into account before passing appropriate sentence as under :

"23. These are some factors which are required to be taken into consideration before awarding appropriate sentence to the accused. These factors are only illustrative in character and not exhaustive. Each case has to be seen from its special perspective. The relevant factors are as under:

(a) Motive or previous enmity;

(b) Whether the incident had taken place on the spur of the moment;

(c) The intention/knowledge of the accused while inflicting the blow or injury;

(d) Whether the death ensued instantaneously or the victim died after several days;

(e) The gravity, dimension and nature of injury;

(f) The age and general health condition of the accused;

(g) Whether the injury was caused without premeditation in a sudden fight;

(h) The nature and size of weapon used for inflicting the injury and the force with which the blow was inflicted;

(i) The criminal background and adverse history of the accused;

(j) Whether the injury inflicted was not sufficient in the ordinary course of nature to cause death but the death was because of shock;

(k) Number of other criminal cases pending against the accused;

(l) Incident occurred within the family members or close relations;

(m) The conduct and behaviour of the accused after the incident. Whether the accused had taken the injured/the deceased to the hospital immediately to ensure that he/she gets proper medical treatment?

These are some of the factors which can be taken into consideration while granting an appropriate sentence to the accused.

24. The list of circumstances enumerated above is only illustrative and not exhaustive. In our considered view, proper and appropriate sentence to the accused is the bounded obligation and duty of the court. The endeavour of the court must be to ensure that the accused receives appropriate sentence, in other words, sentence should be according to the gravity of the offence. These are some of the relevant factors which are required to be kept in view while convicting and sentencing the accused."

26. Now the matter is limited to sentence for offence u/s 304 IPC, and we have to consider about the appropriate sentence for the appellant in this case. For it aggravating circumstances relating to the crime while mitigating circumstances relating to the criminal has to be

considered. From facts and circumstances of the case it is clear that the appellants and victim are neighbours and had initially no intention or premeditation for murder/ homicide as they had been involved in a civil litigation. He had not used any formal weapon in the incident. Appellant had no criminal history and is in incarceration for about 24 years. Apart from these mitigating circumstances, it is noteworthy that the charged incident was due to a sudden provocation without any inducement. Appellant had committed the charged act without any sufficient reason and due to provocation caused by his own act as he is a person of weak brainpower who very often fails to control himself.

27. When we apply the settled principles of law which has been enumerated in the aforementioned cases, the sentence of life imprisonment of the appellant under Section 304 IPC appears to be excessive and inappropriate. In the present case after considering the circumstances presented before the Sessions Judge and before us during hearing of appeal, it appears appropriate that, in the present case the sentence should not exceed more than 10 years' imprisonment. But since he has already been under imprisonment for about 24 years, therefore we are of the view that ends of justice would be met if he be sentenced for the period already undergone.

28. In view of the above facts and discussion, the order of conviction u/s 302 IPC imposed on the appellant is hereby modified u/s 304 IPC, and the sentence of imprisonment for life is modified to the period of imprisonment already undergone. With this modification of conviction, punishment and sentence, the appeal stands disposed off.

29. Let the copy of this judgment be sent to Sessions Judge, Mirzapur of ensuring compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.08.2015

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. 4639 of 2015

Neha Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Som Kartik Shukla

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act 1921-Chapter III Regulation-103-Compassionate appointment-whether a married daughter illegible for compassionate appointment?-held-'No'-reasons discussed.

Held: Para-12
Accordingly, the petitioner being married daughter of the late Suresh Nath Misra, who died while working and discharging his duties on the post of Assistant Teacher of the institution known as Public Inter College, Sampoorna Nagar Kheri is not entitled for compassionate appointment under Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921 , so I do not find any illegality or infirmity in the impugned order dated 21.1.2015 passed by opposite party no.2/ District Inspector of Schools, Lakhimpur Kheri, the writ petition liable to be dismissed.

Case Law discussed:
(2015) 1 UPLBEC 517; AIR 2010 SC 1714; 2015 (33) LCD 1381.

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

1. Heard Sri Som Kartik Shukla, learned counsel for the petitioner, Sri Badrul Hassan, learned Additional Chief Standing Counsel for opposite parties no. 1 and 2 and perused the record.

2. Undisputed facts in the present case are that petitioner's father Sri Suresh Nath Mishra (now deceased) while working on the post of Assistant Teacher in Public Inter College, Sampoorna Nagar Kheri, died during the tenure of his service as such the petitioner, who is married daughter of late Suresh Nath Mishra submitted an application for consideration of her case on compassionate ground before the authority concerned. When no heed has been paid by the official respondents so she approached this Court by filing Writ Petition No. 6032 (SS) of 2014 (Neha Mishra Vs. Stte of U.P. And others) , disposed of by order dated 17.10.2014 with the following directions;

"In view of the above, this writ petition is disposed of with liberty to the petitioner to file fresh representation alongwith certified copy of this order before respondent no.2, who shall, thereafter, examine the claim of the petitioner and pass appropriate orders in accordance with law, expeditiously and preferably within next three months. Needless to mention that this Court has not expressed any opinion on the merits of the claim of the petitioner and which shall be examined by respondent no.2, while taking decision in the matter."

3. Thereafter by means of order dated 21.1.2015, opposite party no.2/ District Inspector of Schools, Lakhimpur Kheri rejected the petitioner's claim for compassionate appointment on the ground that petitioner is married daughter of late Suresh Nath Mishra so she does not fall within the definition of family, as per the provisions as provided under Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921.

4. Learned counsel for the petitioner while assailing the impugned order submits that the same is contrary to law as laid down by this Court in the case of Soniya Vs. State of U.P. , (2015) 1 UPLBEC, 517 relevant portion is quoted herein below:-

"Merely because a daughter is looking after her parents is not a criteria for grant of compassionate appointment. The object with which a married daughter has been excluded from the expression "Family" is based on an intelligible differentia and the dependency should be a yardstick for consideration of compassionate appointment and is commensurate with the sole object of grant of compassionate appointment. It is in these circumstances, the married daughter has not been included in the expression "Family" under Dying-in-Harness Rules, 1974.

However for transfer of retail licence, the criteria is "inheritance" whereas in the matter of grant of compassionate appointment, it is "dependency" and hence ratio of judgment of Bombay High Court(supra) applies in the facts and circumstances of that particular case and is not applicable in the facts of the present case.

So far as the judgments in R. Jayamma(supra) and Manjula (supra) are concerned, it is found that in both the cases, the Karnataka High Court found that the married daughter was financially dependent upon her parents for the reason

that in R. Jayamma(supra) the husband of the petitioner (who was a married daughter) has become mentally deranged. In Manjula(supra) the petitioner has become widow after filing of the petition. In paragraph 10 of the judgment in Manjula(supra) it was observed that no married daughter can be denied of an entry into the service on compassionate employment just because she is married. There may be cases whether the married woman may be living with her parents notwithstanding her marriage for various reasons and there may be cases where married women would be dependent on their parents on account of their individual circumstances. Thus, the Court in those cases, may read down the rule of dependency in the facts and circumstances of the case and issue a direction to provide employment to dependent married daughters subject to satisfaction of their dependency in the given circumstances.

5. Accordingly, he submits that impugned order dated 21.1.2015 passed by opposite party no. 2 thereby rejecting the petitioner's claim for compassionate appointment on the ground that she is married daughter of late Sri Suresh Nath Mishra, is contrary to law, liable to be set aside.

6. Sri Badrul Hassan, learned Additional Chief Standing Counsel for opposite parties while defending the impugned order submits that as the petitioner is married daughter of late Suresh Nath Mishra so keeping in view of the said fact as well as the definition of 'Family' given under Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921 , there is no illegality or infirmity in the impugned order passed by opposite party no.2.

7. In order to decide the controversy involved in the present case , it will be appropriate to consider the Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921 which reads as under:-

" 103. In case an employee of teaching or non-teaching staff of a recognized aided institution who has been duly appointed in accordance with the prescribed procedure, dies in harness one member of his family not below the age of 18 years shall be given appointment to a non-teaching post notwithstanding anything contrary in the prescribed procedure for recruitment if such member possesses requisite educational qualifications prescribed for the post and is otherwise suitable for appointment.

Explanation- For the purpose of this regulation ' member of family' shall means widow/widower, son, unmarried or widowed daughter of the deceased."

8. Form the perusal of the explanation of Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921 , it is apparently clear that the word which has been used therein is family shall mean widow/ widower, son, unmarried or widowed daughter of the deceased family. The word 'means' used therein is exhaustive in nature and includes the persons in the family of the deceased as mentioned therein for the purpose of giving compassionate appointment. Taking into the said facts as well as the settled principle of interpretation of Statutes that a statutory provisions should not be construed in a manner which would lead to manifest absurdity , futility , or anomaly or chaos. Reference may be made to the decision of Apex Court in H.S. Vankani and others Vs. State of Gujrat and others, AIR 2010 SC 1714.

9. Further, in the Sate of Uttar Pradesh the matter in regard to compassionate appointment is governed by the Rules known as under U.P. Recruitment of Dependants Government Servants Dying in Harness (Ninth Amendment) Rules, 2011 and the definition of family is being given in Rule 2C of the Rules which reads as under:-

"2(C) 'family' shall include the following relations of the deceased Government servant;

(i) wife or husband;

(ii) sons/adopted sons;

(iii) unmarried daughters, unmarried adopted daughters, widowed daughters and widowed daughters-in-law;

(iv) unmarried brothers, unmarried sisters and widowed mother dependent on the deceased Government servant, if the deceased Government servant was unmarried;

(v) aforementioned relations of such missing Government servant who has been declared as "dead" by the competent court;

Provided that if a person belonging to any of the above mentioned relations of the deceased Government servant is not available or is found to be physically and mentally unfit and thus, ineligible for employment in Government service, then only in such situation the work "family" shall also include the grandsons and the unmarried grand daughters of the deceased Government servant dependent on him."

10. A Division Bench of this Court in the case of Sunita Bhadooria (Smt.) v. State of U.P. and another (2006) 1 UPLBEC 754 after considering the the provisions as provided under Rule 2 (c) of U.P. Recruitment of Dependants Government Servants Dying in Harness (Ninth Amendment) Rules, 2011 has held that the married daughter of the deceased is not entitled for compassionate appointed under Dying-in-Harness Rules, 1974. (See also Smt. Reeta Singh v. State of U.P. and others (2013) 2 UPLBEC 1540, Sarita Singh v. State of U.P. and others 2012 (91) ALR 323 and in Special Appeal No.553 of 2014 "Gayatri Singh v. State of U.P. and others ").

11. The said view has further reiterated by this Court in the case of Sapana Tiwari Vs. Stte of U.P. And others , 2015(33) LCD 1381 wherein it is also held that married woman does not fall within the definition of family of the deceased as given under Rule 2 (c) of U.P. Recruitment of Dependants Government Servants Dying in Harness (Ninth Amendment) Rules, 2011.

12. Accordingly, the petitioner being married daughter of the late Suresh Nath Misra, who died while working and discharging his duties on the post of Assistant Teacher of the institution known as Public Inter College, Sampoorna Nagar Kheri is not entitled for compassionate appointment under Regulation 103 Chapter III of U.P. Intermediate Education Act, 1921 , so I do not find any illegality or infirmity in the impugned order dated 21.1.2015 passed by opposite party no.2/ District Inspector of Schools, Lakhimpur Kheri, the writ petition liable to be dismissed.

13. For the foregoing reasons, the writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.08.2015

BEFORE
THE HON'BLE RITU RAJ AWASTHI, J.

Misc. Single No. 4794 of 2015

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

Counsel for the Petitioners:
Rajeiu Kumar Tripathi

Counsel for the Respondents:
C.S.C., Azad Khan

Constitution of India Art.-226-Alternative Remedy-order passed under Section 122-B (4-F) of U.P. Zamindari Abolition Act-can be challenged on statutory remedy of Revision-writ-not maintainable.

Held: Para-41
So far as the question as to whether the order passed conferring benefit of Section 122-B (4-F) of the Act on any person or an order cancelling such benefit is an administrative order and against such order no appeal or revision would lie, as claimed by learned counsel for the petitioners is concerned, suffice is to observe that provisions of Section 122-B (4-F) of the act does not confer any independent right on a person and the provisions as envisaged under Section 122-B (4-F) of the Act is to be read in consonance with other provisions under Section 122-B of the Act. Under Section 122-B (4-A) of the Act, there is a specific provision of filing revision against an order passed in proceedings under Section 122-B of the Act, as such, I am of the considered view that any order passed in the matter relating to Section 122-B (4-F) of the Act is a judicial order and the same would be amenable to revisional jurisdiction under Section 122-B (4-A) of the Act. Any person aggrieved has a remedy of filing revision under Section 122-B (4-A) of the Act in this regard.

Case Law discussed:
AIR 2003 (SC) 4102; 2007 (102) RD 136.

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

1. Heard Mr. Rajeiu Kumar Tripathi, learned counsel for the petitioners, Mr. M.E. Khan, learned Additional Chief Standing Counsel as well as Mr. Azad Khan, learned counsel for Gaon Sabha and perused the records. Mr. Ashok Kumar Verma, Advocate, with the leave of the Court has also made his submissions in order to assist the Court.

2. Since the writ petition involves purely legal questions of law, as such, with the consent of parties' counsel, it is being decided at the admission stage without calling for counter affidavit.

3. The instant writ petition has been filed challenging the orders dated 26.02.2014 and 13.01.2015, contained in Annexures-2 and 3 to the writ petition, whereby the operation of order dated 29.01.2013 granting benefits of Section 122-B (4-F) of the Act1 in favour of the petitioners was kept in abeyance and thereafter was cancelled and lands in question was directed to be recorded as banjar land etc. in favour of Gaon Sabha.

4. A preliminary objection regarding maintainability of writ petition has been taken by learned Standing Counsel on the ground that petitioners have statutory alternative remedy of filing revision under Section 122-B (4-A) of the Act against the impugned order, as such, writ petition directly in the High Court without exhausting the statutory alternative remedy is not maintainable.

5. The facts of the case as narrated in the writ petition are that petitioners are said to be agricultural labourers belonging to scheduled caste, they are in cultivatory possession over Gata No.1199 measuring area 0.50 hectare and Gata No.1088 measuring area 0.152 hectare (with regard to petitioner no.1) whereas Gata No.1102-J measuring area 0.083 hectare and Gata No.1175 measuring area 0.033 hectare

(with regard to petitioner no.2) in Village Sithauli, Pargana & Tehsil Rudauli, District Faizabad. The lands held by them are in their possession prior to 13th May, 2007, i.e. the cut-off date mentioned in Section 122-B (4-B), as such, petitioners are entitle to get benefit of Section 122-B (4-F) of the Act. The opposite party no.2/Sub-Divisional Magistrate, Rudauli, District Faizabad after calling the report and recommendation of the revenue authorities vide order dated 29.1.2013 had passed the orders in favour of petitioners, giving them benefit of Section 122-B (4-F) of the Act and the revenue authorities were directed to make necessary entries in the revenue records. Subsequently, the names of petitioners were entered in the revenue records as "Bhumidhar with non-transferable rights" over the lands in question.

6. It is submitted by learned counsel for the petitioners that the lands in question were not recorded as land reserved for public purposes or the land mentioned in Section 132 of the Act; rather the land was vested in Gaon Sabha under Section 117 of the Act. It is alleged that the panel Advocate of Gaon Sabha, on the instigation of persons enemical to the petitioners, had filed application for recall of order dated 29.1.2013. The petitioners had filed their objections to the said application. The opposite party no.2, in most arbitrary and illegal manner without condoning the delay, vide order dated 26.02.2014 had put the order dated 29.1.2013 in abeyance and thereafter vide final order dated 13.1.2015 has set aside the order dated 29.1.2013 and has directed the lands in question to be recorded as 'banjar' lands in favour of Gaon Sabha.

7. Learned counsel for petitioners submitted that in Writ Petition No.6691 (MS) of 2014 the High Court vide order dated 17.10.2014 had stayed the operation of the impugned order dated 26.2.2014. However, the said writ petition was subsequently dismissed as withdrawn with liberty to file separate cases on behalf of petitioners of that writ petition.

8. Mr. Rajeiu Kumar Tripathi, learned counsel for petitioners, in reply to the preliminary objection raised by learned Standing Counsel, submitted that the order impugned is not amenable to revisional jurisdiction as it has been passed under Section 122-B (4-F) of the Act which lies in administrative domain of the concerning competent authority and such orders are not revisable.

9. Submission is that order giving benefit of Section 122-B (4-F) of the Act is not a judicial order; rather it is administrative order against which neither restoration nor the review is entertainable nor maintainable. Hence, both the orders dated 26.2.2014 and 13.1.2015 are without jurisdiction and void ab initio. It is also submitted by learned counsel for the petitioners that the revision provided under Section 122-B (4-A) of the Act would not be applicable to any order passed giving benefit of Section 122-B (4-F) of the Act to any person.

10. It is also submitted that under the Act the statutory remedy available to a person is under Section 331 of the Act. Order passed in exercise of powers under various provisions as mentioned in Schedule II can be challenged by filing first appeal/second appeal before an authority as given in the said Schedule. Since Schedule-II which is to be read with reference to Section 331 of the Act does not entail Section 122-B of the Act, as

such, no remedy is available to the petitioners against the order cancelling the benefit conferred on them under Section 122-B (4-F) of the Act.

11. Submission is that revisional order under Section 122-B (4-A) of the Act is with respect to the orders passed under Section 122-B sub-Section (3) and and it is not applicable to the orders passed giving benefit of Section 122-B (4F) of the Act which is purely administrative order.

12. It is further submitted that the rights under sub-Section (4-F) of the Act is independent right which can be claimed even when there is no pendency of proceedings under Section 122-B of the Act and the person can be treated as Bhumidhar with non-transferable rights under Section 131 (b) of the Act.

13. Mr. Rajeiu Kumar Tripathi, learned counsel for petitioners in support of his submission has relied on the judgment of Hon'ble Apex Court in the case of Manorey @ Manohar Vs. Board of Revenue and others2. It is submitted that in view of law laid down by the Apex Court the legal position would be summarized as under:-

i.The rights under sub-section (4-F) of the Act is independent "statutorily fiction" even when there is no pendency of proceedings under sub-section (1) and (3) of section 122-B of the Act and he is bhumidhar under section 131 (b) of the Act.

ii.Revenue authorities are under mandate to keep the revenue records in the line of rights recognized under deeming provisions of sub-section (4-F) which is one such right that false within the per view of section 131 (b) of the Act.

iii.Since such a mandate casts upon the revenue authorities does not find any specific procedure either in the Act or Rules framed thereunder and in last line of sub-section, it has specifically being provided that there is no necessity to file a suit for declaration of such rights. On the basis of it, inference regarding the intention of legislature can easily be drawn that beneficiary of such "statutorily fiction" is not required to go through rigorous process of court and law and should not be subjected to long drawn litigation in the name of "Recall/Review" or "Appeal" and "Revision".

iv.Since Section 333 of the Act provide revision against any order passed in any suit or proceedings under the Act and in view of provisions of section 331 of the Act, read with Schedule-II, and Rules 338/338-A read with Appendix-III, the provisions of sub-section (4-F) of Section 122-B of the Act, does not find place therein, as such the duty/mandate cast upon the revenue authority is not a judicial proceedings hence any order passed therein to keep the revenue records updated, is an administrative discharge of duties by such revenue official therefore, it may be concluded that no revision is maintainable against any order under sub-section (4-F) of the Act.

v.That nature of any order making entries in the records of rights, in discharge of administrative duties by a revenue official in consonance with the provisions of the sub-section (4-F) of the Act may easily be gathered from the judgment and order dated 02.05.2012 passed by this Hon'ble Court at Allahabad in case Writ-C No. 11431 of 2012 "Lal Ji Harijan Vs. State of U.P. & others" and also from Board Order no. 6074/G-5-46A/86, dated 21 May of 1987 issued by Board of Revenue Uttar Pradesh and Apex statutory body of the State (Copies annexed herewith).

vi.Since the view of this Hon'ble Court taken in case of "Ramdev Vs. Board of

Revenue, 1994, R.D. Page 395", has been overruled by Hon'ble the Apex Court in case of Manorey @ Manohar (Supra) and the case laws relied upon by the learned counsel for the State are in the same footings as that of judgment rendered in case of Ramdeen (Supra) and that too without having any consideration of law laid down by Hon'ble the Apex Court in Manorey @ Manohar, are of no avail to the submission advanced on behalf of the State and same may kindly be treated as "Per-incuriam".

vii.Since the orders impugned in the Writ Petitions are "without jurisdiction" in view of the facts that opposite party no. 2 is not vested with any power to recall or review its own order dated 29.01.2013 passed in discharge of mandate or discharge of duties on administrative side and further in view of the facts that the applications before him was not supported with any affidavit so as to condone the delay, though the opposite party no. 2 was not dealing with any judicial proceedings as such thee was no question of condonation of delay but if same is being sought for, then for the sake of argument without condoning the delay opposite party no. 2 lacks inherent jurisdiction to enter in to the merits of the application for recall/review. In vew of law laid down by Hon'ble Ape Court and this Hon'ble Court in following cases, impunged orders being "without jurisdiction" are amenable to extra ordinary jurisdiction under Article 226 of the Constitution of India irrespective of any alternative remedy (though as respectfully submitted herein above there is no legal remedy before the petitioners against the orders impugned in the Writ Petition":-

a. Whirpool Versus Registrar of Trade Marks 1998 (8) SCC, page 1

b. Satwati Deswal Versus State of Haryana & others, 2009 (27 LCD, 1711.

c. Lipton India Ltd. Ghaziabad Versus State of U.P., 2009 (27) LCD, 161.

14. It is submitted by learned counsel for the petitioner that the Board of Revenue vide circular dated 21st May, 1987 has laid down the procedure for extending benefits of Section 122-B (4-F) of the Act to the eligible persons. In this regard the Lekhpal is required to give his report on the prescribed proforma and the competent authority is required to extend the benefit of Section 122-B (4-F) of the Act by passing appropriate orders. It is submitted that the entire exercise is in the administrative capacity of the authority concerned and, as such, no appeal or revision would lie in such proceedings. The circular dated 21.5.1987, which has been placed before the Court during arguments, has been taken on record.

15. Mr. Ashok Kumar Verma, Advocate, with the leave of the Court has made his submissions that the procedure as envisaged under Section 122-B of the Act is complete in itself, it provides in detail the procedure which is required to be followed, the order which is to be passed and the remedy available against the said order. It also provides the right of defence to the person aggrieved. Mr. Ashok Kumar Verma submitted that provisions of Section 122-B (4-F) of the Act cannot be read independently. It has to be read with respect to other provisions as contained in Section 122-B (1) to sub-Section (4-D) of the Act. It is further submitted by him that so far as the provisions under Section 122-B (4-F) of the Act conferring right of defence to an aggrieved person is concerned, in fact, the said provision provides positive right to the aggrieved person and it clearly means

that the said person claiming the benefit of Section 122-B (4-F) of the Act can move an application for correction of revenue records under Section 39 of U.P. Land Revenue Act and the concerning revenue authority on moving of such application can pass necessary orders for correction of revenue records after holding enquiry etc., as may be required.

16. Learned Additional Chief Standing Counsel, on the other hand, submitted that the order extending the benefits of Section 122-B (4-F) of the Act cannot be treated to be an order passed in independent proceedings; rather the same is in continuation of the proceedings under Section 122-B of the Act which are judicial in nature. It is submitted that such orders are revisable and revision filed in this regard are maintainable. The Board of Revenue in the case of Basanti Vs. State of U.P.3 has observed that "it cannot be said by any stretch of imagination that an order passed under Section 122-B (4F) of the U.P.Z.A. & L.R. Act are executive in nature....."

17. It is submitted that the provisions under Section 122-B (4-F) of the Act is an exception to the general provisions contained under Section 122-B of the Act.

18. Learned Additional Chief Standing Counsel has emphasised that the word "notwithstanding" mentioned in Section 122-B (4-F) of the Act itself denotes that it cannot be treated to be an independent provision and it has to be read with other provisions as contained in Section 122-B of the Act. It is further contended that if the intention of the legislature was to the effect that the order passed under Section 122-B (4-F) of the Act shall be final and no appeal or revision shall lie against the same, it would have been specifically mentioned in the said Section itself as it has been done in Rule 115-P (5) of the Rules4 which categorically provides that the order passed by Collector under sub-Rule shall be final. It is submitted that rights conferred Section 122-B (4-F) of the Act is a right of defence, when a person is sought to be evicted or dispossessed from the land of Gaon Sabha and it is not a weapon of offence. Learned Additional Chief Standing Counsel further submitted that Schedule II of the Act provides proceedings and forum in which the first appeal and second appeal will lie under Section 331 of the Act, however, the same does not include the entire proceedings which can be initiated under the Act.

19. It is submitted that since the provisions contained under Section 122-B (4-F) of the Act are deeming provisions and it provides for conferring rights of a Bhumidhar with non-transferable rights who is in possession over the land under Section 195 of the Act, if he is found in possession prior to 13th May, 2007 and no separate proceedings are required to be initiated for claiming such rights. In this regard he has relied on the judgment of this Court in the case of Shambhu Nath and others Vs. Commissioner Vindhyachal Region, Mirzapur and another5.

20. Learned Additional Chief Standing Counsel also submitted that if a person is in possession over any land vested in Gaon Sabha under Section 117 of the Act since or before 13th May, 2007, he can apply for correction of revenue records under Section 33/39 of U.P. Land Revenue Act and the revenue

records may be corrected on the said application by recording the name of persons claiming benefit of Section 122-B (4-F) of the Act after due enquiry by the Collector. The order passed under Section 39 of U.P. Land Revenue Act shall also be amenable to revision under Section 219 of the Act. In support of his arguments, learned Additional Chief Standing Counsel also relies on the judgment of Hon'ble Apex Court in the case of Manorey @ Manohar (supra).

21. It is submitted that writ petition has been filed directly against the order which have been passed in exercise of power under Section 122-B (4-F) of the Act, the petitioners have remedy of filing revision against the said order, as such, the writ petition directly in the High Court without exhausting the statutory remedy of filing revision is not maintainable.

22. Mr. Rajeiu Kumar Tripathi, learned counsel for petitioners, in rebuttal, submitted that there are no proceedings as such under Section 122-B (4-F) of the Act. It is in fact a deeming provision which is on the basis of fiction in the provisions under Section 122-B of the Act, as such, the benefits conferred on a person under Section 122-B (4-F) of the Act is by way of administrative order which is not amenable to any proceedings under Section 333 (1) of the Act or revision if any in other provisions of the Act.

23. I have considered the submissions made by learned counsel for the parties and gone through the records.

24. The question which has cropped up for this Court to consider is whether the order giving benefits of Section 122-B (4-F) of the Act is an administrative order against which there is no statutory remedy of filing appeal or revision.

25. In order to consider the said question, it would be appropriate to first examine the relevant provisions under the Act.

26. Section 122-B of the Act as amended from time to time on reproduction reads as under:-

"122-B. Powers of the Land Management Committee and the Collector.- [(1) Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damages or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

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

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time

specified in the notice or within such extended time not exceeding [thirty days] from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A). Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order prefer, a revision before the Collector on the grounds mentioned in clauses (a) to (e) of Section 333.

(4-B). The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C). Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this Section-

(i) every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final.

(ii) every order of the Collector under this Section shall, subject to the provisions of sub-section (4-D), be final.

(4-D). Any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a court of competent jurisdiction to establish the right claimed by him in such property.

(4-E). No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

Explanation.- For the purposes of this section, the expression 'Collector' means the officer appointed as Collector under the provisions of the U. P. Land Revenue Act, 1901 and includes an Additional Collector].

[(4-F). Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before [May 13, 2007] and the land so occupied together with land, if any, held by him from before the said date as Bhumidhar, sirdar or asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and [he shall be admitted as bhumidhar with non-transferable rights of that land under section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land]".

Explanation.-The expression "agricultural labourer" shall have the meaning assigned to it in Section 198.

[(5) Rules 115-C to 115-H of the U.P.Zamindari Abolition and Land Reforms Rules, 1952, shall be and be always deemed to have been made under the U.P. Zamindari Abolition and Land Reforms Act, 1950 as amended by the

Uttar Pradesh Land Laws (Second Amendment) Act, 1961, as if this section has been in force on all material dates and shall accordingly continue to force until altered or repealed or amended in accordance with the provisions of this Act.]"

27. Section 131 of the Act relates to bhumidhars with non-transferable rights, whereas Section 131-A of the Act provides bhumidhari rights in Gaon Sabha or State Government land in certain circumstances and Section 131-B of the Act provides bhumidhar with non-transferable rights to become bhumidhar with transferable rights after ten years. The relevant provisions on reproduction reads as under:-

"131. Bhumdhar with non-transferable rights.- Every person belonging to any of the following classes shall be called a bhumidhar with non-transferable rights and shall have all the rights and be subject to all the liabilities comferred or imposed upon such bhumidhars by or under this Act, namely-

(a) every person admitted as a sirdar of any land under Section 195 before the date of commencement of the Uttar Pradesh Land Laws (Amendment) Act, 1977 or as the bhumidhar with non-transferable rights under the said section on or after the said date;

(b) every person who in any other manner acquires on or after the said date, the rights of such bhumidhar under or in accordance with the provisions of this Act;

(c) every person who is, or has been allotted any land under the provision of the Uttar Pradesh Bhoodan Yagna Act, 1952.

(d) with effect from July 1, 1981 every person with whom surplus land is or has been settled under Section 26-A or sub-section (3) of Section 27 of the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960.

[131-A. Bhumidhari rights in Gaon Sabha or State Government land in certain circumstances.- Subject to the provisions of section 132 and section 133-A, every person in cultivatory possession of any land, vested in a Gaon Sabha under section 117 or belonging to the State Government, in the portion of district Mirzapur south of Kaimur range, other than the land notified under section 20 of the Indian Forest Act, 1927, before the 30th day of June, 1978, shall be deemed to have become a Bhumidhar with non-transferable rights of such land:

Provided that where the land in cultivatory possession of a person, together with any other land held by him in Uttar Pradesh exceeds the ceiling area determined under the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960, the rights of a Bhumidhar with non-transferable rights shall accrue in favour of such person in respect of so much area of the first-mentioned land, as together with such other land held by him, does not exceed the ceiling area applicable to him, and the said area shall be demarcated in the prescribed manner in accordance with the principles laid down in the aforesaid Act.

[131-B. Bhumidhar with non-transferable rights to become bhumidhar with transferable rights after ten years.- (1) Every person who was a bhumidhar with nontransferable rights immediately before the commencement of the Uttar Pradesh Zamindari Abolition and Land Reforms (Amendment) Act, 1995 and had been such bhumidhar for a period of ten years or more, shall become a bhumidhar withtransferable rights on such commencement.

(2) Every person who is bhumidhar with non-transferable rights on the commencement referred to in sub-section (1) or becomes a bhumidhar with non-transferable rights after such commencement, shall become bhumidhar with transferable rights on the expiry of period of ten years from his becoming a bhumidhar with non-transferable rights.

(3) Notwithstanding anything contained in any other provision of this Act, if a person, after becoming a bhumidhar with transferable rights under sub-section (1) or sub-section (2). Transfers the land by way of sale, he shall become ineligible for a lease of any land vested in Gaon Sabha or the State Government or of surplus land as defined in the Uttar Pradesh Imposition of Ceiling on Land Holdings Act, 1960.]"

28. Section 195 of the Act empowers the Land Management Committee with the previous approval of the Assistant Collector-in-charge of the Sub Division to admit any person as bhumidhar with non-transferable rights to any land other than land being in any of the classes mentioned in Section 132 of the Act. Section 195 of the Act on reproduction reads as under:-

"195. Admission to land. -The [Land Management Committee] [with the previous approval of the [Assistant Collector-in-charge of the sub-division] shall have the right to admit any person as [bhumidhar with non-transferable rights] to any land (other than land being in any of the classes mentioned in Section 132) where-

(a) the land is vacant land;

(b) the land is vested in the [Gaon Sabha] under Section 117; or

(c) the land has come into the possession of [Land Management Committee] under Section 194 or under any other provisions of this Act."

29. Section 331 of the Act puts an embargo that no Court other than a Court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in Civil Procedure Code take cognizance of any suit, application or proceedings mentioned in Column 3 thereof. Section 331 of the Act on reproduction reads as under:-

"331. Cognizance of suits, etc. under this Act.- (1) Except as provided by or under this Act no court other than a court mentioned in Column 4 of Schedule II shall, notwithstanding anything contained in the Civil Procedure Code, 1908 (V of 1908), take cognizance of any suit, application, or proceedings mentioned in Column 3 thereof or of a suit application or proceedings based on a cause of action in respect of which any relief could be obtained by means of any such suit or application;

Provided that where a declaration has been made under Section 143 in respect of any holding or part thereof, the provisions of Schedule II insofar as they relate to suits, applications or proceedings under Chapter VIII shall not apply to such holding or part thereof.

Explanation.- If the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

*[(1-A) Notwithstanding anything in sub-section *I), an objection that a court mentioned in Column 4 of Schedule II, or,*

as the case may be, a civil court, which had no jurisdiction with respect to the suit, application or, proceeding, exercised jurisdiction with respect thereto shall not be entertained by any appellate or revisional court unless the objection was taken in the court of first instance at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice.

(2) Except as hereinafter provided no appeal shall lie from an order or decree passed under any of the proceedings mentioned in column 3 of the Schedule aforesaid:

[(3) An appeal shall lie from any decree or from an order passed under Section 47 or an order of the nature mentioned in Section 104 of the Code of Civil Procedure, 1908 (V of 1908) or in Order 43, Rule 1 of the First Schedule to that Code passed by a court mentioned in column no. 4 of Schedule II to this Act in proceedings mentioned in column No. 3 thereof to the court or authority mentioned in column No. 5 thereof.

(4) A second appeal shall lie on any of the grounds specified in Section 100 of the Code of Civil Procedure, 1908 (V of 1908) from the final order or decree, passed in an appeal under sub-section (3), to the authority, if any, mentioned against it in column 6 of the Schedule aforesaid.]"

30. Section 333 of the Act gives power to the revenue authorities to exercise the revisional power in certain cases. Section 333 of the Act on reproduction reads as under:-

"333.(1) Power to call for cases. (1) The Board or the commissioner or the Additional Commissioner may call for the record of any suit or proceeding [other than proceedings under sub-section (4-A) of Section 198] decided by any court subordinate to him in which no appeal lies, or, where an appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of any order passed in such suit or proceeding and if such subordinate court appears to have ;

(a) exercised a jurisdiction not vested in it in law; Or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of jurisdiction illegally or with material irregularity;

the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as it thinks fit.

(2) If an application under his section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them.]"

31. Section 122-B of the Act is the provision relating to the power of Land Management Committee and the Collector to be exercised in such matters where the land of Gaon Sabha has been unauthorizedly occupied and is in the use of individual person. The provision gives the procedure in detail which is to be followed in such matters.

32. In the case of Shambhu Nath and others (supra) this Court has examined in detail the procedures prescribed under Section 122-B (4-F) of the Act which does not need to be re-examined. The relevant paragraphs of the judgment on reproduction reads as under:-

"11. Section 122-B(4-F) is placed in part II Chapter VII which has the heading "Gaon Sabha". In this very Chapter the provisions of Section 117, 117-A and 119 regarding vesting of certain land etc. in Gaon Sabha and other local authority only with the provision for exercise of further extra territorial jurisdiction by Gaon Sabha or other local authority and vesting of certain hats, bazars, melas and private ferries etc. in the Zila Parishad or other authority also find their place. Section 122-A speaks about superintendence, management and control of land etc. by the Land Management Committee.

12. Section 122-B under the scheme of which Sub-section (4-F) has also been inserted with a non-obstante clause, in fact, obligates the Land Management Committee and provides a mechanism to save Gaon Sabha land from encroachment or unauthorized possession and for that matter information has to be sent by the Committee to the Assistant Collector concerned in the manner prescribed. A detailed procedure has been provided under sub Clause 2,3, and 4 regarding the manner in which such a report is to be dealt with by the Assistant Collector and if any person is aggrieved by the order of Collector he has been given right of revision before the Collector under Sub-section (4-A). The said provision of Section 122-B enjoins responsibility upon the Land Management Committee to keep a vigil upon unauthorized occupation of Gaon Sabha land and if it finds that the said land has been occupied or is in possession otherwise than in accordance with the provisions of the Act, immediate action is to be taken by making a report to the Assistant Collector concerned who would issue notice and take appropriate action and shall pass orders accordingly. This has been done with a view to protect the Gaon Sabha land from encroachers and from misuse and mis-utilization of the Gaon Sabha land.

13. Sub-section (4-F) of Section 122-B of the Act carves out an exception which permits the occupation over the Gaon Sabha land by certain class of persons namely Scheduled Caste/Scheduled tribe, if he/she is an agricultural labourer and has been in possession over the said land since before May 1, 2002. This provision appears to have been made looking to the interest of the scheduled caste or scheduled tribe persons, who are agricultural labourer.

14. The occupation or unauthorized possession even of an agricultural labourer belonging to Scheduled caste/Scheduled tribe would not have been legal nor such land could be settled with him/her in the absence of the aforesaid exceptional provision of Sub-section (4-F) which was substituted by U.P. Act No. 24 of 1986. Thus, it is an enabling provision to protect the agricultural labourer belonging to Scheduled Caste/Scheduled tribe from being evicted from the Gaon Sabha land, if he/she fulfills the conditions enumerated therein. Under the given circumstances, the said agricultural labourer would be admitted as bhumidhar with non-transferable rights of that land under Section 195 and it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights.

15. U.P. Zamindari Abolition and Land Reforms Act, but for the aforesaid provision of Sub-section (4-F), no where recognizes the rights of any person as bhumidhar with transferable or non-transferable rights, as the case may be,

unless of course his name is duly recorded in the revenue records and in the absence of which, he/she seeks declaration by filing a suit under Section 229-B of the Act. It is only by virtue of Sub-section (4-F) of Section 122-B that the Agricultural labourer who fulfills the conditions given therein is not required to seek declaration by filing a suit but can be admitted as bhumidhar with non-transferable rights under Section 195.

16. In the case of co-tenure holder may be a suit, under Section 176 could also be filed either with a declaratory relief or without seeking it as the law may permit.

17. On a reading of aforesaid provision of Section 122-B in its entirety with the exception carved out in Sub-section (4-F), it is clear that the aforesaid Sub-section (4-F) is not a provision for seeking declaration of the rights of the person who is in occupation of the Gaon Sabha land for declaring him as bhumidhar with non-transferable rights. In fact it is a right to defend, if such a person is sought to be evicted or dispossessed from the land of Gaon Sabha, may be, under the proceedings initiated under Sub-section (1) of Section 122-B read with Rule 115 of the U.P. Zamindari Abolition and Land Reforms Rules or by adopting any other proceedings where such power of eviction is given to the Collector or to any other authority concerned.

18. In case an occupant of the like description as given in Sub-section (4-F), is sought to be evicted from the Gaon Sabha land he would have a right to plead and establish that since his possession continued since before the cut of date, rights have precipitated in his favour and that he is a bhumidhar of the land with non-transferable rights. If such a plea is raised the same would be considered by the authority concerned before evicting that person.

19. The aforesaid Sub-section says that no action under this section viz; Section 122-B shall be taken by the Committee or under the Act against such labourer namely; who fulfills the conditions enumerated therein and further he shall be admitted as bhumidhar with non-transferable rights under Section 195 of the Act and that it shall not be necessary for him to seek declaration by filing a suit for declaration. The provision is specific and clear. The Collector would have no power to evict such person and that he would also be entitled to be admitted as bhumidhar with non-transferable rights by the Land Management Committee in accordance with the provisions of Section 195 of the Act for which no declaration need be taken by filing the suit.

20. The right of defence given under the said provision to the agricultural labourer belonging to scheduled caste/Scheduled tribe cannot be taken as a right of seeking declaration under the aforesaid provision."

33. Section 331 of the Act when read with Schedule II clearly indicates that the procedure has been prescribed to challenge the order passed in various proceedings under various Sections of the Act by filing first appeal and second appeal before the appellate authority as mentioned in Schedule II. The said provision relates to the remedy of filing appeal before the appellate authority as mentioned in said Schedule. The provision does not relate to the revisional power as conferred on the revenue authorities under the Act.

34. Section 333 of the Act is the provision relating to power conferred on

various authorities such as, Board of Revenue or the Commissioner or the Additional Commissioner which can call for record of any suit or proceeding other than the proceedings under sub-Section (4-A) of Section 198 of the Act decided by any Court subordinate to them in which no appeal lies or where an appeal lies but has not been preferred. The reading of Section 331 and 333 of the Act clearly indicates that the separate statutory provisions have been made for availing the remedy of appeal and remedy of revision under the Act.

35. It is also to be noted that in certain provision the power of revision itself has been mentioned under the same provision as is the case under Section 122-B of the Act. Section 122-B of the Act indicates that any person aggrieved under any order passed under Sub-Section (3) of Section 122-B of the Act may file a revision under Section 122-B (4-A) of the Act. The revision filed under Section 122-B (4-A) of the Act can be preferred before the Collector on the same grounds as mentioned in Clauses (a) and (b) of Section 333 of the Act.

36. It is also to be noted that sub-Section (4-F) of Section 122-B of the Act is an exception to Section 122-B of the Act. The language of Section 122-B (4-F) of the Act starts with the words 'notwithstanding anything in the foregoing sub-sections' clearly indicates that it has to be read with respect to other provisions as mentioned in sub-Section (1), (2), (3) & (4) of Section 122-B of the Act.

37. In fact, sub-Section (4-F) of the Act is the provision which extends a positive right on an agricultural labourer belonging to scheduled castes and scheduled tribes having total land not exceeding 1.26 hectare to take a defence in the proceedings under Section 122-B of the Act and may move an application for correction of revenue records on that basis.

38. The words "it shall not be necessary for him to institute a suit for declaration of his rights as bhumidhar with non-transferable rights in that land" clearly means that the said person would not be required to get his rights declared by filing any suit, may be under Section 229-B of the Act or any other suit and can claim his rights to get the revenue records corrected in his favour by moving an application under Section 33/39 of the Act.

39. In the case of Manorey @ Manohar (supra) the Apex Court has categorically held that sub-Section (4-F) of Section 122-B of the Act not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar or the occupant of the land satisfying the criteria laid down in that sub-Section. The Apex Court has observed that when once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. It has also observed that last para of sub-Section (4-F) of Section 122-B of the Act confers by a statutory fiction the status of Bhumidhar with non-transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. The deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to

Bhumidhar rights under Section 195 read with other provisions of the Act. It has also been held that there is no bar against an application being made by the eligible person coming within the four corners of sub-Section (4-F) of the Act to effect necessary changes in the revenue records. The relevant paragraphs 8, 9, and 10 of the judgment on reproduction reads as under:-

"8. First, the endeavour should be to analyze and identify the nature of the right or protection conferred by sub-Section (4-F) of Section 122B. Sub-Sections (1) to (3) and the ancillary provisions upto sub-Section (4E) deal inter alia with the procedure for eviction of unauthorized occupants of land vested in Gaon Sabha. Sub- Section (4-F) carves out an exception in favour of an agricultural labourer belonging to a Scheduled Caste or Scheduled Tribe having land below the ceiling of 3.125 acres. Irrespective of the circumstances in which such eligible person occupied the land vested in Gaon Sabha (other than the land mentioned in Section 132), no action to evict him shall be taken and moreover, he shall be deemed to have been admitted as a Bhumidhar with non transferable rights over the land, provided he satisfies the conditions specified in the sub-Section. According to the findings of the Sub- Divisional Officer as well as the appellate authority, the appellant does satisfy the conditions. If so, two legal consequences follow. Such occupant of the land shall not be evicted by taking recourse to sub-Section (1) to (3) of Section 122B. It means that the occupant of the land who satisfies the conditions under sub-Section (4-F) is entitled to safeguard his possession as against the Gaon Sabha. The second and more important right which sub-Section (4-F) confers on him is that he is endowed with the rights of a Bhumidhar with non transferable rights. The deeming provision has been specifically enacted as a measure of agrarian reform, with a thrust on socio-economic justice. The statutorily conferred right of Bhumidhar with non-transferable rights finds its echo in clause (b) of Section 131. Any person who acquires the rights of Bhumidhar under or in accordance with the provisions of the Act is recognized under Section 131 as falling within the class of Bhumidhar. The right acquired or accrued under sub-Section (4-F) is one such right that falls within the purview of Section 131(b).

9. Thus, sub-Section (4-F) of Section 122B not merely provides a shield to protect the possession as opined by the High Court, but it also confers a positive right of Bhumidhar on the occupant of the land satisfying the criteria laid down in that sub-Section. Notwithstanding the clear language in which the deeming provision is couched and the ameliorative purpose of the legislation, the learned single Judge of the High Court had taken the view in Ramdin Vs. Board of Revenue (supra) (followed by the same learned Judge in the instant case) that the Bhumidhari rights of the occupant contemplated by sub-Section (4-F) can only blossom out when there is a specific allotment order by the Land Management Committee under Section 198. According to the High Court, the deeming provision contained in sub-Section (4-F) cannot be overstretched to supersede the other provisions in the Act dealing specifically with the creation of the right of Bhumidhar. In other words, the view of the High Court was that a person covered by the beneficial provision contained in

sub-Section (4-F) will have to still go through the process of allotment under Section 198 even though he is not liable for eviction. As a corollary to this view, it was held that the occupant was not entitled to seek correction of revenue records, even if his case falls under sub-Section (4-F) of Section 122B. We hold that the view of the High Court is clearly unsustainable. It amounts to ignoring the effect of a deeming provision enacted with a definite social purpose. When once the deeming provision unequivocally provides for the admission of the person satisfying the requisite criteria laid down in the provision as Bhumidhar with non-transferable rights under Section 195, full effect must be given to it. Section 195 lays down that the Land Management Committee, with the previous approval of the Assistant Collector in-charge of the Sub Division, shall have the right to admit any person as Bhumidhar with non-transferable rights to any vacant land (other than the land falling under Section 132) vested in the Gaon Sabha. Section 198 prescribes "the order of preference in admitting persons to land under Sections 195 and 197". The last part of sub-Section (4-F) of Section 122B confers by a statutory fiction the status of Bhumidhar with non transferable rights on the eligible occupant of the land as if he has been admitted as such under Section 195. In substance and in effect, the deeming provision declares that the statutorily recognized Bhumidhar should be as good as a person admitted to Bhumidhari rights under Section 195 read with other provisions. In a way, sub-Section (4-F) supplements Section 195 by specifically granting the same benefit to a person coming within the protective umbrella of that sub-Section. The need to approach the Gaon Sabha under Section 195 read with Section 198 is obviated by the deeming provision contained in sub-Section (4-F). We find no warrant to constrict the scope of deeming provision.

10. That being the legal position, there is no bar against an application being made by the eligible person coming within the four corners of sub-Section (4-F) to effect necessary changes in the revenue record. When once the claim of the applicant is accepted, it is the bounden duty of the concerned revenue authorities to make necessary entries in revenue records to give effect to the statutory mandate. The obligation to do so arises by necessary implication by reason of the statutory right vested in the person coming within the ambit of sub-Section (4-F). The lack of specific provision for making an application under the Act is no ground to dismiss the application as not maintainable. The revenue records should naturally fall in line with the rights statutorily recognized. The Sub-Divisional Officer was therefore within his rights to allow the application and direct the correction of the records. The Board of Revenue and the High Court should not have set aside that order. The fact that the Land Management Committee of Gaon Sabha had created lease hold rights in favour of the respondents herein is of no consequence. Such lease, in the face of the statutory right of the appellant, is nonest in the eye of law and is liable to be ignored."

40. It is needless to observe that in view of law laid down by the Apex Court in the case of Manorey @ Manohar (supra) a landless agricultural labourer belonging to scheduled castes and scheduled tribes who is in occupation of Gaon Sabha land prior to cut-off date and fulfil the prescribe criteria is entitled to

claim the benefit of Section 122-B (4-F) of the Act; and Section 122-B (4-F) of the Act clearly confers a positive right on such person to claim the right of Bhumidhar with non-transferable right. It is also to be observed that in this regard the person concerned can move an application under Section 33/39 of U.P. Land Revenue Act to effect necessary changes in the revenue records.

41. So far as the question as to whether the order passed conferring benefit of Section 122-B (4-F) of the Act on any person or an order cancelling such benefit is an administrative order and against such order no appeal or revision would lie, as claimed by learned counsel for the petitioners is concerned, suffice is to observe that provisions of Section 122-B (4-F) of the act does not confer any independent right on a person and the provisions as envisaged under Section 122-B (4-F) of the Act is to be read in consonance with other provisions under Section 122-B of the Act. Under Section 122-B (4-A) of the Act, there is a specific provision of filing revision against an order passed in proceedings under Section 122-B of the Act, as such, I am of the considered view that any order passed in the matter relating to Section 122-B (4-F) of the Act is a judicial order and the same would be amenable to revisional jurisdiction under Section 122-B (4-A) of the Act. Any person aggrieved has a remedy of filing revision under Section 122-B (4-A) of the Act in this regard.

42. As such, I am of the considered view that the petitioners have statutory remedy of filing revision against the impugned order, as observed above, which they have not availed. Therefore, the writ petition in the High Court directly against the impugned orders is not maintainable. It is accordingly dismissed with remedy to petitioners to avail statutory alternative remedy before the concerning competent Court.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2015

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE ARUN TANDON, J.
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.
THE HON'BLE MANOJ KUMAR GUPTA, J.

Criminal Appeal No. 4922 of 2006

Amar Singh ...Appellant
Versus
State of U.P. ...Opp. Party

Counsel for the Appellant:
Sri Kamal Krishna, Sri Anubhav Trivedi, Sri Dileep Kumar, Sri M.D. Singh Shekhar, Sri R.M. Singh, Sri R.N. Pandey, Sri Rajrshi Gupta, Sri Rajiv Gupta, Sri Rakesh Pandey, Sri Ravindra Sharma, Sri Satish Trivedi, Sri Shashi Nandan, Sri Suresh Singh, Sri Sushil Kumar Dwivedi, Sri V.S. Choudhary, Abhishek Kumar

Counsel for the Respondents:
Govt. Advocate, A.G.A., Sri A.K. Srivastava, Sri Narendra Kr. Singh Yadav, Sri Vishnu Pratap, Sri Manish Goyal, Sri Ravi Kant.

(A)High Court Rules 1952, Chapter V Rule 1,7, 12, 13, 14, 15-Practice & Procedure-Verdict of Full Bench in case of Smt. Chawali-affecting notification dated 16.12.13-without framing any question-whether could have give findings?-held-'No'.

Held: Para-48

From a bare perusal of the 18 questions which were formulated by the Full Bench in Smt. Chawali (supra), which were later compartmentalised as Issues no. A to H, it is clear that no issue was framed in respect of validity of the order of the Chief Justice dated 16 December 2013. We have no hesitation to record that the Full Bench could not have examined the validity of the order of the Chief Justice dated 16 December 2013 in absence of any issue having been framed and the same being addressed by counsel for the parties.

(B)High Court Rules 1952-Chapter-V Rule 14-setting a side notification dated 16.12.13 regarding tied -up and part-heard cases-without hearing Registrar General-without considering Full Bench Opinion in Sanjay Srivastava case duly approved by Apex Court-whether bad-in-law?-held-'Yes'.

Held: Para-50
So far as issue no. 'C' is concerned, we are of the considered opinion that the Full Bench judgment in Sanjay Kumar Srivastava (supra) had been completely ignored by the majority opinion in Smt. Chawali (supra). The judgment had been noted with approval by the Supreme Court in State of Rajasthan vs. Prakash Chand (supra) and had a material bearing on the issue as to when a case can be said to be tied up/part-heard within the meaning of Rule 14 of Chapter V. Therefore, non consideration of the said judgment in our opinion is bad in law.

(C) High Court Rules 1952 Chapter V-Rule 14-Tied up cases-notification dated 16.12.13-after change of roster-whether should be heard by same Bench?-held-can be heard by same Senior Judge-even after change of roster-after fresh nomination by Hon'ble the Chief Justice.

Held: Para-51
So far as the issue no. 'D' is concerned, it has been dealt with extensively, herein above. In our opinion for a case to be treated as tied up or part heard, it must have been extensively heard on merits by the Judge/Bench concerned. The Bench should have spent sufficient time for hearing of the matter on merits so that administration of justice would require the case to be heard/disposed of by the same Bench. It is only such cases which have to be placed before the Chief Justice for consideration as to whether the matter has to be listed before the same Bench or not.

Case Law discussed:
(1998) 1 SCC 1; (2013) 2 SCC 398; 2010 (4) SCC 290; AIR 1974 SC 209; 2010 (83) ALR 664; 1996 (14) LCD 1170; 2008(1) AWC 1050.

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

1. The Hon'ble The Chief Justice while notifying the roster (allocation of work to The Hon'ble Judges) vide orders dated 16 December 2013 and dated 23 December 2014 directed as follows :

ORDER

No pending, case, civil or criminal, shall be treated as part-heard or tied up in a Court after the commencement of a new roster. All pending cases shall be listed before the appropriate Bench dealing with such matters in accordance with the fresh roster, unless so ordered by the Chief Justice in a specific case hereafter.

16.12.2013

ORDER

The administrative order dated 16th December, 2013 regard part heard and tied up cases will continue in operation."

23.12.2014

2. A Full Bench of the High Court of Judicature at Allahabad (A bench of three Hon'ble Judges) in the case of Smt. Chawali vs. State of U.P. and others [Writ Petition (Misc. Bench) No. 9470 of 2014]

decided on 16 January 2015 by majority judgment, while dealing with the said orders, in paragraph 79 and 80 held as follows :

"79. In view of above, part-heard and tied up cases should be listed before the same Bench for disposal. Listing of part-heard and tied-up cases to other Bench is an exception. Accordingly, in case Hon'ble The Chief Justice is of the opinion that a particular cases is to be listed before other Bench for fresh hearing, then necessarily, it implies that part-heard and tied-up matter to other Bench is an exception which requires separate order. Hence by general (sweeping) order or circular while changing the roaster, it is not permissible to release all part-heard cases by the Chief Justice, without applying mind to individual cases.

WITHDRAWAL OF CASES

80. Withdrawal of a case may be for variety of reasons which may be administrative or otherwise on complaint against the Judge concerned or for some other reasons. After withdrawing a petition/case, Chief Justice may refer to other Bench or nominate a particular Bench. Nomination of a petition/case to other Judge/Bench also depends upon a variety of factors keeping in view the ability, competency or knowledge of a particular Judge. Once a case is nominated to a particular Judge, then it does not appear that it may be denominated or go to other regular Bench with the change of roster. Nominated case may be withdrawn or be listed to other Bench or regular Bench only in case Chief Justice passes some order withdrawing the same followed by nomination to other Bench competent to adjudicate the controversy in accordance with rules of the Court. In absence of fresh nomination, if shall not be open for the registry to withdraw and send it to other Bench with the change of roster.

Exercise of power with regard to allocation of work at regular interval for the purpose of change of roster stands on different footing than the power exercised by Chief Justice to withdraw a particular case from a particular Bench or nomination to other Bench."

3. It is because of the said directions of the Full Bench that Criminal Appeal No. 4922 of 2006 was listed before a Division Bench for hearing on 03 February 2015 although as per the changed roster enforced from 05 January 2015 by the The Chief Justice, the Division Bench was not assigned the jurisdiction to hear the criminal appeals.

4. The Registry of the High Court placed the Criminal Appeal before the Division Bench because of the earlier nomination order dated 15 November 2014 made by the Hon'ble The Chief Justice for listing of the appeal before the Bench presided over by one of the Hon'ble Judge named therein.

5. The Division Bench, finding it difficult to agree with the reasoning and the conclusions drawn in the majority judgment in Smt. Chawali (supra) regarding the impact of the orders/circulars of The Chief Justice, referred to above, deemed it fit to refer the following seven questions for consideration by a Larger Bench vide order dated 03 February 2015 :

(a) Whether the Full Bench in the case of Smt. Chawali (supra) could have proceeded to examine the legality/enforceability of the circular issued by Hon'ble The Chief Justice dated 16.12.2013 specifically in the circumstances when no issue was framed in that regard by the Full Bench and it

had not been addressed upon by any of the counsel present before the Full Bench in the case of Smt. Chawali (supra).

(b) Whether general direction to list and tied up cases irrespective of the circulars of Hon'ble the Chief Justice dated 16.12.2013 could be issued to the Registry by the Full Bench without affording opportunity to the High Court to have its say in the matter.

(c) Whether the majority opinion of the Full Bench in the case of Smt. Chawali (supra) on the issue is bad for non-consideration of the law laid down by earlier Full Bench in the case of Sanjay Kumar Srivastava (supra).

(d) What meaning is to be attached to the words "tied up cases" in light of Rule 14 to which the circulars dated 16.12.2013 may not apply and that there may be a requirement of separate order from Hon'ble The Chief Justice after application of mind for being listing before another Bench.

(e) Whether the nominated cases must be listed before the same Bench even after there has been a change of roster.

(f) At what stage the assignment of fresh cases to a particular Bench comes to an end.

(g) Whether nomination in the name of the Senior Member of the Bench would suffice or there should be a nomination with the name of all the judges constituting the Bench, in matters is to be heard by more than one Judge.

6. The Chief Justice vide order dated 10 February 2015 constituted this Bench for answering the referred questions.

7. We have heard Shri Rajrshi Gupta, Advocate on behalf of the appellant, Shri Shashi Nandan, Senior Advocate, Shri M.D.Singh Shekhar, Senior Advocate, Shri Vishnu Bihari Tiwari, Advocate and Shri Rakesh Pandey, President High Court Bar Association as friends of the Court. Shri Vijay Bahadur Singh, Advocate General appeared on behalf of the State of U.P., while Shri Ravi Kant, Senior Advocate assisted by Shri Manish Goyal, Advocate appeared on behalf of the Allahabad High Court.

8. All the counsel who assisted the Bench were unanimous on at least one issue namely the power of the Chief Justice in the matter of constitution of Benches and allocation of cases/work to the Benches so constituted as also on the issue that a puisne Judge/Judges can do such work as is allotted to Judge/Judges by the Chief Justice or under the directions of the Chief Justice and not beyond it.

9. As a matter of fact such an administrative control of the Chief Justice in the matter of allocation of work to the puisne judge is well settled under the judgment of the Supreme Court in State of Rajasthan vs. Prakash Chand And Others reported in (1998) 1 SCC, 1. In paragraph 59 of the judgment, the Supreme Court held :

"59. From the preceding discussion the following broad CONCLUSIONS emerge. This, of course, is not to be treated as a summary of our judgment and the conclusions should be read with the text of the judgment:

(1) That the administrative control of the High Court vests in the Chief Justice alone. On the judicial side, however, he is only the first amongst the equals.

(2) That the Chief Justice is master of the roster. He alone has the prerogative to constitute benches of the court and allocate cases to the benches so constituted.

(3) That the puisne Judges can only do that work as is allotted to them by the Chief Justice or under his directions.

(4) That till any determination made by the Chief Justice lasts, no Judge who is to sit singly can sit in a Division Bench and no Division Bench can be split up by the Judges constituting the bench themselves and one or both the Judges constituting such bench sit singly and take up any other kind of judicial business not otherwise assigned to them by or under the directions of the Chief Justice.

(5) That the Chief Justice can take cognizance of an application laid before him under Rule 55 (supra) and refer a cases to the larger bench for its disposal and he can exercise this jurisdiction even in relation to a part-heard case.

(6) That the puisne Judges cannot "pick and choose" any case pending in the High Court and assign the same to himself or themselves for disposal without appropriate orders of the Chief Justice.

(7) That no Judge or Judges can give directions to the Registry for listing any case before him or them which runs counter to the directions given by the Chief Justice.

(8) .....

(9) .....

.....

.....

....."

10. The judgment in State of Rajasthan vs. Prakash Chand (Supra) has been reiterated with approval in paragraphs 26 and 27 of the judgment of the Supreme Court in Kishore Samrite vs. State of Uttar Pradesh and others reported in (2013) 2 SCC, 398 and in paragraph 29 the Supreme Court held as follows :

"29. Judicial discipline and propriety are the two significant facets of administration of justice. Every court is obliged to adhere to these principles to ensure hierarchical discipline on the one hand and proper dispensation of justice on the other. Settled cannons of law prescribe adherence to the rule of law with due regard to the prescribed procedures. Violation thereof may not always result in invalidation of the judicial discretion. Where extraordinary jurisdiction, like the writ jurisdiction, is very vast in its scope and magnitude, there it imposes a greater obligation upon the courts to observe due caution while exercising such powers. This is to ensure that the principles of natural justice are not violated and there is no occasion of impertinent exercise of judicial discretion."

11. We may at the very outset record that the Rajasthan High Court rules which were subject matter of consideration in the case of State of Rajasthan vs. Prakash Chand (Supra) are para materia to the Allahabad High Court Rules, 1952 (hereinafter referred to as the Rules, 1952). Therefore, what has been observed by the Supreme Court in State of Rajasthan vs. Prakash Chand (Supra) would apply with full force in respect of Rules, 1952.

12. In our opinion the notification of the roster has twin purpose :

(a) it provides for the category of cases jurisdiction-wise to be heard by a Judge/Division Bench and;

(b) it also directs the Registry of the High Court to ensure that the cases of the assigned jurisdiction are listed before a particular Judge/Division Bench only.

13. It, therefore, acts as a controlling direction in the matter of listing of cases before various Judges/Benches.

14. It is in the aforesaid legal background we propose to examine the issues involved.

15. The administrative powers to be exercised by Hon'ble The Chief Justice in

the matter of framing of the roster and in the matter of listing of cases is regulated by the Rules, 1952 framed in exercise of powers conferred under Article 225 of the Constitution of India.

16. For answering the seven questions which have been referred to the Larger Bench, it is worthwhile to refer to, Rules 1, 7, 12, 13, 14 and 15 of Chapter V and Rule 7 of Chapter VI of the Rules, 1952 which read as follows:

"Chapter V:-- JURISDICTION OF JUDGES SITTING ALONE OR IN DIVISION COURTS :--

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

(7) Contempt in facie curiae :-- Where a contempt as contemplated by Section 345 of the Code of Criminal Procedure, 1973is committed before the Court, the Judge or judges before whom such contempt is committed may take cognizance of the offence and deal with the offender under the provisions of that Code and subsequent sections of that Code.

(12) Application for review :--An application for the review of a judgment shall be presented to the Registrar, who shall endorse thereon the date when it is presented and lay the same as early as possible before the Judge or Judges by who such judgment was delivered along with an office report as to limitation and sufficiency of Court fees. If such Judge or Judges or any one or more of such Judges be no longer attached to the Court, the application shall be laid before the Chief Justice who shall, having regard to the provisions of Rule 5 of Order XLVII of the Code, nominate a Bench for the hearing of such applications :

Provided that an application for the review of a judgment of one Judge who is precluded by absence or other clause for a period of six months next after the presentation of the application from considering the decree or order to which the application refers, shall be heard or disposed of by a Single Judge and that an application for the review of a judgment of two or more Judges, any one or more or whom is or are precluded by absence or other cause for a period of six months next after the presentation of the application from considering the decree or order to which the application refers, shall be heard or disposed of by a Bench consisting of the same or a greater number of Judges.

(13) Subsequent application on the same subject to be heard by the same Bench :--No application to the same effect or with the same object as a previous application upon which a Bench has passed any order other than an order of reference to another Judge or Judges, shall except by way of appeal, ordinarily be heard by any other Bench.

The application when presented by or on behalf of the person by whom or on whose behalf such previous application was made shall give the necessary particulars of such previous application, the nature and the date of the order passed thereon and the name or names of the Judge or judges by whom such order was passed.

(14) Tied up cases :-- (1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex-parte order

shall not be deemed to be a case partly heard by such Bench.

(2) When a criminal revision has been admitted on the question of severity of sentence only, it shall ordinarily be heard the Bench admitting it.

(15) Application in a tied up case :-- Any application in case, which may under the next preceding Rule be heard by a particular Bench shall ordinarily be heard by such Bench."

Chapter VI, Rule 7 which is relevant for our purposes is also reproduced :

"Chapter VI :-- HEARING AND ADJOURNMENT OF CASES :

7. Part-heard cases :-- A case, which remains part-heard at the end of the day, shall, unless otherwise ordered by the Judges concerned, be taken up first after miscellaneous cases, if any, in the Cause List for the day on which such Judge or Judges next sit. Every part-heard case entered in the list may, unless the Bench orders otherwise, be proceeded with whether any Advocate appearing in the case is present or not :

Provided that if any part-heard case cannot be heard for more than two months on account of the absence of any Judge or Judges constituting the Bench, the Chief Justice may order such part-heard case to be laid before any other Judge or Judges to be heard afresh."

17. From a plain reading of the aforesaid Rules it would be clear that the allocation of work to the Judges who are to sit singly or in Division Benches is done under orders of The Chief Justice or in accordance with the directions of the Chief Justice as per Rule 1 of Chapter V. It is clear that Judges can only do that work as is allocated to the Judge under orders of the Chief Justice or under the directions of the Chief Justice. This method of allocation of work/jurisdiction to hear cases of particular nature in the Allahabad High Court is known as framing of the Roster by the Chief Justice. Besides the roster, there can be special orders for allocating a particular case or a particular category of cases to Judge/Judges. The power to allocate work by the Chief Justice includes the power to direct any case or class of cases which are normally to be heard by a single Judge to be heard by a Division Bench and similarly a case normally to be heard by a Division Bench, to be heard by a Judge sitting alone [Ref. Chapter V Rule 2 Proviso (a)].

18. The Rules, 1952 do contemplate that in certain circumstances a matter has to be normally heard by a particular Judge/Bench like matters which are covered by Rule 7, 12, 13 and 14. Similarly Applications which are made in tied up cases have to be heard by the particular Bench to which the case is tied up. (Ref. Rule 15 of Chapter V).

19. Chapter VI of the Rules, 1952 lays down the procedure for the listing and hearing of cases before the Court concerned. Rule 7 of Chapter VI provides that all part-heard matter at the end of the day shall be taken up first after miscellaneous cases, if any, on the cause list for that day when the Judge/Judges sit next with a further condition that the Bench shall proceed with the matter whether any Advocate is present or not unless ordered otherwise. This would mean that so far as part-heard cases at the end of the day are concerned, they have to be heard by the Bench concerned after the miscellaneous cases even in the absence of the counsel. The proviso to Rule 7 of Chapter VI further clarifies that if a part-

heard matter cannot be heard for more than two months on account of the absence of any Judge/Judges, the Chief Justice may order such part-heard case to be laid before any other Judge/Judges to be heard afresh.

20. We have narrated the scheme of the Rules, 1952 framed under Article 225 of the Constitution of India only for the purposes of illustrating that irrespective of the general roster notified by the Chief Justice in the matter of allocation of work to the puisne Judges, the Rules do contemplate that certain cases like review application, application for the ex-facie contempt proceedings, application on the same subject, tied up cases and applications in tied up cases are to be listed before the particular Judge/Bench even if the roster as notified under Rule 1 of Chapter V confers jurisdiction in respect of that particular nature of cases to other puisne Judge/Bench.

21. At this stage itself we may put in a caveat to the aforesaid general statement namely that even in respect of such cases which are to be listed before a particular Bench namely the review application, the ex facie contempt application, tied up cases and application in tied up cases, the Chief Justice retains the power to withdraw such matters also from a particular Judge/Bench and to assign the same to some other Bench/puisne Judge.

22. The power of the Chief Justice to withdraw even tied up case/cases which have been heard substantially earlier by a particular Single Judge or the Division Bench is well recognized. The legal position in that regard stands settled under the judgment of the Supreme Court in State of Rajasthan vs. Prakash Chand (Supra). Paragraphs 21, 22 and 23 of the Judgment read as follows :

"21. A Full Bench of the Allahabad High Court in Sanjay Kumar Srivastava v. Acting Chief Justice was confronted with a similar situation. The Full Bench precisely dealt with an objection raised in that case to the effect that since the writ petition was a part-heard matter of the Division Bench, it was not open to the Chief Justice of the High court to refer that part-heard case to a Full Bench for hearing and decision. It was argued before the Full Bench that once the hearing of the case had started before the Division Bench, the jurisdiction to refer the case or the question involved therein to a larger Bench vests only in the judges hearing the case and not in the Chief Justice. It was also argued that the Chief Justice could not, even on an application made by the Chief Standing Counsel, refer the case which had been heard in part by a Division Bench for decision by a Full Bench of that Court.

22. After referring to the provisions of the Rules of the Allahabad High Court and in particular Rule 1 of Chapter V, which provides that Judges shall sit alone or in such Division Courts as may be constituted by the Chief Justice from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions and Rule 6 of Chapter V which inter alia provides :

"6. The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such

question and dispose of the case after deciding the remaining questions, if any, arising therein."

and a catena of authorities, rejected the arguments of the learned counsel and opined that the order of the Chief Justice, on an application filed by the Chief Standing Counsel, to refer a case, which was being heard by the Division Bench, for hearing by a larger Bench of three Judges because of the peculiar facts and circumstances as disclosed in the application of the Chief Standing Counsel, was a perfectly valid and a legally sound order. The Bench speaking through S. Saghir Ahmad, J. (as His Lordship them was) said :

"Under Rule 6 of Chapter V of the Rules of Court, it can well be brought to the notice of the Chief Justice through an application or even otherwise that there was a case which is required to be heard by a larger Bench on account of an important question of law being involved in the case or because of the conflicting decisions on the point in issued in that case. If the Chief Justice takes cognizance of an application laid before him under Rule 6 of Chapter V of the Rules of the Court and constitutes a Bench of two or more Judges to decide the case, he cannot be said to have acted in violation of any statutory provisions."

The learned Judge then went on to observe :

"In view of the above, it is clear that the Chief Justice enjoys a special status not only under the Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or to Judges sitting in Full Bench. He alone has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges.

The conferment of this power exclusively on the Chief Justice is necessary so that various courts comprising of a Judges sitting alone or in Division Bench etc., work in a coordinated manner and the jurisdiction of one court is not overlapped by other court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the 'self' and 'judicial' discipline of Judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings."

23. The above opinion appeals to us and we agree with it. Therefore, from a review of the statutory provisions and the cases on the subject as rightly decided by various High Courts, to which reference has been made by us, it follows that no Judge or a Bench of Judges can assume jurisdiction in a case pending in the high Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted. If every Judge or a High Court starts picking and choosing cases for disposal by him, the discipline in the High court would be the casualty and the administration of

justice would suffer. No legal system can permit machinery of the Court to collapse. The Chief Justice has the authority and the jurisdiction to refer even a part-heard case to a Division Bench for its disposal in accordance with law where the rules so demand. It is a complete fallacy to assume that a part-heard case can under no circumstances be withdrawn from the Bench and referred to a larger Bench, even where the Rules make it essential for such a case to be heard by a larger Bench."

23. The word 'ordinarily' as used in Rule 14 of Chapter II of Rules, 1952 pertaining to part-heard and tied up cases has been interpreted by the Supreme Court in Union of India and Another vs. Hemraj Singh Chauhan and others reported in 2010 (4) SCC, 290 and in Krishan Gopal vs. Shri Prakashchandra and others reported in AIR, 1974 SC, 209. The word 'ordinarily' as used in Rule 14 would mean that the normal practice of listing of the tied up case before the same Bench, which had heard the matter earlier, can be departed with under orders of the Chief Justice for good and valid reasons. As a matter of fact the word ordinarily itself indicates that there can be a departure from the normal practice of listing a part-heard case before the same Bench. The word 'ordinarily' means in a large majority of cases but not invariably. The expression 'ordinarily' would mean that the authority empowered to assign matters can exercise that power to place the matter before the Bench, which had earlier heard the matter.

24. In this context, the word 'ordinarily' has also been considered by a Full Bench of Allahabad High Court in Smt. Maya Dixit and Others vs. State of U.P. through the Secretary/Special Secretary, Industrial Development/Geology and Mining, Lucknow and others reported in 2010 (83) ALR, 664. The relevant part reads as under :

"17. .....The expression 'ordinarily' would mean that the authority empowered to assigning matters must exercise that power to place the matter before the Bench, which earlier had heard the matter. This can be done in individual cases or by a general order. This rule is based on the principle that a Bench having substantially heard the matter and spent valuable judicial time, must be allowed to ordinarily hear and dispose of the matter. This power, therefore, could only be exercised by the Chief Justice who constitutes the Benches and not by the Registry of the Court, nor can a Bench hold that it can proceed with the matter as a part heard matter."

25. The legal position which emerges from a reading of the rules contained in Chapters V and VI of Rules, 1952 specifically those quoted above, is that the Chief Justice is the master of the roster and can alone decide as to which Judge would sit singly and which Judge would sit in Division Benches. The Chief Justice can allocate work to puisne Judges and no Judge has jurisdiction to call for any particular case and to hear the same. Every Judge is bound by the roster framed under Rule 1 of Chapter V of Rules, 1952.

26. But at the same time, the power of the Chief Justice is circumscribed by the Rules, 1952 in respect of review application, tied up cases, application in tied up cases, applications on same subject and ex facie contempt case. In

such matters the case is normally to be listed before the same Bench which had dealt with the matter earlier except when the Chief Justice passes an order for the matter to be listed before another Judge/Bench.

27. So far as review application, tied up cases, application in tied up cases and ex facie contempt case are concerned, they do not present any difficulty with regard to the case to be treated within the said category. It is the category of cases to be treated as tied up/part-heard that difficulty arises.

28. A Full Bench of this Court in Sanjay Kumar Srivastava vs. Acting Chief Justice and others reported in 1996 (14) LCD, 1170 has explained that later part of Rule 14(1) clarifies that if the Bench has merely directed notice to be issued or passes an ex-parte order, it shall not be a case partly heard by a Bench. The Full Bench went on to hold that if the same Bench passes an order that the matter shall come up before that Bench for further hearing or as part heard, such an order would be in violation of the rules of the Court and, therefore, a nullity. (Ref. Paragraph 69 of the judgment).

29. Therefore, a case does not become part-heard merely because of passing of an interim order or that notices have been directed to be issued to the respondent. In such a case if any order on the judicial side is passed for the case to be listed as tied up/part-heard before the same Judge/Bench, it would be in violation of Rules of the Court and, therefore, a nullity.

30. Following the aforesaid Full Bench judgment of this Court, a Division Bench of this Court in Sanjay Mohan vs. State of U.P. and others reported in 2008 (1) AWC, 1050 held that at pre admission stage no case can be treated as tied up and no Single Judge or Division Bench of the Court can issue a direction to the Registry to list the matter before him or before the Bench of which he is a member after the roster has changed. Such orders have been held to be a nullity.

31. We broadly agree with what has been held in the case of Sanjay Kumar Srivastava (supra) and Sanjay Mohan (supra), but in our opinion the absolute proposition that in no circumstance a case could be part-heard/tied up at the admission stage may not be correct.

32. In our opinion what is relevant is not the stage of the case but as to whether the case has been substantially heard i.e. it has been heard extensively and therefore, administration of justice requires that the case should be heard and disposed of by the same Bench.

33. Such extensive hearing of a petition can takes place even at the admission stage e.g. where parties have exchanged their affidavits but the petition has not been formally admitted, in cases where the contesting parties decide not to exchange any further affidavits, in the background that the relevant facts are already on record or where pure question of law are raised and are to be decided on admitted facts.

34. We are, therefore, of the opinion that the relevant factors for deciding as to when a case can be said to be 'tied up' or 'part heard', is not dependent on the stage of the proceedings but on whether it had been extensively heard/the Court has

devoted sufficient time in the hearing of the petition so as to require in the interest of administration of justice that the matter be disposed of by the same Bench. There cannot be any hard and fast rule that unless the case is listed for final hearing, it can not fall within the category of part-heard case, within the meaning of Rule 14 of Chapter V of the Rules, 1952. To that extent we find it difficult to agree with the observation made in Sanjay Kumar Srivatava (Supra) and Sanjay Mohan (supra).

35. This takes the Court to the issue as to who is to decide as to when the case has been extensively heard by the Judge/Bench concerned or the Judge/Bench has devoted sufficient time while hearing the merits of the petition so as to fall within the category of tied up/part-heard case covered by Rule 14 of Chapter V to be listed before the same Bench/Judge.

36. Another issue which may come up for consideration is as to who is to decide as to whether the judicial order of the Court for the matter being part-heard or the matter being treated as tied up or for listing as part heard before the same Bench is as per the Rules of the Court or it is a nullity i.e. it can be ignored.

37. In our opinion the Registry of the High court cannot be permitted to sit over the judicial order of the Court that 'the case be treated as part-heard' or 'be listed before the same Bench'. The issue as to whether a particular case has been extensively heard by the Judge/Bench or not so as to fall within the category of 'tied up' cases, can be examined by the Chief Justice. The Chief Justice alone has to satisfy himself as to whether the case would fall within the category of tied up or part-heard cases covered by Rule 14 of Chapter V and no one else.

38. It is for this reason that the Chief Justice under the administrative order dated 16 December 2013 had directed that the no case shall be treated as tied up or part-heard after the commencement of new roster except when so ordered by the Chief Justice in a specific case hereafter. The circular of the Chief Justice dated 16 December 2013 has to be read in a manner that it is in conformity with the Rules, 1952 of the Court.

39. In our opinion the circular of the Chief Justice only intends to provide that the Registry on its own will not list a matter before a particular Bench after the change of roster on the pretext that it is a tied up or part-heard matter. Only such cases are to be listed before a particular Bench under the category of 'tied up cases', as may be ordered by the Chief Justice after the change of roster.

40. The purpose is obvious. The Chief Justice can examine as to whether the order made by the Bench concerned for treating the matter as tied up or part-heard or for listing of the matter before the same Bench, is in conformity with the Rules or in conflict thereof as has been noticed in Sanjay Kumar Srivastava (supra) and in Sanjay Mohan (supra).

41. Initially the counsel for the Allahabad High Court did suggest that the rational behind the circular was to see that the special Benches are not required to be constituted for hearing tied up matters so as to save judicial time. Delay in disposal of the matters is avoided by placing the matter before a Bench which is readily

available as per the changed roster. The order dated 16 December 2013 only clarifies the confusion which may arise in respect of listing of the matters before the Court concerned.

42. We are in agreement with the rational so suggested by the counsel for the High Court but at the same time as noticed above, the circular has to be read in conformity with the statutory rules.

43. We are, therefore, of the opinion that the order dated 16 December 2013 has to be read in a manner to suggest that in all matters where there are judicial orders for the matter being treated as part-heard or orders for listing of the matters for further hearing before a particular Judge/Bench, the Registry shall not on its own list the matter before the same Judge/Bench but would place the records of the case before the Chief Justice so that the Chief Justice can examine as to whether the order made by the Judge/Bench for the case being treated as tied up or part-heard, is in conformity with the Rules or not. The Chief Justice may, thereafter, issue appropriate orders for the listing of the matter before the appropriate Bench.

44. We may record that even if the case is found to be tied up or part-heard by the Chief Justice within the meaning of Rule 14 of Chapter V of Rules, 1952, the Chief Justice can issue orders for the matter to be listed before another Bench for good and valid reasons. This power of the Chief Justice has been recognized by the Supreme Court in State of Rajasthan vs. Prakash Chand (supra) and paragraph 10 is reproduced below :

"10. A careful reading of the aforesaid provisions of the Ordinance and Rule 54 shows that the administrative control of the High court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted: which Judge is to sit alone and and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice. That necessarily means that it is not within the competence or domain of any Single or Division Bench of the Court to give any direction to the Registry in that behalf which will run contrary to the directions of the Chief Justice. Therefore in the scheme of things judicial discipline demands that in the event a Single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice. The puisne Judges are not expected to entertain any request from the advocates of the parties for listing of case which does not strictly fall within the determined roster. In such cases, it is appropriate to direct the counsel to make a mention before the Chief Justice and obtain appropriate orders. This is essential for smooth functioning of the Court. Though, on the judicial side the Chief Justice is only the 'first amongst the equals' on the administrative side in the matter of constitution of Benches and making of roster, he alone is vested with the necessary powers. That the power to make roster exclusively vests in the Chief Justice and that a daily cause-list is to be prepared under the directions of the Chief Justice as is borne out from Rule 73, which reads thus :..."

45. The said judgment has been approved by the Supreme Court in Kishore Samrite (supra). It is also worthwhile to refer to the judgment of the Supreme Court in High Court of Andhra Pradesh vs. Special Deputy Collector (L.A.), Andhra Pradesh and others reported in (2007) 13 SCC, 580 wherein paragraph 6 it has been held as follows :

"6.....At this juncture, it is to be noted that where the matter is heard in part, normally it should not be transferred to another Bench or learned Single Judge. But it has come to notice in several instances that cases have been noted to be part-heard even when it was really not so. Such practice is to be discouraged. The Chief Justice of the High Court has power even to transfer a part-heard case from one Bench to another or from one learned Single Judge to another. But this should be done in exceptional cases for special reasons."

46. Having arrived at the said conclusion in respect of part-heard and tied up cases, we may consider the other questions which have been referred for consideration to this Bench.

47. So far as issue no. 'a' is concerned, it may be noticed that the Bench of three Judges in Smt. Chawali (supra) framed in all 18 questions for consideration out of which 10 questions were framed by order dated 14 December 2014, 4 questions were framed on 25 November 2014. Question nos. 15 to 18 were framed on 26 November 2014. These questions were then compartmentalised and arranged under heading 'A to H'.

48. From a bare perusal of the 18 questions which were formulated by the Full Bench in Smt. Chawali (supra), which were later compartmentalised as Issues no. A to H, it is clear that no issue was framed in respect of validity of the order of the Chief Justice dated 16 December 2013. We have no hesitation to record that the Full Bench could not have examined the validity of the order of the Chief Justice dated 16 December 2013 in absence of any issue having been framed and the same being addressed by counsel for the parties.

49. So far as the issue no. B is concerned, we are of the considered opinion that since the order dated 16 December 2013 had been made by the Chief Justice and if the Full Bench of this Court in Smt. Chawali (supra) wanted to examine the legality of the same, the minimum expected was to have issued notice to the Registrar General of the High Court so that he could represent the views of the High Court on the said order. Any direction issued in the absence of the High Court in respect of the order dated 16 December 2014 would be in violation of principles of natural justice. Therefore, answer to question no. B has to be in negative.

50. So far as issue no. 'C' is concerned, we are of the considered opinion that the Full Bench judgment in Sanjay Kumar Srivastava (supra) had been completely ignored by the majority opinion in Smt. Chawali (supra). The judgment had been noted with approval by the Supreme Court in State of Rajasthan vs. Prakash Chand (supra) and had a material bearing on the issue as to when a case can be said to be tied up/part-heard within the meaning of Rule 14 of Chapter V. Therefore, non consideration of the said judgment in our opinion is bad in law.

51. So far as the issue no. 'D' is concerned, it has been dealt with extensively, herein above. In our opinion for a case to be treated as tied up or part heard, it must have been extensively heard on merits by the Judge/Bench concerned. The Bench should have spent sufficient time for hearing of the matter on merits so that administration of justice would require the case to be heard/disposed of by the same Bench. It is only such cases which have to be placed before the Chief Justice for consideration as to whether the matter has to be listed before the same Bench or not.

52. So far as the issue nos. 'E & F' are concerned, we find that nomination of cases are made in different contingencies. For example :

(a) where there are large number of fresh cases filed before a particular Bench;

(b) when a particular Judge recuses himself from the case;

(c) when there are orders on the judicial side by the Supreme Court or a larger Bench of the High Court for the matter being placed before another Bench.

53. The nomination/assignment of fresh cases is made for a particular purpose i.e. to clear the backlog of fresh cases before the particular Judge/Bench having jurisdiction as per the roster. The purpose exhausts itself once the roster is changed. Therefore, in respect of fresh cases the nomination/assignment must come to an end with the change of the roster.

54. So far as the cases which are nominated because of the Judge recuses himself, we are of the considered opinion that having regard to the status of the case i.e. (a) whether the case has been admitted and (b) whether the case has been fixed for final hearing etc, the Chief Justice may consider making an appropriate nomination i.e. whether the nomination would continue till admission or till disposal of the case or till the change of the roster. This would obliviate any confusion, both in the mind of the litigant as well as in the minds of the officials of the Registry, regarding listing of the case after the change of the roster.

55. So far as the third category of cases are concerned, we are of the considered opinion that the Chief Justice may consider application of the same principle as in the cases covered by category 'B' above.

56. In respect of the last question, we are of the opinion that the nomination by the Chief Justice in the name of one of the member of the Bench would suffice inasmuch as if for certain reasons the other member of the Bench is not available, the case can still proceed. This will avoid unnecessary delay in the disposal of the matter. The nomination can be in the name of the senior member of the Bench or in the name of the other member of the Bench, as may be deemed fit, by the Chief Justice.

57. All the questions referred are answered accordingly.

58. Let the records of Criminal Appeal No. 4922 of 2006 be placed before the Chief Justice for appropriate orders for listing of the appeal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.08.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

C.M.W.P. No. 7386 of 2015

Vikas Kumar ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma, Sri Rahul Srivastava

Counsel for the Respondents:
A.S.G.I., S.C., Sri S.K. Pandey

Constitution of India, Art.-26-Right to appointment-cancellation-allegations of cheating during examination-with identical allegation-Writ Petition allowed by Delhi High Court-not stayed by Supreme Court as yet-held-cancellation of appointment on highly belated stage when violation of principle of Natural Justice-not sustainable-discussed.

Held: Para-14
It has been categorically brought on record that the petitioner has already been selected in the Combined Graduate Level Examination 2012. The result was declared on 8.2.2013 and the authority concerned has already verified the documents and his medical examination has already been taken place. Therefore, at this stage, the claim of the petitioner cannot be denied.

Case Law discussed:
W.P. © 9055 OF 2014 and C.M. No. 20669 - 670/2014

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

1. Heard Shri Umesh Narain Sharma, Senior Advocate assisted by Shri Rahul Srivastava for the petitioner and Shri Sanjeev Kumar Pandey for the respondents.

2. By means of present writ petition, the petitioner has prayed for quashing the order dated 13.1.2015 passed by the Deputy Director, Staff Selection Commission (Central Region), 8-AB, Beli Road, Allahabad-respondent no.3 on approval of the Regional Director, Staff Selection Commission (Central Region), 21-23, Lowther Road, Allahabad-respondent no.2. He has further prayed for direction commanding the respondent nos. 2 and 3 to issue necessary directions to the office of Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai regarding issuance of appointment letter to him in pursuance of his final selection on the post of Tax Assistant in the office of Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai.

3. The matter was again taken up on 11.3.2015 and this Court had passed the following orders:-

"Heard Shri Umesh Narain Sharma, Senior Advocate assisted by Shri Rahul Srivastava for the petitioner and Shri Sanjeev Kumar Pandey, learned counsel for the respondents.

This Court vide order dated 6.2.2015 had passed the following orders:-

"Sri Sanjeev Kumar Pandey, learned counsel has put in appearance on behalf of the respondents by filing his parcha today, is taken on record.

Heard Sri Umesh Narain Sharma, assisted by Sri Rahul Srivastava, learned counsel for the petitioner and learned counsel for the respondents.

Sri Umesh Narain Sharma, learned Counsel has placed reliance upon the judgment of the Delhi High Court passed in Writ Petition (C) No.7484 of 2013 dated 17.12.2014 Ashwani Kumar vs. Union of India and others.

Learned Counsel for the respondents prays for and is granted two weeks' time to seek instructions in the matter.

Put up this matter as fresh on 23rd February, 2015."

Again the matter was taken up on 23.2.2015 and on the said date, a last opportunity of two weeks' and no more time had been granted to learned counsel for the respondents to obtain instructions in the matter.

Today when the matter was taken up, learned counsel for the respondents prays for an adjournment on the basis of a letter dated 20.2.2015 sent by Shri A.K. Jha, Assistant Director (Legal) and while seeking adjournment, no affidavit has been filed in the matter.

Put up this matter as fresh on 30.3.2015.

It is directed that meanwhile, if the order dated 6.2.2015 has not been complied with, Shri A.K. Jha, Assistant Director (Legal) shall remain present before this Court on the next date.

4. Thereafter, the matter was again taken up on 4.8.2015 and this Court had passed following order:-

"In para-19 of short counter affidavit, it has been averred that the Commission has taken a decision to assail the judgment of Hon'ble Delhi High Court dated 17.12.2014 in Writ Petition (C) 7484/2013 by means of SLP. This affidavit was sworn in the month of March, 2015 and considerable time has been lapsed in between.

Learned counsel for the contesting respondents prays for and is allowed three days time to obtain instructions whether any SLP has been filed or not.

List this matter again on 10.8.2015 in the top 10 cases of the cause list."

5. It appears from the record that the petitioner is a resident of District Vaishali and belongs to Other Backward Classes category in the State of Bihar. The petitioner has qualified more than 15 competitive examinations conducted by various Selection Commissions/Boards. He applied for and was declared qualified in the final result of Combined Graduate Level Examination-2012 declared on 8.2.2013, conducted by Staff Selection Commission (North Eastern Region), Guwahati. The petitioner was recommended to be appointed on the post of Tax Assistant in the office of Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai.

6. A show cause notice dated 3.1.2013 was issued to him alleging, that the petitioner had committed fraud and malpractice in Sub Inspector in CPO's, Assistant Sub-Inspector in CISF and Intelligence Officer (IO) in Narcotics Control Bureau (NCB) Examination-2011 and accordingly, he was directed to show cause as to why his candidature for Examination-2011 may not be cancelled. The petitioner appeared in person before the respondents on 23.1.2013. He was directed to sign 40 times in Hindi as well as in English on blank sheets of paper. His left and right thumb impression were also taken by the respondents. By the Office Memorandum dated 6.2.2013 the candidature of the petitioner for the Examination-2011 was cancelled and the petitioner was debarred for a period of five years from the date of written examination dated 28.8.2011 of the Examination-2011 from appearing in any of the examinations conducted by the Commission. Being aggrieved by the aforesaid show cause notice dated 3.1.2013 and the final order dated 6.2.2013, the petitioner filed a Writ Petition No.57401 of 2013. The said writ petition was allowed on 27.5.2014 by

quashing the impugned orders therein and the respondents were directed to reconsider the matter after disclosing the material to the petitioner on the basis of which the charge of impersonation is sought to be sustained and pass a final order after giving opportunity to the petitioner to submit a detailed reply.

7. In the meantime, the office of the Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai on the basis of final result dated 8.2.2013 for the post of Tax Assistant, sent a call letter dated 9.11.2013 to the petitioner for appearing before the authority concerned for the purpose of verification of documents as well as medical examination. The petitioner appeared before the Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai and produced the required documents. He was also medically examined and declared fit. When the appointment letter was not issued to him, he made a representation before the respondent no.4 on 26.6.2014. A show cause notice was issued to the petitioner on 9.9.2014, by which the earlier charge of impersonation was changed to the charge of malpractice/unfair means. Inspite of the order of this Court dated 27.5.2014, no material/evidence was served upon the petitioner alongwith the show cause notice dated 9.9.2014. The petitioner filed a detailed reply dated 30.9.2014, denying all the allegations levelled against him.

8. Being aggrieved by the inaction of the respondents, the petitioner again preferred a Writ Petition No.62827 of 2014 challenging the show cause notice dated 9.9.2014. The said writ petition was disposed of on 24.11.2014 with a direction to the respondents to consider the reply of the petitioner dated 30.9.2014 and pass order within two months. The petitioner preferred Special Appeal No.1146 of 2014 challenging a part of the order dated 24.11.2014 by which this Court directed the respondents to lodge a first information report against the petitioner. The Special Appeal is still pending. By the impugned order dated 13.1.2015 the candidature of the petitioner for the Examination-2011 has been cancelled and he has been debarred for a period of three years since 28.8.2011 from appearing in any of the examinations conducted by the Staff Selection Commission on the ground of cheating with one Ashwani Kumar.

9. It has been averred in the writ petition that Ashwani Kumar, who has been named alongwith the petitioner, was also issued an order dated 9.2.2013 while he was already inducted into the service and was also serving as Assistant Sub Inspector (Executive) in Central Industrial Security Force. By the order dated 9.2.2013 the services of Ashwani Kumar were terminated and he was further debarred to appear in any of the examinations conducted by the Staff Selection Commission. Shri Ashwani Kumar challenged the said order dated 9.2.2013 before Delhi High Court by way of Writ Petition (C) No.2514 of 2013. Several other candidates, who were facing the similar stigma, also preferred writ petitions before Delhi High Court. The Writ Petition (C) No.2514 of 2013 filed by Ashwani Kumar as well as the bunch of writ petitions were heard by Delhi High Court and vide order dated 30.5.2013 all the writ petitions were allowed and the order dated 9.12.2013 was set aside. Thereafter, the respondents

again issued a show cause notice to Ashwani Kumar, alleging malpractice and unfair means in the examination. The aforesaid show cause notice was again assailed by Ashwani Kumar before Delhi High Court in Writ Petition (C) No.7484 of 2013 (Ashwani Kumar vs. Union of India and others). Hon'ble Delhi High Court, after hearing the parties vide order dated 17.12.2014 allowed the aforesaid writ petition and set aside the impugned orders dated 9.10.2013 and 21.11.2013 therein and also directed the respondents to allow the petitioners to continue the service so allotted to them.

10. Learned counsel for the petitioner submits that the impugned order has been passed without furnishing any evidence or material whatsoever to the petitioner. The petitioner has also not been afforded any opportunity of hearing to defend his case. Whole proceeding has been carried out at the back of the petitioner in an ex-parte manner. For the first time after four years the respondents have passed the impugned order dated 13.1.2015 on the ground of cheating with one Ashwani Kumar. He submits that since Ashwani Kumar has already been held to be innocent by the Division Bench of Hon'ble Delhi High Court and the impugned orders issued by the respondents have been quashed by the Delhi High Court, the charges levelled against the petitioner are absolutely false and frivolous.

11. Learned counsel for the petitioner has also placed his reliance on a Division Bench judgment of Delhi High Court in Writ Petition (C) 9055/2014 and C.M. No.20669-670/2014 (Staff Selection Commission & another vs. Sudesh) decided on 19.12.2014. In the aforesaid writ petition, the Staff Selection Commission challenged the common order dated 30.7.2014 passed by the Central Administrative Tribunal in OA No.930/2014 (Sudesh vs. Staff Selection Commission & ors) by which the Tribunal allowed the Original Application and quashed the second show cause notice dated 28.1.2014 issued to the applicant for adopting malpractice/cheating in Tier-II examination. The Tribunal directed the petitioner to declare the result of the respondent applicant and other applicants appeared in Combined Graduate Level Examination-2012 and to allocate them the service for which they are found eligible on the basis of pure merit. The Delhi High Court dismissed the writ petition and held in paragraph 12 to 16 as follows:-

"12. We have heard learned counsel for the petitioner, perused the impugned order and the relevant record and considered the submissions. The first show-cause notice was quashed by the Tribunal, firstly on the ground that it lacked in material particulars inasmuch, as, it did not contain any details of the alleged malpractice/ copying and the modus operandi allegedly adopted by the applicant in coming to the conclusion that the applicant had resorted to any malpractices/ copying in the Tier-II examination. It is, precisely, for this reason that the Tribunal required the furnishing of details, as aforesaid in paragraphs 20 to 24 of its order dated 22.11.2013. The rationale behind the petitioner SSC being required to furnish the details was simply that the applicant and other candidates could not be condemned on the basis of vague and non-specific allegation of a serious nature, which impinge on their candidature and

future prospects. If, according to the petitioner, malpractice/ cheating had been resorted to by the applicant and the other candidates, it was essential that such candidates were, at least, informed of the basis on which it had been concluded, or a prima-facie view formed, that such malpractices/ act of cheating had been undertaken. The petitioner should have given the reasons for its said conclusions, by disclosing as to what was the analysis undertaken by the experts/ outside agency; what was the pattern discerned by the outside experts upon analysis of the answer-sheets of all such candidates, and; that the disclosed pattern could lead to a reasonable inference ? with a very high probability/ near certainty of cheating/ malpractice. Without such disclosure, the applicant and other candidates were left in the dark, not knowing how to meet the serious allegations made against them, except by simply denying the same ? which they did.

13. A comparison of the two show-cause notices issued gives the impression that the petitioner merely window-dressed the earlier show-cause notice, and served the same upon the applicant again. In fact, there was hardly any difference in the two. The show-cause notice dated 28.01.2014 issued to the respondent-applicant in its entirety reads as follows:

"SHOW CAUSE NOTICE

1. Whereas Shri Sudesh, Son of Shri Parvinder Kumar R/o H.No.228, Gali No.2, Ambedkar Nagar, Haiderpur, Delhi was a candidate of Combined Graduate Level Examination 2012 which was notified in the Employment News dated 20.04.2012 and appeared with Roll number 2201520498 for the said examination.

2. Whereas Shri Sudesh was provisionally called for Computer Proficiency Test (CPT)and interview cum personality Test of the aforesaid examination and appeared in the said CPT and Interview on 12.11.2012 and 01.01.2013 respectively.

3. Whereas the Commission, the Competent Authority in the matter, has made a conscious decision with a view to protecting the integrity of the selection process and to prevent candidates who are prima facie found to indulge in unfair means in such examination from entering into government service through such manipulative practices.

4. Whereas the Commission gets regular post-examination scrutiny and analysis of performance of the candidates in objective type multiple choice question papers conducted with the help of experts who have proven expertise in such scrutiny and analysis and had undertaken such scrutiny and analysis in the case of written examination papers of the aforesaid examination.

5. Whereas incontrovertible and reliable evidence has emerged during such scrutiny and analysis that Shri Sudesh had resorted to malpractice/unfair means in the said papers in association with other 46 candidates/ candidates in Paper I of Tier II and 44 with other candidates/ candidates in Paper II of Tier II.

6. Now, therefore, Hon?ble CAT, New Delhi directed vide its order dated 22.11.2013 in OA No. 2404/2013. Sh. Sudesh son of Sh. Parvinder Kumar is hereby informed that he had restored to malpractice with the candidates as per list enclosed.

7. In view of the above he is directed to show cause within 10 days of issue of this detailed show cause notice as to why his candidature may not be cancelled and he may not be debarred from the Commission?s examination for the next five years.?

14. Though the same makes a mention in paragraph 6 of the list of candidates ? in collusion with whom the applicant allegedly resorted to malpractice, once again, the petitioner failed to provide the basis for the allegation of malpractice/ copying.

15. In our view, therefore, the Tribunal was justified in quashing the second show-cause notice which suffered from the same lacunae of being vague and devoid of any relevant particulars, and there was no purpose in permitting the petitioner to deal with the replies and pass any further order on the basis of such a vague show-cause notice. The said show-cause notice did not fulfill the basic requirements of principles of natural justice inasmuch, as, the respondent-applicant could not effectively have met the allegations made against him ? except to deny the same (which he did), in view of the show-cause notice itself being completely vague and devoid of particulars.

16.Consequently, we find no merit in the present petition and dismiss the same."

12. Shri Sanjeev Kumar Pandey, learned counsel for the respondents, on the other hand, submits that the petitioner appeared and was selected in the final result of Combined Graduate Level Examination-2012. He was issued the show cause notice dated 9.9.2014 as to why his candidature in recruitment of SI in CPOs ASI in CISF & Intelligence Officer (IO) in Narcotics Control Bureau (NCB) Examination, 2011 should not be cancelled and also why he should not be debarred for a period of three years from appearing in any of the examination conducted by the Staff Selection commission. He filed a Writ Petition No.62827 of 2014, which was disposed of on 24.11.2014 with direction to decide the reply of the petitioner dated 31.9.2014 within two months. The Commission has carefully considered the reply dated 31.9.2014 of the petitioner. In the written examination for Paper-II, the petitioner and Shri Ashwani Kumar were seated in the same venue in one row, one after the other. There was very high matching of answers of both the candidates. The extant of such matching, including matching of wrong answers, cannot happen by chance and clearly establishes collusion among the candidates to copy or to get the answers from a common source. The Commission has come to the conclusion that the petitioner resorted to malpractice/unfair means in the same Examination and cancelled the candidate of the petitioner in the said examination. The petitioner was also debarred for a period of three years from the date of examination i.e. 28.8.2011 from appearing in any of the examination conducted by the Staff Selection Commission. The petitioner filed a Writ Petition No.62827 of 2014, which was disposed of on 24.11.2014. In compliance of the order of this Court dated 24.11.2014, the representation of the petitioner has been rejected. The petitioner filed a Special Appeal No.1146 of 2014 against the order dated 24.11.2014, which is still pending. Meanwhile, the petitioner filed the present writ petition claiming the same benefit as provided to Shri Ashwani Kumar. The Commission is considering to file a SLP against the judgment dated 17.12.2014 before Hon'ble Supreme Court.

13. It is apparent from the record that Ashwani Kumar had filed the writ petition

before the Delhi High Court impleading the respondents as opposite parties and the issue before the Delhi High Court was exactly the same as in the present case. The Delhi High Court vide order dated 17.12.2014 allowed the writ petition filed by Ashwani Kumar and since Ashwani Kumar has already been held to be innocent by the Division Bench of Delhi High Court and the impugned orders issued by the respondents have been quashed, the charges levelled against the petitioner cannot be sustained. Moreover, Ashwani Kumar has already been given an appointment on the basis of selection held in the year 2011, whereas in the subsequent year in 2012 the petitioner has been selected and the impugned order has been passed on the ground of cheating with one Ashwani Kumar. The similar allegation was levelled against Ashwani Kumar and once the Division Bench of Delhi High Court has already set aside the orders, which had been passed against Ashwani Kumar for his termination and for the same recruitment year, he has been given an appointment and he is still working, at this stage, taking a shelter of malpractice/cheating adopted by the petitioner in the examination of 2011 the appointment of the petitioner in the subsequent recruitment year cannot be denied.

14. It has been categorically brought on record that the petitioner has already been selected in the Combined Graduate Level Examination 2012. The result was declared on 8.2.2013 and the authority concerned has already verified the documents and his medical examination has already been taken place. Therefore, at this stage, the claim of the petitioner cannot be denied.

15. In para-19 of the short counter affidavit, it is stated that the Commission has taken a decision to challenge the judgment of Delhi High Court dated 17.12.2014. This affidavit was sworn in the month of March, 2015 and considerable time has lapsed in between. The order dated 17.12.2014 was passed by the Delhi High Court before passing of the impugned order dated 13.1.2015. Admittedly, the respondents were in the knowledge of the order passed by the Delhi High Court, which has attained finality. Nothing has been brought on record to indicate that the respondents have preferred any Special Leave Petition against the judgment of Delhi High Court dated 17.12.2014.

16. In view of above, the order impugned dated 13.1.2015 is violative of principle of natural justice and is accordingly set aside.

17. The writ petition is allowed. The respondents are directed to issue appointment letter in favour of the petitioner in pursuance of his final selection in Combined Graduate Level Examination-2012 on the post of Tax Assistant in the office of Commissioner of Customs (General), New Custom House, Ballad Estate, Mumbai within a period of four weeks' from the date of production of a certified copy of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2015

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

C.M.W.P. No. 7401 of 2015

Rajendra Patel ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C. , Sri Niseeth Yadav, Sri G.K. Singh

Constitution of India, Art.-226-Scope of interference under Writ Jurisdiction-last date submission of form-prescribed with stipulation-hard copy of document must be send before the last date either personally or by registered post-if petitioner adopted the registered mode-should be on its own risk-view taken by Division Bench in Nirbhay Kumar Case-not correct-once the commission prescribed the mode with clear stipulation-Writ Court can not interpret otherwise-view taken in Raj Narayan case affirmed.

Held: Para-22
For these reasons, we hold that where the Commission requires the submission of a hard copy of the online application together with all accompanying documents by a prescribed last date and has clearly placed the candidates on notice of the fact that an application which is submitted beyond the last date together with the prescribed documents would result in the invalidation of the candidature, the condition which has been imposed by the Commission would have to be scrupulously observed. It would not be open to the Court to hold that notwithstanding such a clear condition, an application which has not been received by the last date should be entertained. The Commission has given an option to candidates of submitting their applications in the hard copy by either of the two modes, namely by registered post or by personal delivery. A candidate who has opted for one of the two modes, is required to comply with the condition that all the requisite four stages are completed within the time stipulated.

Case Law discussed:
Writ A No. 9651 of 2015 decided on 18 February 2015; [(2010) 4 UPLBEC 2876]; Writ A No. 24060 of 2014 decided on 28 April 2014; (2005) 9 SCC 779; (2011) 14 SCC 227.

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

1. This reference to the Full Bench has been occasioned by a referring order dated 2 April 2015.

2. The Uttar Pradesh Public Service Commission1 issued an advertisement on 24 April 2014 notifying the Combined State/Upper Subordinate Services Examination 2014. The petitioner participated in the preliminary written examination on 3 August 2014. Candidates who had qualified in the preliminary written examination were required to submit an online application for appearing at the main written examination. An advertisement was issued on 4 October 2014 by the Commission notifying that the candidates who had been declared successful in the preliminary examination should visit the website of the Commission for obtaining information in regard to the process to be followed for appearing at the main examination. The four stages with a time schedule indicated in the advertisement were as follows:

(i)Date for the filling up of applications online on the website of the Commission for appearing at the main examination and selection of the examination centre and the two optional subjects.....From 1 October 2014 to 11 October 2014

(ii) The last date for submitting the examination fee through the process of E - Challan/I - Collect (through SBI/PNB). ….....Upto 17 October 2014

(iii) The last date for the submission of online applications after submission of the examination fee and obtaining its print out. ….....Upto 20 October 2014

(iv) Submission of the applications in the conventional hard copy together with all the accompanying documents in the

office of the Commission either through registered post or through personal delivery. ….....Upto 27 October 2014 by 5 pm

3. On 27 October 2014, the Commission issued a further advertisement stating that the main examination would be conducted between 5 November 2014 and 21 November 2014 in the districts of Allahabad and Lucknow. All the candidates were informed that they were being granted provisional permission to appear at the main examination subject to the condition that they had completed the process for fulfilling all the aforesaid four stages within the stipulated time and if it was found upon scrutiny that any candidate had failed to complete any of the four stages in time, his candidature was liable to be rejected. We are extracting hereinbelow the relevant part of the advertisement dated 27 October 2014:

"उक्त परीक्षा से सम्बन्धित अभ्यर्थियों को एतद्द्वारा सूचित किया जाता है कि उन्हें मुख्य परीक्षा में इस शर्त के साथ औपबन्धिक रूप से सम्मिलित होने की अनुमति प्रदान की जा रही है कि उनके द्वारा निर्धारित तिथि तक आवेदन पत्र जमा करने की चारो चरण की प्रक्रिया पूर्ण कर ली गयी है यदि सन्निरीक्षोपरान्त यह पाया जाता है कि उन्होंने निर्धारित तिथि तक आवेदन पत्र जमा किये जाने विषयक चारो चरणों की प्रक्रिया पूर्ण नहीं की है तो उनका अभ्यर्थन निरस्त कर दिया जायेगा।"

4. The brochure which was issued by the Commission to the candidates similarly provided as follows:

"आवश्यक नोटः– अभ्यर्थियों को एतद्द्वारा सूचित किया जाता है कि उन्हें मुख्य परीक्षा में इस शर्त के साथ औपबन्धिक रूप से सम्मिलित होने की अनुमति प्रदान की जा रही है कि उनके द्वारा निर्धारित तिथि तक आवेदन पत्र जमा करने की चारो चरण की प्रक्रिया पूर्ण कर ली गई है यदि सन्निरीक्षोपरान्त यह पाया जाता है कि उन्होंने निर्धारित तिथि तक आवेदन पत्र जमा किये जाने विषयक चारो चरणों की प्रक्रिया पूर्ण नहीं की है तो उनका अभ्यर्थन निरस्त कर दिया जायेगा।"

5. Under the notice dated 27 October 2014 and the conditions stipulated in the brochure all the candidates were placed on notice that they were being permitted to appear at the main written examination subject to the condition that the candidate should have completed all the four stages of the process failing which the candidature of the candidate would be cancelled.

6. In the present case, the facts are that the petitioner submitted an online application form for appearing at the main examination before the last date prescribed. A hard copy of the application form was sent to the Commission by speed post on 16 October 2014. The speed post cover was tendered at the office of the Commission by the postal authorities on 31 October 2014. The postal cover was not accepted on the ground that it was submitted beyond the last date. A provisional admit card had, in the meantime, been issued to the petitioner for appearing in the main examination and the petitioner appeared at the examination which was held between 5 and 10 November 2014. The result of the petitioner was not declared. A writ petition was, accordingly, filed commanding the Commission to accept the hard copy of the application form and not to reject the candidature of the petitioner on the ground that the hard copy had been tendered after 27 October 2014. A direction was also sought for the declaration of the result of the petitioner.

7. When the writ petition came up before the Division Bench, the Court

noted a conflict between the views taken by two coordinate Division Benches these being in (i) Nirbhay Kumar Vs U P Public Service Commission2; and (ii) Raj Narayan Singh Vs U P Public Service Commission3.

8. In the judgment in Raj Narayan Singh (supra), a Division Bench of this Court while construing the provisions of the same advertisement has held, following a judgment of the Full Bench of this Court in Neena Chaturvedi Vs Public Service Commission4 that the petitioner had an option to submit the application form by registered post or by hand delivery. The Division Bench held that as the candidates were clearly placed on notice that in the event the application form was not received in time, it would stand rejected, it was for the petitioner to have ensured that the application form was received in the office of the Commission by the stipulated date. The view of the Division Bench was that since the print out of the application form together with the requisite documents was not submitted in time and in view of the clear stipulation contained in the advertisement that the application form would stand rejected, mere appearance at the main examination would not confer any benefit upon the petitioner.

9. This view of the Division Bench in Raj Narayan Singh (supra) was also consistent with an earlier judgment of the Division Bench in Ravindra Kumar Vs Public Service Commission5. The judgment in Ravindra Kumar (supra) also relied upon the judgment of the Full Bench in Neena Chaturvedi (supra).

10. Another Division Bench of this Court which considered the issue in Nirbhay Kumar (supra) took a different view and held that the submission of a hard copy of the application together with the prescribed documents was only an act of confirmation of the application and the delay in receiving the hard copy cannot be a ground to reject the application. The Division Bench observed as follows:

"In the present case we are faced with entirely different facts. With large number of applicants applying for the vacancies, the method of inviting applications online has received acceptance in almost all the departments of the Central and State Governments. The High Court is also now inviting applications online both to avoid delay, and the collection of data in a digital form, which makes it easy for compiling and cataloging the applications. Once the applications are received online complete in all aspects along with details of payments of examination fees, the registration of the application becomes complete, unless there is some difficulty in the online application, or that the examination fees paid is not sufficient. Ordinarily in all such cases online applications are rejected and are not accepted on the server of the examining body.

However, as soon as the application is accepted online, the requirement of making application and the registration of the application is complete. The forwarding of the downloaded hardcopy of the online application form and the testimonials including the certificates, which makes the applicant eligible for the job for claiming reservation is an act of confirmation of the application. The delay in receiving the hard copy cannot be a ground to reject the application of the applicant. In such case if the hard copy is

sent by registered post before the last date of receipt of the application, the envelope by the registered post cannot be refused to be accepted.

There may be exceptions in which either the envelope by registered post dispatched prior to the last date is either lost or is received after the examinations have begun. In the present case, however, we are not concerned with any such facts."

11. In the view of the Division Bench, once an application had been submitted online and hard copies and testimonials were sent by registered post, the Commission could not refuse to accept the envelope containing the hard copy, if it was dispatched prior to the last date fixed for receiving the hard copy and testimonials in the envelope. The Division Bench observed as follows:

"In view of the aforesaid discussion, we hold that where the applications are invited online and the hard copies and testimonials are provided to be sent by registered post/ speed post and date of its receipt is fixed, once the online registration is complete with the proof of examination fees paid, the Commission cannot refuse to accept the envelopes containing hard copy of the application and the testimonials, if it has been dispatched prior to the last date fixed for receiving hard copy and testimonials in the envelope."

12. Finding a conflict between the judgments of the Division Benches, a reference has been made to the Full Bench. For convenience of exposition, the question which arises before the Full Bench is formulated as follows:

"Where the Commission requires the submission of an online application as well as the submission of a hard copy of the application together with all the requisite documents by a prescribed last date and candidates are placed on notice that the candidature of an applicant who has failed to complete all the prescribed stages by the last date would be rejected, would it be a correct position in law to hold that the Commission is bound to entertain the application though the hard copy together with the documents was received after the last date prescribed merely on the ground that the documents had been dispatched before the last date of the receipt of the application."

13. In the present case, the facts which are not in dispute, are as follows:

(i) All the candidates were duly notified by the Commission of the four stages that were required to be completed for submission of the application for appearing at the main examination. The stages which were indicated included the submission of an online application by a stipulated date as well as the submission of a hard copy together with all documents at the office of the Commission by 27 October 2014;

(ii) The candidates were given an option of submitting the documents either by registered post or of delivering the hard copy of the application together with all requisite documents by personal delivery at the office of the Commission by the prescribed date; and

(iii) The candidates were placed on notice that all the four stages that were contemplated would have to be completed by the prescribed last date, failing which, the candidature would stand rejected.

14. The issue before the Court is whether there is any substance in the

contention which has been urged on behalf of the petitioner by learned senior counsel that (i) the submission of a hard copy together with all documents was merely an act of confirmation of the online application; and (ii) the requirement of submitting a hard copy by the prescribed date can be regarded as directory in nature.

15. On the other hand learned senior counsel appearing on behalf of the Commission has submitted that (i) the documents are submitted by a candidate for the first time with the office of the Commission together with a hard copy; (ii) the submission of the hard copy of the application together with prescribed documents is not just a confirmation of the online application but it is only on the basis of the documents which the candidate submits together with his application that the Commission is in a position to determine whether the candidate fulfils the required conditions of eligibility; (iii) all the candidates were specifically placed on notice that should they fail to fulfil all the prescribed four steps by the last date which had been prescribed, the candidature would stand rejected; and (iv) the Commission which conducts the examination is required to fix some cut off date and once a cut off date has been fixed, it would necessarily have to be regarded as mandatory, failing which, the conduct of public examinations on such a large scale would become impossible of compliance.

16. The Commission while conducting the Combined Services Examination had clearly placed all the candidates on notice of the fact that the process of submitting applications for appearing at the main examination involves four stages. The advertisement which was issued by the Commission on 4 October 2014 delineated each one of the four stages and prescribed a last date for compliance. The question of compliance at a subsequent stage arises only when the prior stage has been completed by the prescribed last date. In the first stage, the candidate is required to visit the website for the purpose of selecting the examination centre and the optional subjects. In the second stage, the candidate has to submit the examination fee through the prescribed electronic mode. In the third stage, the candidate has to submit the application online after deposit of the examination fee and obtain a print out of the online format by the date prescribed. In the fourth stage, the candidate is required to submit a conventional hard copy complete with all documents in the office of the Commission either through registered post or by personal delivery by a stipulated last date. All the candidates were also placed on notice that in the event they do not comply with the stages as prescribed, the candidature would stand rejected.

17. Having regard to the clear stipulations which are contained in the advertisement which was issued by the Commission and the instructions to candidates in the brochure, all candidates were placed on an unambiguous notice in regard to the process of compliance and the consequences of a breach. Compliance was not made optional but was mandatory for all the candidates. When the Commission holds public examinations on such a large scale, candidates must be clearly aware of the fact that it is not open to a candidate to decide as to when an application should be submitted and compliance with the time schedule

which has been indicated is mandatory. If this is not read to be mandatory, the entire process of holding an examination would stand dislocated. If no last date for the receipt of the hard copy of the application with the documents were to be provided for, the issue which would arise would be until when would the Commission be required to consider the application submitted. Should this be until the examination is held or should this continue until the date fixed for the holding of the interview? These aspects cannot be left in uncertainty more so at the individual discretion of candidates. The submission of the hard copy of the application together with the documents is not a mere ministerial act nor does it constitute a mere confirmation of the application which has been submitted online. Candidates who submit applications online are still required to submit full documentary evidence which evinces eligibility and satisfaction of the required conditions. For instance, a candidate who applies for a particular post may be required to hold a qualification with a specialisation in a particular subject. It is only on scrutinising the application and the documents that the Commission can determine whether the candidate does fulfil the required conditions. This process cannot be left in a perpetual state of indecision or uncertainty. Hence, we are of the view that as a matter of first principle, the time schedule which was prescribed by the Commission for submission of the print out copy of the application submitted online with the documents was of a mandatory nature. Non-compliance with the schedule would invite the consequence which was clearly specified, namely the rejection of the candidature of the applicant.

18. The issue which we have considered has to a certain extent been dwelt upon in the judgment of a Full Bench in Neena Chaturvedi (supra). The Full Bench in Neena Chaturvedi (supra), inter alia, considered as to whether the post office through which the applications are submitted by a candidate who seeks to appear at an examination conducted by the Commission becomes an agent of the addressee. The Full Bench held that if the post office was treated to be an agent of the addressee, the very process of recruitment would be frustrated. The Full Bench observed as follows:

"33. Apart from that insofar as the entire process of recruitment is concerned, may be in the office of respondent or any other body, which invites applications, if view is accepted that the post office becomes the agent of the addressee, the very process of recruitment itself would be frustrated. A contract between the sender and the post office cannot bind the addressee. Even otherwise accepting a proposition that the post office becomes the agent of the body which invited the applications would lead to manifest inconvenience and absurdity. For how long would such body have to wait for receipt of applications sent by post to conduct the interview, or hold the examination and what happens in cases where the application is lost through transit. Therefore when applications are to be received by a particular cut off date assuming that there is an offer and acceptance, receipt of the application by that cut off date only would make the acceptance complete."

19. The judgment of the Full Bench was followed in a judgment of the Division Bench in Ravindra Kumar (supra) which was delivered on 28 April 2014. The judgment in Ravindra Kumar (supra) was in fact cited before the Division Bench when the writ petition in

Nirbhay Kumar (supra) came up for hearing. If the Division Bench in Nirbhay Kumar (supra) was inclined to take a view at variance with what was laid down in Ravindra Kumar (supra), the appropriate course of action would have been to refer the case to a Full Bench for reconsideration. Instead, the Division Bench has charted out a course of action which, with respect, is inconsistent with the law which was laid down in the earlier judgment in Ravindra Kumar (supra). This, in our view, with greater respect, is impermissible.

20. Even on merits, we are not inclined to accept the correctness of the principle which has been laid down in Nirbhay Kumar (supra) that the submission of a hard copy of the application together with the accompanying documents is merely an act of confirmation of the application. The view which has found acceptance in Nirbhay Kumar (supra) would, in our view, dislocate the examination process and would render the process which is conducted by the Commission in a perpetual state of uncertainty. We are, with respect, in agreement with the view which was expressed by the Division Bench in Raj Narayan Singh (supra) decided on 18 February 2015.

21. Reliance was also sought to be placed on a judgment of the Supreme Court in Dolly Chhanda Vs Chairman, JEE6. In Dolly Chhanda (supra), the Supreme Court has observed that the general rule is that while applying for any course of study or post, a person must possess the eligibility qualification on the last date fixed for such purpose either in the admission brochure or in the application form, as the case may be, unless there is an express provision to the contrary. The Supreme Court held that there could be no relaxation in the matter of holding the requisite eligibility qualification by the date fixed. However, depending upon the facts of the case, there can be some relaxation in the matter of submitting proof and it may not be proper to apply a rigid principle which may pertain to the domain of procedure. Hence, every infraction of the rule relating to submission of proof need not necessarily result in the rejection of the candidature. These principles which have been laid down are not in dispute and they cannot be. However, the issue in the present case is whether the submission of a hard copy by the specified date together with all the documents was merely a matter of procedure. To accept the submission of the petitioner would, as we have held earlier, result in a situation where a candidate would be entitled to assert that despite the stipulated last date and a prescribed consequence of invalidation which has been drawn to the notice of the candidates, the Commission would be bound to scrutinise applications which are received together with the hard copies beyond the prescribed date. This, in our view, would not be permissible. We may also note that in a judgment in Secretary, UP Public Service Commission Vs S Krishna Chaitanya7, the Supreme Court has held that the Commission cannot be directed to declare the final results when the application form of a candidate had not been received within the prescribed period.

22. For these reasons, we hold that where the Commission requires the submission of a hard copy of the online application together with all accompanying documents by a prescribed last date and has clearly placed the candidates on notice of the fact that an application which is submitted beyond the last date together with the prescribed documents would result in the invalidation of the candidature, the condition which has been imposed by the Commission

would have to be scrupulously observed. It would not be open to the Court to hold that notwithstanding such a clear condition, an application which has not been received by the last date should be entertained. The Commission has given an option to candidates of submitting their applications in the hard copy by either of the two modes, namely by registered post or by personal delivery. A candidate who has opted for one of the two modes, is required to comply with the condition that all the requisite four stages are completed within the time stipulated.

23. The reference is answered accordingly. The petition shall now be placed before the regular bench for disposal in the light of the reference answered.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.07.2015

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Civil Misc. Habeas Corpus Writ Petition
No. 8528 of 2015

Jitendra Yadav ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ram Niwas Singh, Sri Vinay Kr. Singh Chandel

Counsel for the Respondents:
A.G.A., A.S.G.I. (2015/0271)

Constitution of India, Art.-226-detention order-on solitary incident-while petitioner was already in jail under judicial custody-satisfaction regarding possibility of repetition of said misconduct-held-detention not sustainable-quashed.

Held: Para-12
Learned counsel for the respondents have further failed to draw our attention to any material which was placed by the sponsoring authority before the detaining authority respondent no.3 for recording his satisfaction that there was every likelihood of the petitioner being released on bail and even the fleeting reference made in the impugned order that the petitioner was trying to obtain bail does not appear to be based on any material whatsoever.

Case Law discussed:
2013 Legal Eagle (Ald.) 2177

(Delivered by Hon'ble B.K. Narayana, J.)

1. Heard learned counsel for the petitioner, Sri. J.K.Upadhyay, lerned AGA for the State and Sri Brij Lal, learned counsel for the Union of India.

2. This habeas corpus writ petition has been filed on behalf of the petitioner Jitendra Kumar with a prayer to isssue a writ order of direction in the nature of certiorari quashing the impugned detention order dated 28.10.2014 passed by District Magistrate, Ballia (Annexure-1) to the writ petition. Further prayer has been made to issue a writ order or direction in the nature of habeas corpus commanding the respondent nos. 1, 2 and 3 to set the petitioner, who is presently detained in District Jail, Ballia, at liberty.

3. The facts of the case in brief are that the District Magistrate, Ballia passed the order dated 28.10.2014 in exercise of the powers conferred on him under Section 3(2) of the National Security Act (hereinafter referred to as 'NSA') while the petitioner was in District Jail, Ballia on account of his being accused of case crime no. 420 of 2014, under Sections 147, 148, 149, 307, 386 and 279 IPC and

7 Crl. Law Amendment Act. The copy of the detention order and the grounds of detention and all other connected papers were served upon the petitioner while he was in jail in connection with the aforesaid case crime. The petitioner made a representation to the Chairman, Advisory Boad, Lucknow, annexure-3 to the writ petition. The detention order was approved by the State Government respondent no.1 vide order dated 12.12.2014 Annexure-4 to the writ petition.

4. Learned counsel for the petitioner submitted that the impugned detention order has been passed by the respondent no.3 against the petitioner on account of his alleged participation in a solitary incident which had taken place on 23.07.2014 at about 11.30 a.m. in Bahadurpur Chatti, P.S. Kotwali, District Ballia, on the basis of which case crime no. 420 of 2014, was registered against the petitioner and other accused. Advancing his submissions further, learned counsel for the petitioner submitted that since the impugned order of preventive detention was passed by the respondent no.3 while the petitioner was in prison as a person under judicial custody, it was incumbent upon the detaining authority respondent no.3 while passing impugned order of detention to record therein that there was strong possibility of the detenue being released on bail from the said judicial custody, the detaining authority respondent no.3 having failed to record any such satisfaction in the impugned order the same stands vitiated and liable to be set aside.

5. He next submitted that a valid detention order should reflect that the authority was aware that the detenu was already in prison under judicial custody and there was reliable material before him on the basis of which he had reason to believe that there was every possibility of the detenu being released on bail and in case of such release the detenu would indulge in prejudicial activities and in order to prevent him from indulging in any activities affecting the public order or the tranquillity of the community, it was imperative to pass an order for his preventive detention and unless the aforesaid satisfaction is recorded, the application of mind by the detaining authority cannot be proved and testing the impugned order on the aforesaid principle, the impugned order appears to suffer from vice of complete non application of mind.

6. Per contra learned AGA and Sri Brij Lal, learned counsel for the Union of India made their submission in support of the impugned order.

7. We have very carefully perused the impugned order as well as other material brought on record.

8. A careful reading of the grounds of detention supplied to the petitioner under Section 8 of the Act along with the detention order (Annexure-2) reveals that the same merely contains a passing reference to the fact that the petitioner who was in District Jail, Ballia on account of his being involved in case crime no. 420 of 2014 was making efforts to obtain bail. The impugned order does not contain any furhter recital to the effect that the petitioner had moved a bail application and there was every likelihood of his being released on bail and in the absence of any such satisfaction being recorded in the impugned order, recording subsequently therein that upon being released on bail, he

may again indulge in criminal activities, which may be prejudicial to the public order, will not validate the impugned order.

9. Even for recording the satisfaction in the impugned order, that the petitioner was making efforts to obtain bail, there was no material before the detaining authority except the confidential report of Superintendent of Police, Ballia and even the aforesaid report of the Superintendent of Police dated 24.10.2014, copy whereof has been filed as Annexure-9 to the writ petition, does not refer to any material in this regard.

10. A Division Bench of this Court in 2013 Legal Eagle (Ald.) 2177 reported in Cheeku Badla Vs. Superintendent, District Jail, Bulandshahar and others, while examining the legal impact of the failure of the detaining authoirty to record in the order of preventive detention passed with regard to a detenu already in prison as a person under judicial custody "that there was possibility of the detenue being released on bail from said judicial custody", has held hereunder :

"Considering the submission made by the learned counsel for the petitioner and the learned A.G.A. for the State of U.P. and from the perusal of the record it appears that in the grounds of detention, it is mentioned that the petitioner is making efforts/trying to get the bail but for recording such satisfaction there was no material before the detaining authority, even the sponsored authority has not committed any error to show that the petitioner was trying or making efforts for releasing on bail, merely on the ground that the detenu was trying to release or trying for releasing on bail, is not sufficient to satisfy the detaining authority to answer that there was real possibility of releasing the detenu on bail and he shall involve in prejudicial activities after releasing on bail, this ground has been taken on the basis of information given by the Pairokar of P.S. Lalkurti to verify this information detaining authority did not summon the record by which the bail application of the petitioner was rejected by the Additional District & Sessions Judge, Court No. 18 Meerut and the application moved before the High Court, shows that the such satisfaction recorded by the detaining authority is not subjective but it is based on hearsay even on the basis of information given by the Pairokar of P.S. Lalkurti detaining authority has not recorded his satisfaction that there was real possibility of releasing of the petitioner on bail. The Supreme Court of India observed in the case of Haradhan Saha Versus State of Bengal, (1975) 3 SCC 198; AIR 1975 S.C. 2151 in its paragraph No 35 that "where the concerned person is actually in jail custody at the time when the order of detention is passed against him, and is not likely to be released for a fair long time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in the activities which would jeopardised the security of the State or the public order." The Supreme court have laid down principles as to when the such detention order can be passed, In this regard, the leading case is reported in (1991) 1 SCC 128, Kamarunnissa Vs. Union of India and another; which has been followed in the case of Veeramani Vs. State of Tamil Naduu; (2006) 2 SCC 664, TV Sravanan alias SAR Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and another; JT 2003 (Suppl 2) SC 503 Union of India Vs. Paul Manickam and another. It has been held by the Supreme Court of India in paragraph 13 of Kamarunnisa case;-

" From the catena of decisions referred to above, it seems clear to us that even in the case of a person in custody a detention order can validly be passed(1) if the authority passing the

order is aware of the fact that he is actually in custody; (2) if he has reason to believe on the basis of reliable material placed before him(a) that there is real possibility of his being released on bail, and(b) that on being so released he would in all probability indulge in prejudicial activity; and (3) if it is felt essential to detain him to prevent him from so doing. If the authority passes an order after recording his satisfaction in his behalf, such an order can not be struck down on the ground that the proper course for the authority was to oppose the bail and if bail is granted notwithstanding such opposition to question if before a higher court."

The above mention conditions should be satisfied for the above valid detention or against the person in custody, one of the condition is that there should be real possibility of the person being released on bail."

11. Learned AGA and Sri Brij Lal, learned counsel for the Union of India despite making elaborate submissions failed to demonstrate that the detaining authority had recorded his satisfaction in the impugned order that the petitioner who was in prison had moved a bail application for his released and there was strong possibility of his being released on bail.

12. Learned counsel for the respondents have further failed to draw our attention to any material which was placed by the sponsoring authority before the detaining authority respondent no.3 for recording his satisfaction that there was every likelihood of the petitioner being released on bail and even the fleeting reference made in the impugned order that the petitioner was trying to obtain bail does not appear to be based on any material whatsoever.

13. For the aforesaid reasons and keeping in view the settled law on the issue, we are of the view that the impugned order cannot be sustained and is liable to be quashed.

14. The writ petition is allowed. The impugned order dated 28.10.2014 passed by the respondent no.3 Annexure -1 to the writ petition is hereby quashed. The petitioner shall be released forthwith if he is not wanted in any other case.

15. There shall however be no order as to costs.

16. The Registrar General of this Court is directed to communicate this order to Superintendent of Police, Ballia for necessary follow up action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2015

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

C.M.W.P. No. 9826 of 1979

Moti Lal ...Petitioner
Versus
D.D.C. Jhansi & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.P. Singh, Sri Haider Husain, Sri R.P. Srivastava, Sri S.P. Sharma

Counsel for the Respondents:
S.C., Sri N.B. Nigam, Sri Y.K. Sinha, Sri Shyam Kumar Srivastava

U.P.Z.A. & L.R. Act-1955-Section 155 and 164-mortgage with possession-amounts to sale-transfer of possession not actually done-contrary to contents of deed-can not be considered-in terms of Section 92 of Evidence Act.

Held: Para-20 & 21

20. Under the circumstances, therefore, it would not be open for the petitioner to contend with the conditions enumerated in the document were either varied, added to, or subtracted from. It must therefore, necessarily be held that the parties are bound by the recitals contained in the document and they cannot adduce evidence to show that the terms and conditions in the document in question, had been varied.

21. In such view of the matter, the contention of learned counsel for the petitioner that possession was never handed over to the respondents mortgagee or that contrary to the terms of the deed itself, only the crops were given to him in lieu of a loan, cannot be accepted being contrary to the terms of the agreement itself.

Case Law discussed:
AIR 2008 SC 2015; AIR 1958 SC 448.

(Delivered by Hon'ble Anjani Kumar Mishra, J.)

1. Heard Sri D.P. Singh learned Senior Counsel for the petitioner and Sri Shyam Kumar Srivastava holding brief of Sri N.B. Nigam learned counsel for the respondents.

2. The instant petition arises out of an objection under Section 9-A (2) of the U.P. Consolidation of Holdings Act and is directed against the orders passed by the three courts below namely the Consolidation Officer, Settlement Officer Consolidation and Deputy Director of Consolidation.;

3. The dispute relates to Plot no. 232 which in the basic year was recorded in the name of the petitioner Moti Lal. The objection of the respondent no. 4 Harkishun was that the petitioner had executed a registered mortgage deed with possession of the plot in question in his favour on 26.02.1975 and therefore, the same amounted to a sale in view of Section 164 of the U.P. Zamindari Abolition & Land Reforms Act and the objector was therefore, liable to be recorded as its bhumidhar.

4. The petitioner contested the objection alleging that possession of the land was never transferred and that he had only transferred the crops in lieu thereof. It was stated in the mortgage deed that in case the petitioner returns the money within four years the land would be reconveyed.

5. It has been contended by learned counsel for the petitioner that in support of his contentions the petitioner had adduced documentary evidence in the form of Khasras of 1382 and 1383 Fasli corresponding to the years 1975-76. In these documents the petitioner was recorded in possession over the land in question. It has further been submitted that the contesting respondent in his cross-examination had admitted the fact that if the money was returned within a period of four years the mortgage would be redeemed. It is therefore, his contention that mere recital of delivery of possession in the mortgage deed did not amount to actual transfer of possession. The benefit of Section 164 of the U.P.Z.A. & L.R. Act could have been given to the objector only when he proved that he was in possession over the land in question.

6. It has lastly been submitted that the condition of re-conveyance within four years specified in the mortgage deed itself, was binding upon the parties. This period had not elapsed. This aspects have not been considered by the courts below.

7. Learned counsel for the respondent, rebutting the submissions made by learned counsel for the petitioner has placed reliance on two judgments of the Apex Court namely Smt. Rama Devi

Vs Dilip Singh1 and Bai Hira Devi and others Vs Official Assignee of Bombay2.

8. I have considered the submissions made by learned counsel for the parties and have perused the record.

9. All the courts below have decided against the petitioner holding that the document in question categorically recorded that possession was transferred and therefore in view of Section 164, the same would amount to a sale.

10. In view of the submissions made the only point that arises for consideration is as to whether in view of the categorical recital contained in the mortgage deed that possession was being delivered to the mortgagee, whether any evidence could be led, and if led whether the same was liable to be considered, to show that in fact possession was never delivered to the mortgagee.

11. In the first case cited on behalf of the respondents it has been held that even if a transaction is alleged to be mortgage with conditional sale and there is refusal for re-transfer of land, the same, in view of the deeming provisions of Section 164, would be deemed to be sale and the mortgagor upon execution of the same would loose all his rights in the land in question.

12. Section 155 of the U.P.Z.A. & L.R. Act is absolutely categorical and reads as follows:-

'Mortgage of land by a bhumidhar- No bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced.'

13. The consequence of a mortgage with possession is to be found in Section 164 which is extracted below:-

"Transfer with possession by a bhumidhar to be deemed a sale:- Any transfer of any holding or part thereof made by a bhumidhar by payment of money advanced or to be advanced by way of loan and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall, notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Sections 154 and 163 shall apply."

14. The Apex Court, upon a consideration of Section 164 held that a mortgage with possession "would be deemed at all times and for all purposes to be sale to the transferee" and therefore, the statutory right of redemption under Section 60 of the Transfer of Property Act would not be available to the mortgagor in view of Section 164.

15. In view of the aforesaid decision as also Section 164 itself, it must necessarily be held that the deed in question was a transfer or sale.

16. The only point which now requires consideration is the contention of learned counsel for the petitioner that possession was never actually transferred to the respondents. In this context, it has been submitted that the khasras filed before but the courts below have not been referred to and possession of the respondents has been assumed merely on

the basis of the recital contained in the mortgage deed itself.

17. In my considered opinion the judgment cited by the respondents namely the case of Bai Hira Devi provides a complete answer to the submissions made on behalf of the petitioner. In this judgment the Apex Court has upon a consideration of Section 91, 92 and 99 of the Indian Evidence Act, held that Section 91 provides that where the terms of the contract or any other disposition of property, specially in any matter required by law to be reduced in the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself. The document in question in the instant case is a registered agreement reduced to writing and duly registered. The same has been filed on record. Therefore, the contents of the document stands proved in view of Section 91.

18. Section 92, on the other hand, excludes any evidence of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of the contract in writing. Therefore, in view of Section 92 the oral testimony of the parties on the question of possession over the land in dispute stood categorically excluded.

19. Section 99 provides as to who is entitled to give evidence of an agreement varying the terms of a document. It provides that persons who are parties to a document, or their representatives in interest may not give evidence on a fact which amounts to varying the terms of the document. Such evidence may be lead only by one who is not a party to the document or is not a representative in interest of the parties to the document. It therefore, necessarily follows that parties to a document cannot give evidence to show a contemporaneous agreement varying the terms of the document. The parties in the instant case are parties to the document in question.

20. Under the circumstances, therefore, it would not be open for the petitioner to contend with the conditions enumerated in the document were either varied, added to, or subtracted from. It must therefore, necessarily be held that the parties are bound by the recitals contained in the document and they cannot adduce evidence to show that the terms and conditions in the document in question, had been varied.

21. In such view of the matter, the contention of learned counsel for the petitioner that possession was never handed over to the respondents mortgagee or that contrary to the terms of the deed itself, only the crops were given to him in lieu of a loan, cannot be accepted being contrary to the terms of the agreement itself.

22. The submissions of learned counsel for the petitioner therefore, are liable to be and are repelled.

23. Accordingly and in view of the discussion above, the writ petition fails and is dismissed.
