APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.02.2015

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

Reference against Misc. Act No. 1 of 1993

Smt. Pushpa Sarin ...Appellant
Vers us
State of U.P. ...Respondent

Counsel for the Appellant:
Sri Ajay Kumar Singh, Sri Ashish Kumar Singh, Sri Rajendra Kumar

Counsel for the Respondent:
S.C., C.B. Yadav, Additional General, Sri Sashank Sekhar Singh, Additional Chief Standing Counsil

(A)Indian Stamp Act, 1899-Section-47(i)(A)-Power of Registry officer to refer a document-contingencies and circumstances explained.

Held: Para-13
We, therefore, answer question 1 by holding that a finding that the market value of the property as set forth in the instrument is less than even the minimum market value determined in accordance with the rules made under the Act applies to a situation governed by sub-section (1) and not to a situation governed by sub-sections (2) and (4).

(B)Indian Stamp Act, 1899-Section 47(A)(3)-Power of collector stamp-to fix the valuation of property-on assumption of future prospective use-held-stamp duty is levy imposed and not on transaction-potential of land to be considered on date of execution of sale and not future use.

Held: Para-30
Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser.

(C)Indian Stamp Act, 1899-Section 57(i) Power of review by Chief Controlling officer-held no substantive power-except limited power of procedural review.

Held:Para-37
In this view of the matter, we hold that the Chief Controlling Authority does not possess a substantive power to review its own decision. However, a limited procedural review in terms of the judgments of the Supreme Court referred to above would be maintainable.

Case Law discussed:
AIR (37) 1950 SC 218; (1968) 1 SCR 685=AIR 1968 SC 497; 1986 ALL.L.J. 49; (1972) 1 SCC 726: AIR 1972 SC 899; 2003 (4) AWC 3342, para 21; 2010 (2) AWC 1720, para5; 2012 (3) AWC 2343; AIR 1999 SC 2126, para 5; (2012) 5 SCC 566.

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

1. The present reference to a bench of three Judges is in pursuance of the provisions of Section 57 (1) of the Indian Stamp Act 18991. The questions which have been referred to this Full Bench for determination by the Chief Controlling Revenue Authority are as follows:

"(1) Whether the registering officer can refer a document even if he does not find that the market value of the property as set forth in the instrument is less than even the market value determined in accordance with the rules made under this Act;

(2) Whether the Collector Stamps has power to fix the valuation of a plot on the assumption that the same is likely to be used for commercial purposes, and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector;

(3) What should be the norms for fixing the valuation of a free-hold land viz-a-vis lease land;

(4) Whether the Collector can demand stamp duty under Section 47-A of the Stamp Act without a finding of fact that the market value as stated in the document is less than that which was actually agreed upon between the parties;

(5) Whether the orders passed by the Chief Controlling Revenue Authority can be reviewed if it is shown that the known norms of valuation have not been followed in the case."

2. An agreement to sell was entered into on 11 November 1982 for the sale of certain immovable property, admeasuring 17377 sq.ft. equivalent to 1615 sq. mtrs., more particularly described as J-13/93, Chauka Ghat, Cotton Mills Compound at Varanasi for a consideration of Rs. 2,96,660/-. A deed of conveyance was executed on 30 August 1985. When the document was presented for registration, registration was postponed because no map was attached to the sale deed. In the meantime, a complaint was addressed to the Additional Collector (Finance and Revenue) stating that the valuation of the plot together with structure standing thereon would not be less than Rs.13 lacs and that there was a willful attempt to evade stamp duty.

3. The Additional Collector called for a report together with the original documents. On 26 December 1985, the Joint Sub-Registrar, Varanasi made a reference under Section 47-A (1) of the Stamp Act. Following the receipt of the reference, a notice to show cause was issued to the purchasers who filed their objections. On behalf of the purchasers, it was urged that the rate which was reflected in the agreement to sell was higher than the market rate and the stamp duty had been paid on a much higher valuation of Rs.3,70,000/- as compared to the rate of Rs.1,44,000/- fixed under the United Provinces Stamp Rules, 19422. The Additional Collector (Finance and Revenue), by an order dated 21 October 1987, adjudicated upon the case and directed the purchasers to pay a deficit of stamp duty of Rs. 1,46,317.50 holding the valuation of the land and building to be Rs.17,63,032/-. The purchasers filed a revision under Section 56 (1) of the Stamp Act before the Chief Controlling Revenue Authority which was dismissed on 13 January 1990. On 1 January 1991, the purchasers moved the Chief Controlling Revenue Authority stating that the case involved substantial questions of law which should be referred to the High Court under Section 57(1) of the Stamp Act. Allowing the application,

a reference has been made of the questions referred to above.

4. Before we deal with the questions which have been referred to this Bench on a reference under Section 57(1), it would be necessary to answer a preliminary objection which has been raised by the learned Additional Advocate General to the maintainability of the reference. The submission which has been urged is that the Chief Controlling Revenue Authority has the power to refer a case under Section 57(1), which is pending before it. For, it is only when a case is pending before the authority, that Section 59(2) contemplates that the authority would dispose of the case on the basis of the judgment of the High Court rendered on the reference. In the present case, it was urged that once the Chief Controlling Revenue Authority had disposed of the case, there was no pending proceeding before it and a reference could not have been made.

5. The preliminary objection does not raise an issue which is res integra. The issue as to whether a reference can only be made in a pending case was dealt with in several judgments by the Supreme Court.

6. In The Chief Controlling Revenue Authority vs. The Maharashtra Sugar Mills Ltd.3, a Constitution Bench of the Supreme Court held that the power to make a reference under Section 57 is not only to the benefit of the Chief Controlling Revenue Authority but also enures for the benefit of a party which is affected by the assessment. The power which is conferred upon the Chief Controlling Revenue Authority is coupled with a duty which is cast on him, as a public officer to do the right thing and when an important and intricate question of law in regard to the construction of a document arises before him, the officer is duty bound to make a reference. Moreover, if he was to omit to do so, it would be open to the High Court in the exercise of its jurisdiction to issue a mandamus directing him to discharge the duty and make a reference to the Court.

7. The issue as to whether the power to make a reference in a case which is not pending before the authority is exhausted once the case has been disposed of stands concluded by the decision of the Supreme Court in Banarsi Das Ahluwalia vs. The Chief Controlling Revenue Authority, Delhi4. In that case, a deed of trust was submitted to the Sub-Registrar for registration, where it came to be impounded and forwarded to the Collector under Section 38 (2) of the Stamp Act. The Collector adjudicated the stamp duty and penalty against which a revision was filed before the Chief Controlling Revenue Authority. The revisional authority reduced the deficit duty and penalty by passing an order on the revision. Subsequently, an application was made to the authority to state a case to the High Court under Section 57(1) which was rejected and a writ petition before the High Court was also dismissed in limine. The Supreme Court held that the view which had been taken inter alia by the High Court of Allahabad holding that a reference could be made under Section 57 only when a case is pending and in which a question of the amount of stamp duty is yet to be decided proceeded on an erroneous construction of the decision in Maharashtra Sugar Mills (supra). The Supreme Court held that in Maharashtra Sugar Mills (supra), there was no case pending before the authority

or any other Court and yet a mandamus granted by the High Court was confirmed. Consequently, the principle of law which has been stated is as follows:-

"...It also must now be taken as settled that that duty is not affected by the question whether the case is pending before the Authority or not. The principle underlying the decision is that sec. 57 affords a remedy to the citizen to have his case referred to the High Court against an order of a revenue authority imposing stamp duty and/or penalty provided the application involves a substantial question of law and imposes a corresponding obligation on the authority to refer it to the High Court for its opinion. Such a right and obligation cannot be construed to depend upon any subsidiary circumstance such as the pendency of the case before the Authority. If the position is as held in I.L.R. 25 Mad. 752 the mere fact that the Collector has determined the duty and closed the case would render nugatory not only the controlling jurisdiction of the Authority but the remedy which sec. 57(1) gives to the citizen as also the obligation of the Authority to state the case. The difficulty which the learned judges felt in I. L. R. 25 Mad. 752 and repeated in subsequent decisions is not, in our view, a real one because as soon as a reference is made and the High Court pronounces its judgment the decision of the Authority is at large and the Authority, as required by sec. 59(2) would have to dispose of the case in conformity with such judgment. The position therefore is that when a reference has been made to the Authority or the case has otherwise come to his notice, if an application is made under s. 57(1) and it involves a substantial question of law, whether the case is pending or not, the Authority is bound to state the case in compliance with its obligation. The Authority is in a similar position as the Income-tax Tribunal under analogous provisions in the Income-tax Act."

8. In view of this decision, the preliminary objection cannot be accepted.

9. Undoubtedly, once a decision is rendered on the reference under Section 57, Section 59(2) requires the Court to remit a copy of its judgment to the revenue authority by which the case was stated. The revenue authority on receiving a copy of the decision has to dispose of the case conformably to such judgement. The words "dispose of the case" are not amenable to the construction nor can they be construed to mean a case which is pending before the revenue authority. What Section 59(2) essentially requires is that effect has to be given to the decision of the High Court on a reference under Section 57. Once a decision is rendered on a reference, the authority making the reference has to act in conformity with the decision by disposing of the case. We, therefore, are unable to accept the preliminary objection to the maintainability of the reference.

10. We will now proceed to analyze the questions referred to in the order of reference. At the outset, it would be necessary for the Court to clarify that the position will have to be considered on the basis of the provisions of the Indian Stamp Act 1899 as it stood at the material time and the United Provinces Stamp Rules 1942.

11. Section 47-A as amended by U.P. Act Nos. 11 of 1969, 20 of 1974, 49

of 1975 and 6 of 1980 provided as follows:

"47-A Instruments of conveyance etc., if undervalued, how to be dealt with. -(1) If the market value of any property which is the subject of any instrument of conveyance, exchange, gift, settlement, award or trust as set forth in such instrument, is less than even the minimum value determined in accordance with any rules made under this Act the registering officer appointed under the Indian Registration Act, 1908, shall refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(2) Without prejudice to the provisions of sub-section (1), if such registering officer while registering any instrument on which duty is chargeable on the market value of the property has reason to believe that the market value of the property which is the subject of such instrument, has not been truly set forth in the instrument, he may, after registering such instrument, refer the same to the Collector for determination of the market value of such property and the proper duty payable thereon.

(3) On receipt of a reference under sub-section (1) of sub-section (2) the Collector shall, after giving the parties a reasonable opportunity of being heard and after holding an enquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of the instrument and the duty as aforesaid. The difference, if any, in the amount of duty shall be payable by the person liable to pay the duty.

(4) The Collector may, suo motu, or on a reference from any court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the Board of Revenue in that behalf within four years from the date of registration of any instrument on which duty is chargeable on the market value of the property not already referred to him under sub-section (1) or sub-section (2), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject of such instrument and duty payable thereon, and if after such examination he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine the market value of such property and the duty payable thereon in accordance with the procedure provided for in sub-section (3). The difference, if any, in the amount of duty, shall be payable by the person liable to pay the duty."

12. Sub-section (1) of Section 47-A enables the registering officer who is appointed under the Indian Registration Act, 1908 to refer an instrument to the Collector for determining the market value of the property and the duty payable thereon. The registering officer was empowered to do so, if the market value of any property which was the subject of the instrument, as set forth in the instrument, was less than even the minimum value determined in accordance with the rules made under the Indian Stamp Act, 1899. Sub-section (2) of Section 47-A was without prejudice to the provisions of sub-section (1), and enabled the registering officer while registering any instrument to refer the instrument to the Collector for determination of the market value of the property and the duty payable thereon. Sub-section (2) indicated

that the registering officer had to do so after registering such instrument. His power to refer the instrument to the Collector for adjudication of the market value and the duty payable thereon came into existence on his having reason to believe that the market value of the property had not been truly set forth in the instrument. On receipt of a reference under sub-section (1) or sub-section (2), the Collector under sub-section (3) was empowered to determine the market value of the property after holding an enquiry in which the parties would have a reasonable opportunity of being heard. Thereupon, the difference in duty was payable by the person liable to pay the duty. Sub-section (4) conferred a suo motu power upon the Collector as well as a power on a reference from any court where the instrument had not been referred under sub-section (1) or sub-section (2). Under sub-section (4), the Collector was empowered to call for and examine the instrument for the purpose of satisfying himself of the correctness of the market value of the property and the duty payable thereon and if he had reason to believe that the market value of such property was not truly set forth, he would determine the market value as well as the duty payable in accordance with the provisions of sub-section (3). Sub-sections (1), (2), and (4) of Section 47-A operated in distinct eventualities. Sub-section (1) operated in a situation where the registering officer found that the market value of the property which was the subject matter of the instrument was less than even the minimum prescribed in the rules made under the Act. Sub-section (2) applied to a situation where the registering officer formed a reason to believe that the market value of the property has not been truly indicated in the instrument, when it was presented to him for registration and the registering officer was empowered after registering the instrument to refer it to adjudication to the Collector. Sub-section (4) inter alia enabled the Collector suo motu to examine an instrument and to adjudicate upon the market value of the property if he had reason to believe that the market value was not truly set forth in the instrument. Under sub-section (4), the power was exercisable by the Collector within a stipulated period from the date of the registration of the instrument. The expression "reason to believe" conditions the exercise of power under sub-sections (2) and (4). On the other hand, under sub-section (1), the registering officer could refer the instrument to the Collector, if the market value of the property as reflected therein, was less than the minimum which was prescribed in the rules. Hence, a situation where the market value of the property was less than even the minimum prescribed in the rules, was a condition which applied to exercise of the power under sub-section (1). However, sub-sections (2) and (4) did not condition the exercise of power on a finding that the market value as reflected in the instrument is below the market value prescribed in the rules. Under both sub-sections (2) and (4), the registering officer or, as the case may be, the Collector had to form a reason to believe; the reason to believe being that the market value, as reflected in the instrument, was not a correct reflection of the true market value of the property.

13. Once this legal position is clear from a plain and literal construction of the provisions of Section 47-A, the answer to the first question in the reference does not pose any difficulty. The registering officer under sub-section (1) was required to find

that the market value of the property as set forth in instrument is less than even the market value prescribed by the rules. However, this requirement of sub-section (1) of Section 47-A had not been incorporated by the legislature either in sub-section (2) or in sub-section (4). The registering officer under sub-section (1) of Section 47-A, exercised the power to refer the matter to the Collector even before the registration of the document. On the other hand, without prejudice to the provisions of sub-section (1), the registering officer was empowered by sub-section (2) to refer the instrument to the Collector for adjudication of the market value and the duty, if he had reason to believe that the market value of the property had not been truly set forth in the instrument. The power under sub-section (2) came into existence, if while registering the instrument, the registering officer formed a reason to believe and the provision stipulated that after registering the document, he was required to forward it to the Collector who, in turn, upon receipt of the instrument, had to pursue the procedure under sub-section (3). Hence, it would not be a correct interpretation of the provisions of Section 47-A to read the requirement of sub-section (1) into the provisions of sub-sections (2) and (4). Each of them operates in a distinct field and is governed by a different set of conditions. We, therefore, answer question 1 by holding that a finding that the market value of the property as set forth in the instrument is less than even the minimum market value determined in accordance with the rules made under the Act applies to a situation governed by sub-section (1) and not to a situation governed by sub-sections (2) and (4).

14. In connection with the first question, we will now take up the fourth question for analysis.

Section 27 of the Stamp Act stipulated as follows:

"27. Facts affecting duty to be set forth in instrument. - (1) The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.

(2) In the case of instruments relating to immovable property chargeable with an ad valorem duty on the value of the property, and not on the value set forth, the instrument shall fully and truly set forth the annual land revenue in the case of revenue paying land, the annual rental or gross assets, if any, in the case of other immovable property, the local rates, Municipal or other taxes, if any, to which such property may be subject, and any other particulars which may be prescribed by rules made under this Act."

15. In exercise of the powers conferred by the provisions of the Stamp Act, the Stamp Rules were made. Chapter XV contains provisions for the determination of the market value on certain instruments.

16. Sub-section (3) of Section 47-A provided that on receipt of a reference under sub-section (1) or sub-section (2), the Collector after furnishing a reasonable opportunity of being heard and upon holding an enquiry as prescribed by the rules was required to determine the market value of the property which is the subject matter of the instrument as well as the duty. The question as framed for reference is whether the Collector should demand stamp duty under Section 47-A without a finding of fact that the market value as stated in the document is less

than that which was agreed upon between the parties. The Collector, as we have already noted, could be moved on a reference by the registering officer under sub-section (1) or sub-section (2) or could even exercise his powers suo motu under sub-section (4). When he received a reference under sub-sections (1) and (2), the Collector was required to follow the provisions of sub-section (3). Similarly, even when the Collector acted suo motu under sub-section (4), he was required to follow the procedure provided in sub-section (3). In other words, once the Collector was seized with the proceedings either on a reference under sub-section (1) or sub-section (2) or suo motu under sub-section (4), what he was required to determine is the market value of the property in accordance with the provisions of sub-section (3). Whether the market value, as stated in the document, is less than that which was actually agreed upon between the parties, to our mind, begs the basic question. The jurisdiction of the Collector was to determine the correct market value. These provisions of Section 47-A were introduced in order to curb the evasion of stamp duty and to enable the Collector to determine what is the correct market value of the property in a situation where the instrument was not reflective of the correct market value.

17. The law on the subject was duly formulated in several decisions of this Court.

18. In Kaka Singh vs. The Additional Collector and District Magistrate (Finance and Revenue) and another5, a Division Bench of this Court noted that Section 47-A filled in a lacuna because prior to the insertion of the provision, there was no enabling provision under the Act empowering the revenue authority to make an enquiry into the value of the property conveyed for determining the duty payable thereon. Section 27 of the Act laid down that the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty or the amount of the duty with which it is chargeable, shall be truly and fully set forth therein. However, prior to the insertion of Section 27, if the instrument did not set forth the true market value of the property, the revenue was not empowered to adjudicate upon the correct market value. This lacuna which was noticed in a judgment of the Supreme Court in Himalaya House Co. Ltd., Bombay vs. The Chief Controlling Revenue Authority6 was remedied by the insertion of Section 47-A. After the insertion of Section 47-A, this Court had taken the consistent position that the power of the Collector was not only confined to the minimum value which was prescribed in the rules framed under the Act. Rule 341 of Chapter XV of the Stamp Rules provided that for the purposes of the payment of stamp duty, the minimum market value of immovable property forming the subject inter alia of a conveyance referred to in Section 47-A (1) would not be less than what was arrived at on the basis of the provisions of the rules. But it was well settled that the power of the Collector was not confined to the minimum as prescribed in Rule 341. In other words, the value computed under Rule 341 was not conclusive of what should be the correct market value when the Collector had to make a determination in pursuance of an inquiry under sub-section (3) of Section 47-A. Under sub-section (1) of Section 47-A, the registering officer could make a

reference to the Collector, if he found that the market value as reflected in the instrument was less than even the minimum prescribed in the Rules. However, the minimum which was prescribed in the rules was at best a guiding factor for the Collector and was not conclusive of his power to determine the market value. For that matter, the value under Rule 341 was not binding either on the person who produced the instrument for registration or on the State Government.

19. Subsequently, the provisions of the Stamp Rules in regard to valuation were replaced by the Uttar Pradesh Stamp (Valuation of Property) Rules, 1997 which have been made in exercise of the powers conferred by Sections 27, 47A and 75 of the Stamp Act. However, it is not necessary for the Court to express any view on the scheme or provisions of those rules since the period of dispute in the present reference is prior to the enforcement of those rules.

20. We may also note at this stage that the decision of the Division Bench in Kaka Singh (supra) was followed by another Division Bench of this Court in Agra City Real Estate Development Organisation vs. State of U.P. and others7, where it was held as follows:

"Section 47A (1) does not say that the valuation of the property for the purpose of stamp duty has to be the minimum value determined under the Rules. All it says is that if the valuation set forth in the instrument is less than the minimum value determined in accordance with the rules, then a reference has to be made to the Collector. Thus, the minimum value fixed under the rules is only for the purpose of getting a reference made to the Collector. When the reference comes before the Collector, he has to make an enquiry and determine the correct market value of the property. After such enquiry, the Collector can even hold that the correct market value of the property is less than the minimum fixed under the Rules."

21. In this view of the matter, we answer question 4 by holding that the power of Collector to determine the market value either on a reference under sub-section (1) or (2) of Section 47-A or acting suo motu under sub-section (4) was to determine the correct market value of the property.

22. Now insofar as the second question is concerned, the issue posed for consideration before the Court is whether the Collector has the power to fix the valuation of a plot on the assumption that it is likely to be used for commercial purposes and whether the presumed future prospective use of the land can be a criterion for valuation by the Collector. The Collector, while exercising his jurisdiction under Section 47-A, is required to determine the market value of the property on the date of the instrument. It is a well settled principle of law that stamp duty is a levy which is imposed not on the transaction but on the instrument.

23. The attention of the Court has been drawn to certain judgments of the learned Single Judges of this Court which had taken the view that the market value of the land could not be determined with reference to the use of the land to which the buyer intends to put it in future.

24. Section 17 of the Stamp Act provides that all instruments chargeable to

duty and executed by any person in India shall be stamped before or at the time of execution.

25. In certain judgments of the learned Single Judges of this Court, a view had been taken that the authorities are required to determine the value of the land on the date on which the sale was made and cannot consider the potential value of the land to which it could be put to use in future. (Smt. Kusum Lata Jaiswal vs. State of U.P. and others8). Similarly in Dinesh Tiwari vs. Commissioner, Gorakhpur and others9, it was held that the Collector had no power to assess the market value of the property on the basis of a future value which the property may acquire.

26. The power and jurisdiction of the Collector, as contained in Section 47-A, is to determine the actual market value of the property. The Collector in making that determination is not bound either by the value as described in the instrument or for that matter, the value as discernible on the basis of the rules.

27. In Ramesh Chand Bansal and others vs. District Magistrate/Collector, Ghaziabad and others10, the Supreme Court held as follows:

"The object of the Indian Stamp Act is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. This is to protect the State revenue. It is matter for common knowledge in order to escape such duty by unfair practice, many a time under valuation of a property or lower consideration is mentioned in a sale deed. The imposition of stamp duty on sale deeds are on the actual market value of such property and not the value described in the instrument. Thus, an obligation is cast on authority to properly ascertain its true value for which he is not bound by the apparent tenor of the instrument. He has to truly decide the real nature of the transaction and value of such property. For this, Act empowers an authority to charge stamp duty on the instrument presented before it for registration. The market value of a property may vary from village to village; from location to location and even may differ from the sizes of area and other relevant factors. This apart there has to be some material before such authority as to what is likely value of such property in that area. In its absence it would be very difficult for such Registering Authority to assess the valuation of such instrument. It is to give such support to the Registering Authority the Rule 340-A is introduced. Under this Collector has to satisfy himself based on various factors mentioned therein before recording the circle rate, which would at best be the prima facie rate of that area concerned. This is merely a guideline which helps the Registering Authority to assess the true valuation of a transaction in an instrument. This gives him material to test prima facie whether description of valuation in an instrument is proper or not.... Reading Section 47-A with the aforesaid Rule 340-A it is clear that the circle rate fixed by the Collector is not final but is only a prima facie determination of rate of an area concerned only to give guidance to the Registering Authority to test prima facie whether the instrument has properly described the value of the property. The circle rate under this Rule is neither final for the authority nor to one subjected to pay the stamp duty. So far sub-sections (1) and (2) it is very limited in its application as it

only directs the Registering Authority to refer to the Collector for determination in case property is under valued in such instrument. The circle rate does not take away the right of such person to show that the property in question is correctly valued as he gets an opportunity in case of under valuation to prove it before the Collector after reference is made. This also marks the dividing line for the exercise of power between the Registering Authority and the Collector. In case the valuation in the instrument is same as recorded in the circle rate or is truly described it could be registered by Registering Authority but in case it is under valued in terms of sub-section (1) or sub-section (2), it has to be referred and decided by the Collector. Thus, the circle rate, as aforesaid, is merely a guideline and is also indicative of division of exercise of power between the Registering Authority and the Collector."

28. The true test for determination by the Collector is the market value of the property on the date of the instrument because, under the provisions of the Act, every instrument is required to be stamped before or at the time of execution. In making that determination, the Collector has to be mindful of the fact that the market value of the property may vary from location to location and is dependent upon a large number of circumstances having a bearing on the comparative advantages or disadvantages of the land as well as the use to which the land can be put on the date of the execution of the instrument.

29. Undoubtedly, the Collector is not permitted to launch upon a speculative inquiry about the prospective use to which a land may be put to use at an uncertain future date. The market value of the property has to be determined with reference to the use to which the land is capable reasonably of being put to immediately or in the proximate future. The possibility of the land becoming available in the immediate or near future for better use and enjoyment reflects upon the potentiality of the land. This potential has to be assessed with reference to the date of the execution of the instrument. In other words, the power of the Collector cannot be unduly circumscribed by ruling out the potential to which the land can be advantageously deployed at the time of the execution of the instrument or a period reasonably proximate thereto. Again the use to which land in the area had been put is a material consideration. If the land surrounding the property in question has been put to commercial use, it would be improper to hold that this is a circumstance which should not weigh with the Collector as a factor which influences the market value of the land.

30. The fact that the land was put to a particular use, say for instance a commercial purpose at a later point in time, may not be a relevant criterion for deciding the value for the purpose of stamp duty, as held by the Supreme Court in State of U.P. and others vs. Ambrish Tandon and another11. This is because the nature of the user is relateable to the date of purchase which is relevant for the purpose of computing the stamp duty. Where, however, the potential of the land can be assessed on the date of the execution of the instrument itself, that is clearly a circumstance which is relevant and germane to the determination of the true market value. At the same time, the exercise before the Collector has to be based on adequate material and cannot be

a matter of hypothesis or surmise. The Collector must have material on the record to the effect that there has been a change of use or other contemporaneous sale deeds in respect of the adjacent areas that would have a bearing on the market value of the property which is under consideration. The Collector, therefore, would be within jurisdiction in referring to exemplars or comparable sale instances which have a bearing on the true market value of the property which is required to be assessed. If the sale instances are comparable, they would also reflect the potentiality of the land which would be taken into consideration in a price agreed upon between a vendor and a purchaser.

31. In the circumstances, we answer the second question as referred in the aforesaid terms.

32. The third question which has been referred would not arise in this reference. The question is what should be the norms for fixing the valuation of free hold land vis-a-vis lease hold land. In the present case, it is not in dispute that the land was not lease hold property. Hence, properly construed the question would not arise for determination in this reference.

33. Finally, in respect of the fifth and the last question, the law on the subject is clear. The power of substantive review is a statutory power which has to be conferred upon an authority by an enabling provision of law. The power of a substantive review cannot be implied.

34. In a decision of the Supreme Court in Patel Narshi Thakershi and others vs. Pradyumansinghji Arjunsinghji12, the principle of law was enunciated in the following terms:

"...It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. No provision in the Act was brought to our notice from which it could be gathered that the Government had power to review its own order. If the Government had no power to review its own order, it is obvious that its delegate could not have reviewed its order..."

35. In Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and others13, a distinction was made between a procedural review which is inherent or implied in a Court or Tribunal and a review on merits where the error which is sought to be corrected is one of law and is apparent on the face of the record.

36. The decision in Patel Narshi has been construed in the judgement in Grindlays Bank (supra) to exclude a substantive power of review where there is no enabling provision. However, when a review is sought due to a procedural defect arising out of an inadvertent error committed by the Tribunal, such as when an authority or Tribunal has decided a proceeding without notice to the affected parties, the power of a procedural review inheres in the Tribunal or authority. This principle has been reiterated by the Supreme Court in Kapra Mazdoor Ekta Union vs. Management of M/s. Birla Cotton Spinning and Weaving Mills Ltd. and others14.

37. In this view of the matter, we hold that the Chief Controlling Authority does not possess a substantive power to review its own decision. However, a limited procedural review in terms of the

judgments of the Supreme Court referred to above would be maintainable.

38. The reference is answered in the above terms.

39. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNEET KUMAR, J.

Special Appeal Defective No. 69 of 2015

State of U.P. & Ors. ...Appellants
Versus
Ram Pati Yadav & Anr. ...Respondents

Counsel for the Appellants:
S.C.

Counsel for the Respondents:
Sri O.P. Singh

Constitution of India, Art.-226-notional promotion-denied on ground petitioner/appellant already retired in 2003 itself-while DPC recommended in the year 2005-with stipulation-order shall be effective from date of joining-learned Single Judge declined to interfere ignoring G.O. 23.08.97 providing notional promotional benefits-order including judgment of Single Judge set-a-side.

Held: Para-9
The Government Order, on which the learned Single Judge has placed reliance, has been carefully scrutinized during the course of the hearing of the special appeal. As a matter of fact, the Government Order adopts a position quite contrary to what has been held by the learned Single Judge. What the government order stipulates is that though an employee has since died or has retired from service, the name of such an employee would be included in the eligibility list for the year for which he has been found to be eligible. However, the government order clarifies that there is no legal compulsion to grant notional promotion and an employee would be allowed notional promotion only with effect from the date on which an employee who was junior to him has been promoted. This government order is, in fact, in consonance with the two judgments of the Supreme Court which have been referred to earlier.

Case Law discussed:
1989 Supp (2) SCC 625; (1998) 7 SCC 44.

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

1. The special appeal has arisen from a judgement and order of the learned Single Judge dated 8 October 2013 by which a writ petition filed by the respondents was allowed and a direction has been issued to the effect that the respondents would be entitled to at least notional promotion on the post of Commandant from the date on which other persons in a promotion order dated 13 December 2005 had been given promotion.

2. For convenience of reference parties shall be referred to by the array of parties in the original court proceedings.

3. The two petitioners were promoted as Platoon Commanders on 29 June 1991 and 9 June 1994 respectively. On 14 June 2001, they were promoted as Inspectors, Home Guard Cadre and retired from service on 30 November 2003 and 31 December 2004. A meeting of the

Departmental Promotion Committee1 for promotion to the District Commandant Cadre was held for 2003-04 and 2004-05 under the U.P. Public Service Commission. The DPC for 2003-04 was held on 24 October 2005. The petitioners were found eligible for promotion against the vacancies for 2003-04. On 13 December 2005, the Principal Secretary in the Home Department issued promotional orders for thirteen persons. As against the names of the first and second petitioners, the promotional order indicated that they had retired on 30 November 2003 and 31 December 2004 respectively. The promotional orders were to take effect from the date on which the employees assumed charge of the promotional post. The eligibility list was for 2003-04. On 14 December 2005, promotional orders were issued by the Home Guards Secretariat in which names of the two petitioners were not included since they had retired prior to that date. The petitioners moved a representation which was disposed of on 22 April 2008. The order dated 22 April 2008 relied on a Government Order dated 23 August 1997, according to which, in the case of an employee who had retired, notional promotion would be granted with effect from the date on which a junior had been promoted. In the present case, no junior had been promoted prior to the date of retirement. Hence the representation was rejected.

4. That led to the filing of a writ petition before the learned Single Judge for challenging the order dated 22 August 2008 and for a mandamus to the authorities to compute pensionary dues of the petitioners on the post of District Commandant (Home Guards) w.e.f. 13 December 2005. The writ petition has been allowed by the learned Single Judge. The learned Single Judge has held that since the petitioners were within the eligibility criterion of promotion to the post of Commandant and their names were considered and found fit by the DPC, having been mentioned in the promotional order dated 13 December 2005, they were entitled to at least notional promotion on the post of Commandant from the date when other persons in the order dated 13 December 2005 had been given promotion. Aggrieved, the State is in special appeal.

5. The issue which falls for consideration before the Court turns on a Government Order dated 23 August 1997. The Government Order states that there is a provision for preparing an eligibility list for each year. Accordingly, the name of an employee would be included in the eligibility list for that year in which the employee had been found entitled, even if in the meantime, the employee had died or attained the age of superannuation. However, the Government Order states that where the question of notional promotion is concerned, there is no legal compulsion to grant promotion with effect from the date on which the vacancy has arisen. Notional promotion would be granted in the event of a junior being promoted, upon the employee being found fit by the DPC.

6. The law on the subject, is well settled.

7. In Union of India vs. K.K. Vadera2, the Supreme Court held that after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date such post falls vacant. Similarly, there is no principle of law under which a promotion

is to be effective from the date of creation of a promotional post since promotions can be granted only after the Assessment Board has met and made its recommendations for the grant of promotions. On the other hand, if promotions are directed to be effective from the date of creation of the additional posts, then in such eventually, it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotions. This judgment was followed by a subsequent judgement in Baij Nath Sharma vs. Hon'ble Rajasthan High Court at Jodhpur and another3 where the Supreme Court held that there was no rule in that case under which an officer was to be granted promotion from the date when the post fell vacant. Moreover, it was held that, in the case, no officer who had been junior to the appellant, had been promoted to the Higher Judicial Services.

8. In the present case, as the facts would indicate, the name of the petitioners were considered by the Departmental Promotional Committee together with other persons. The Departmental Promotion Committee, as was stated in the counter filed by the State, met on 24 October 2005. The petitioners were found eligible for promotion for 2003-04. However, in the case of all employees, the orders of promotion were to be effective from the date on which the employees assumed charge on the promotional post. This is evident from a notification dated 13 December 2005 issued by the Home Department with the approval of the Governor. The petitioners had, in the meantime, retired respectively on 30 November 2003 and 31 December 2004.

9. The Government Order, on which the learned Single Judge has placed reliance, has been carefully scrutinized during the course of the hearing of the special appeal. As a matter of fact, the Government Order adopts a position quite contrary to what has been held by the learned Single Judge. What the government order stipulates is that though an employee has since died or has retired from service, the name of such an employee would be included in the eligibility list for the year for which he has been found to be eligible. However, the government order clarifies that there is no legal compulsion to grant notional promotion and an employee would be allowed notional promotion only with effect from the date on which an employee who was junior to him has been promoted. This government order is, in fact, in consonance with the two judgments of the Supreme Court which have been referred to earlier.

10. Significantly, in the writ petition which was filed by the petitioners, there was no averment to the effect that any junior had been promoted prior to the date on which the petitioners superannuated. Moreover, no entitlement was claimed on the basis of any rule allowing the benefit of notional promotion.

11. In this view of the matter, the learned Single Judge was in error in holding that the petitioners would be entitled to notional promotion at least, on the post of Commandant from the date when other persons in the order dated 13 December 2005 had been given such promotion. As a matter of fact, the other employees were given promotion by the order dated 13 December 2005 with effect from the date on which they assumed charge. By then, the petitioners had already retired.

12. For these reasons, we allow the special appeal and set aside the impugned judgment of the learned Single Judge dated 8 October 2013. In consequence, the writ petition filed by the petitioners before the learned Single Judge shall stand dismissed.

13. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNEET KUMAR, J.

Special Appeal No. 99 of 2015

Indra Bahadur Srivastava ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Rajesh Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Interest-claimed of 11 months 25 days-delay in payment of provident fund-initially the authorities released 90% gratuity-but realizing their mistake as being class IV-entitled for full payment-issued cheque with incorrect particulars of name-subsequently corrected cheque issued-being class 4th employee compelled to rush up the court on two times-Single Judge wrongly denied interest-held-entitled for 9% interest from due date to the actual date of payment within 3 months-in case of default-12 % interest would be payable-appeal allowed.

Held: Para-5 & 6

5. In these circumstances, the claim of interest was sustainable. The learned Single Judge has erred in coming to the conclusion that there was no willful delay where the facts of the present case are indicative that there was a clear dereliction on the part of the officials of the State.

6. In these circumstances, we direct that the appellant shall be paid interest computed at 9% per annum on the provident fund amount from the due date until it was actually paid to the appellant. Since the appellant had already been paid the provident dues, the interest shall be payable to him no later than within a period of three months from the date of receipt of a certified copy of this order computed at the rate of 9% per annum as stated above. In the event of any further delay beyond the period of three months from the receipt of a certified copy of this order, the State shall pay interest at the rate of 12% per annum until payment is made.

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

1. The appellant retired on 31 August 2011 from the post of Meth in the Irrigation Department. On 18 May 2012, after retirement of the appellant, a cheque in the amount of Rs.3,06,052/- was paid over to him. The cheque was however drawn in the name of ?Indra Bahadur? whereas the correct name of the appellant as in the service record was Indra Bahadur Srivastava. The cheque was returned back by the treasury. Subsequently, on 5 June 2012, the appellant moved an application for the issuance of a fresh cheque in the correct name of the appellant. Eventually on 22 August 2012, a cheque was issued to the appellant in the amount of Rs.3,06,052/-.

2. The appellant claimed interest for the delay of eleven months and twenty

five days. But his request was not considered. Thereafter, in pursuance of an order passed in an earlier writ petition, the second respondent rejected the claim on 30 April 2013 which led to the filing of a writ petition for claiming interest. The learned Single Judge dismissed the writ petition holding that the delay in payment of the provident fund dues of the appellant was not willful.

3. The order of the Executive Engineer in the Irrigation Department dated 30 April 2013 indicates the factual position. Initially only 90% of the provident fund amount was sought to be released in favour of the appellant. However, subsequently, the competent authority realized that a class-IV employee was entitled to the release of the entire provident fund dues and it was not permissible to withhold a part of the amount. Subsequently, a cheque was issued to the appellant but that was not in the correct name as borne out by the service record. The appellant was required to pursue the matter when the cheque was returned and it was only thereafter that a fresh cheque was issued. In this process a period of eleven months and twenty five days, admittedly, elapsed.

4. The appellant is not at fault and there is no suggestion to the effect that it was because of the conduct of the appellant that the payment was delayed. There was no inquiry pending against the appellant nor was there any valid justification to withhold a portion of the amount initially. Similarly there was absolutely no reason or justification for the State to issue a cheque in the wrong name, as a result of which encashment of the amount was delayed. Retiral dues are not a bounty or charity but constitute an entitlement. The appellant who was a class-IV employee was made to move this Court on two occasions, first for disposal of his representation for interest and thereafter against the order denying him interest. There had been a clear dereliction on the part of the officials of the State in processing the claim of the appellant expeditiously, firstly withholding the part of the claim and later issuing a cheque in the wrong name.

5. In these circumstances, the claim of interest was sustainable. The learned Single Judge has erred in coming to the conclusion that there was no willful delay where the facts of the present case are indicative that there was a clear dereliction on the part of the officials of the State.

6. In these circumstances, we direct that the appellant shall be paid interest computed at 9% per annum on the provident fund amount from the due date until it was actually paid to the appellant. Since the appellant had already been paid the provident dues, the interest shall be payable to him no later than within a period of three months from the date of receipt of a certified copy of this order computed at the rate of 9% per annum as stated above. In the event of any further delay beyond the period of three months from the receipt of a certified copy of this order, the State shall pay interest at the rate of 12% per annum until payment is made.

7. The impugned judgment and order of the learned Single Judge shall, accordingly, stand set aside. The writ petition under Article 226 of the Constitution of the appellant shall stand allowed in the aforesaid terms.

8. The special appeal stands, accordingly, allowed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNEET KUMAR, J.

Special Appeal Defective No. 119 of 2015

Smt. Ram Shri & Anr. ...Appellants
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellants:
Sri Suresh Singh, Sri Bhanu Pratap Singh

Counsel for the Respondents:
C.S.C., Sri Shiv Nath Singh

High Court Rules, Chapter VIII, Rule 5- Special Appeal-against order by Single Judge-direction to pay minimum wages to daily wages-as payable those daily wager of other department-now claim that minimum pay scale as payable to regular employees of same cadre-held-appointment without following rules of selection-para 54 of Uma Devi case-further clarified by Apex Court in Surjeet Singh case-claim of minimum wages-not maintainable-appeal dismissed.

Held: Para-9
In this background and in view of the clear position in law, it would not be possible for this Court to accept the contention of the appellants that they should be allowed the minimum of the pay scale merely on the basis of certain directions which were issued in the past. This Court must be governed by the principle of law which has been laid down in several judgments of the Supreme Court noted above. As daily wage employees, the appellants would be entitle to receive minimum wages, as directed by the learned Single Judge in the impugned judgment. Their claim to receive salary payable to regular employees of the University at the minimum of the pay scale would not be maintainable in law.

Case Law discussed:
(2006) 4 SCC 1; Civil Misc. W.P. No. 51066 of 2013; Spl. Appeal D No. 477 of 2010; (2009) 9 SCC 514; [(2014) 4 UPLBEC 3128].

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

1. The appellants are daily wagers in the employment of the Chandra Shekhar Azad University of Agriculture and Technology, represented in these proceedings by the second and third respondents. The appellants had filed a writ petition1 seeking to challenge an order passed by the third respondent declining their claim for the payment of wages at the minimum of the pay scale admissible to regular employees and a writ of mandamus for the payment of the minimum of the pay scale. By the impugned judgment and order of the learned Single Judge dated 15 May 2014, the University has been directed to pay atleast the minimum wages as prescribed by the Government. The appellants are in appeal, seeking a direction for the payment of the minimum of the pay scale as admissible to regular employees of the University.

2. Initially, the appellants filed a writ petition (Writ - A No. 29214 of 2013), seeking regularization and pay parity of the minimum wages being paid to the regular employees of the University. The University resisted the petition on the ground that there was no rule for regularization and such a claim

could not be made in view of the judgment of the Supreme Court in Secretary, State of Karnataka and others Vs. Uma Devi (3) and others2. The writ petition was disposed of with a direction to the competent authority to consider the grievance in accordance with law and to pass an order thereon. Contempt proceedings3 were initiated, in which on 22 November 2013 an order was passed directing a decision in accordance with the earlier order within two months, failing which, it was stated, that the competent authority would be liable to be summoned and prosecuted after framing charges. An order was passed by the third respondent on 27 January 2014 declining the claim of the appellant. The impugned order records that, in the past, payment at minimum of the pay scale had been allowed to certain daily wage employees based on a judgment of the Allahabad High Court rendered in 2000. However, in view of the subsequent decision of the Supreme Court in Uma Devi (supra), it was held that these daily wage employees who have been appointed illegally could not be given the benefit of the earlier decision. Moreover, it was stated that the State Government has not provided funds to the University for payment at the minimum of the pay scale and that the University was unable to bear the financial burden. This led to the filing of the writ petition in which the learned Single Judge has issued directions on 15 May 2014, directing that the appellants be paid atleast the minimum wages prescribed by the Government to such daily wage employees.

3. The sole basis on which the appellants claim payment at the minimum of the pay scale, is an alleged claim of parity with certain other daily wagers who had succeeded in writ proceedings before this Court. As the record before this Court indicates, initially on 24 April 2000, an order was passed by the learned Single Judge in Writ Petition No.7942 of 1994, directing the University to pay the minimum of the pay scale admissible to Class-III and Class-IV daily waged workers. A special appeal4 was dismissed on 10 May 2001. The Supreme Court dismissed the Special Leave Petition on 10 December 2001. Following this, certain orders were passed by the learned Single Judges of this Court directing the University to pay at the minimum of the pay scale admissible to regular employees. The appellants have annexed to these proceedings, an order passed by Rakesh Sharma, J in Santosh Kumar Asthana and others Vs. State of U.P. and another5.

4. On the other hand, in a special appeal filed by the University, Chandra Shekhar Azad University of Agriculture and Technology Vs. Smt. Renu and others6, a Division Bench of this Court in an order dated 3 April 2013 observed that until the State Government provided funds to the University, the University would be permitted to continue to pay such wages as were now being paid to the daily wage employees and in case funds were provided by the State Government, they would be paid the minimum scale of regular employees. The University in the present case passed an order on 27 January 2014, as noted earlier, recording that (i) the position which obtained prior to the decision of the Supreme Court in Uma Devi (supra) where certain orders have been passed provisionally by this Court in 2000 is materially altered after the decision of the Constitution Bench of the Supreme Court; and (ii) the University

is unable to bear the financial burden in the absence of funds being allocated by the State Government and those cases where the University was paying at the minimum of the pay scale were situations in which, following the earlier directions and contempt proceedings, the University had been constrained to pay at the minimum of the pay scale. Those orders would be binding inter-se between the parties to those proceedings.

5. Essentially, what the Court must deal with, as a matter of first principle, is whether, on the position of laws as it stands today, daily wage employees are entitled to assert a right to claim wages at the minimum of the pay scale. The position, as it obtained prior to the decision of the Constitution Bench of the Supreme Court in Uma Devi (supra), stands modified in view of the observations contained in paragraph 54 of the judgment, to the following effect:-

"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

6. In paragraph 55 of the decision in Uma Devi (supra), the following directions were issued by the Supreme Court referable to the powers of the Supreme Court under Article 142 of the Constitution.

"55...We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them..."

7. Subsequently, in State of Punjab Vs. Surjit Singh7, these directions in paragraph 55 of the judgment in Uma Devi (supra) were expressly held to constitute directions referable to the jurisdiction under Article 142 of the Constitution. The Supreme Court observed as follows:-

"29. It is in the aforementioned factual backdrop, this Court in exercise of its jurisdiction under Article 142 of the Constitution of India, directed: (Umadevi case8, SCC p. 43, para 55)

"55.....Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the

Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.

30. We, therefore, do not see that any law has been laid down in para 55 of the judgement in Umadevi (3) case. Directions were issued in view of the limited controversy. As indicated, the State's grievances were limited."

8. In a recent judgment of a Division Bench of this Court in State of U.P. and others Vs. Mahipal Singh and another8, this position of law has been followed.

9. In this background and in view of the clear position in law, it would not be possible for this Court to accept the contention of the appellants that they should be allowed the minimum of the pay scale merely on the basis of certain directions which were issued in the past. This Court must be governed by the principle of law which has been laid down in several judgments of the Supreme Court noted above. As daily wage employees, the appellants would be entitle to receive minimum wages, as directed by the learned Single Judge in the impugned judgment. Their claim to receive salary payable to regular employees of the University at the minimum of the pay scale would not be maintainable in law.

10. The University has observed that the appellants were recruited without following any procedure prescribed under the law for recruitment. Moreover, the University has also observed that it is unable to bear the financial burden in the absence of financial support from the State.

11. We see no reason to entertain the special appeal since the judgment of the learned Single Judge is in accordance with the position in law as it now stands. The special appeal is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.02.2015

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE ASHOK PAL SINGH, J.

Service Bench No. 428 of 2006

Ghanshyam Das Varshney ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Hemendra Pratap

Counsel for the Respondents:

C.S.C.

U.P. Government Servangt (Discipline & Appeal Rules 1999-Rule-7(iii)-Disciplinary Proceeding-enquiry officer without opportunity of oral hearing-without supplying list of witness alongwith charges-in serious violation of procedure prescribed under Rule-merely on basis of verification report without examination-order deduction of 25% pension-held-not proper.

Held: Para-23
Lastly, we may emphasise that we are alive to the legal proposition as argued by learned Additional Standing Counsel that this court cannot scrutinise the matter in its writ jurisdiction as if it is sitting in appeal. We are of the considered view that taking into consideration a preliminary enquiry during a regular enquiry and that too without conducting any oral enquiry in contravention of the prescribed Rules would be a mere casual exercise violating also the rules of natural justice envisaged under Article 311(2) of the Constitution of India. Such an enquiry report cannot be sustained in the eyes of law. Resultantly, the impugned order of punishment also deserves to be quashed.

Case Law discussed:
(2009) 5 Supreme Court Cases 545; (2010) 2 Supreme Court Cases 772; [2014(3) LBESR 94 (All.)]; [2013 (31) LCD 762].

(Delivered by Hon'ble Ashok Pal Singh, J.)

1. Heard Sri Hemendra Pratap, learned counsel for the petitioner, Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel and perused the record.

2. The petitioner has preferred the instant writ petition challenging the order dated 04-01-2006 passed by the State Government imposing punishment of reduction of his 25% pension permanently during the departmental proceedings taken up against him.

3. The petitioner was posted as an Assistant Engineer (Mechanical) Tubewell Division, Meerut (West) having under his command area as many as 217 tubewells of district-Baghpat. The maintenance and running of the said tubewells was being done under his administrative authority. The Chief Engineer, Tubewell (West), Meerut vide his order dated 17-09-2001 directed the areawise task of 100% verification of the aforesaid 217 tubewells to four of his Executive Engineers and called upon them to report as to whether the tubewells so verified by them were found in running state or not and in case, they were not found in running state, the reasons therefor.

4. Subsequently, on the basis of the verification report received from the aforesaid Executive Engineers, a disciplinary enquiry was initiated against the petitioner for committing certain irregularities in respect of the above tubewells. A chargesheet dated 28-10-2002 was issued to the petitioner containing as many as four charges. The documentary evidence which was being relied upon in support of the charges in essence contained the verification report of the tubewells submitted by the four Executive Engineers to the Chief Engineer and the order of Chief Engineer thereon. The request of the petitioner for the supply of the copies of said documentary evidence was turned down on the premise of said documentary evidence being voluminous. However, the petitioner was allowed to inspect the record. It appears that after making the

inspection, the petitioner submitted his reply denying the charges levelled against him.

5. Thereafter, the Enquiry Officer without holding any oral enquiry, merely on the basis of the reply given by the petitioner and the aforesaid documentary evidence arrived at the conclusion of the charges to have been proved against the petitioner and submitted his enquiry report to the Disciplinary Authority i.e. the State Government for further action. The State Government, in turn, issued a show cause notice dated 12-09-2003 to the petitioner furnishing alongwith it to him a copy of the enquiry report. In response thereto, the petitioner submitted his reply dated 28-12-2004. The petitioner thereafter attained the age of superannuation on 31-12-2004. According to the respondents after obtaining necessary permission under 351-A of CSR impugned order imposing the aforesaid punishment was passed by the State Government.

6. It has been submitted by learned counsel for the petitioner that a fair and reasonable opportunity to defend his case was not provided to the petitioner in as much as no date, time or place was fixed by the Enquiry Officer to proceed with the enquiry after submission of his reply to the chargesheet nor the same was ever intimated to him. No enquiry including any oral enquiry was also held by the Enquiry Officer. Neither any oral evidence of any witness was recorded nor any opportunity for making any cross-examination with any such witness was provided to him. In fact, no list of witness at all was provided by the department to the Enquiry Officer proposing any witness to be examined in order to prove the documentary evidence. The conclusions drawn by the Enquiry Officer were merely on the basis of the charges levelled and the explanation provided by the petitioner.

7. It has also been submitted on behalf of the petitioner that burden of proving the charges was on the department, but, the Enquiry Officer shifted the burden of proving the negative upon the petitioner. The enquiry, thus, conducted by the Enquiry Officer, was no enquiry in the eyes of law and the impugned order passed on the basis of such an enquiry deserves to be set aside.

8. Per contra, Smt. Sangeeta Chandra, learned Additional Chief Standing Counsel representing the respondents, has submitted that a fair opportunity of hearing was provided to the petitioner by the Enquiry Officer. Attention of the court has been invited by her towards the directions given in the chargesheet served upon the petitioner, requiring the petitioner to submit his explanation on or before 20-11-2004. The petitioner was further required therein to inform as to whether he wanted personal hearing and to get oral statement of any witness recorded and in case, he wanted to examine or cross-examine any witness, then to provide with his written reply, the names and addresses of such witnesses and also to provide a brief note indicating the points on which such examination or cross- examination of the witnesses was intended. It was also mentioned in the chargesheet that if no explanation was submitted within the time stipulated, then it would be deemed that the petitioner had nothing to say in respect of the charges and orders in the enquiry would be passed accordingly.

9. It has been submitted by the learned Additional Chief Standing Counsel that despite the aforesaid directions in the charge sheet and a reminder given, the petitioner failed to submit before the Enquiry Officer as to if he wanted any personal hearing. He also failed to provide the list of persons to whom he wanted to examine or cross-examine with a brief note indicating the points on which such examination or cross-examination was intended. The learned Additional Chief Standing Counsel, further submitted that the facts disclosed in the documentary report of the Executive Engineers regarding verification of the tubewells had not been denied by the petitioner because of which the Enquiry Officer did not consider for recording any oral evidence and drawn his conclusions on the basis of the enquiry report submitted by the Executive Engineers and the reply to the chargesheet submitted by the petitioner. According to learned Additional Chief Standing Counsel, strict rules of evidence are not applicable to the departmental enquiries as applicable in criminal cases. Such enquiries are to be decided on the basis of preponderance of evidence. Her further submission is that under the writ jurisdiction this court is not required to appreciate and decide the matter as if sitting in appeal. The conclusions drawn by the Enquiry Officer are based upon the documentary evidence as well as the facts admitted by the petitioner. The impugned order passed in consequence thereof by the State Government thus needs no interference.

10. According to the learned counsels for the parties, U.P. Government Servant(Discipline and Appeal) Rules, 1999 (hereinafter referred to as "the rules") governs the field in the instant case for conducting enquiry and imposing a major penalty on a government servant. Rule 7 of the aforesaid Rules which deals with enquiry procedure reads as under:-

7. Procedure for imposing major penalties - Before imposing any major penalty on a Government servant, an inquiry shall be held in the following manner :

(i) The disciplinary authority may himself inquire into the charges or appoint an authority subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the form of definite charge or charges to be called charge-sheet. The charge-sheet shall be approved by the disciplinary authority :

Provided that where the appointing authority is Governor, the charge-sheet may be approved by the Principal Secretary or the Secretary; as the case may be, of the concerned department.

(iii) The charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidence and the name of the witnesses proposed to prove the same alongwith oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence.

He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and Inquiry Officer shall proceed to complete the inquiry ex-parte.

(v) The charge-sheet, alongwith the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servants personally or by registered post at the address mentioned in the official records. In case the charge-sheet could not be served in aforesaid manner, the charge-sheet shall be served by publication in a daily newspaper having wide circulation:

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charged Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government servant appears and admits the charges, the Inquiry Officer shall submit his report to the disciplinary authority on the basis of such admission.

(vii) Where the charged Government servant denies the charges the inquiry officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross-examine such witnesses. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desired in his written statement to be produced in his defence."

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The Inquiry Officer may summon any witness to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental Inquiries (Enforcement of Attendance of Witnesses and Production of Documents) Act, 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government servant does not appear on the date fixed in the inquiry or at any state of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Offi9cer shall proceed with the inquiry ex parte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government servant.

(xi) The disciplinary authority, if it considers it necessary to do so, may, by an order appoint a Government servant or a legal practitioner, to be know as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government servant to present the case on his behalf but not engage a legal practitioner for the purpose unless the Presenting Officer appointed by the disciplinary authority is a legal practitioner of the disciplinary authority having regard to the circumstances of the case so permits :

Provided that this rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of

conduct which has led to his conviction on a criminal charge ; or

(ii) Where the disciplinary authority is satisfied that for reason to be recorded by it in writing, that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) Where the Governor is satisfied that, in the interest of security of the State, it is not expedient to hold an inquiry in the manner provided in these rules."

11. It is clear from Rule 7(iii) that the proposed documentary evidence and the names of witnesses proposed to prove the charges are to be mentioned in the charge sheet. But what we find from the perusal of the chargesheet in the instant case is that in order to prove all the charges certain documentary evidence was proposed to be relied upon. For charge nos. 1 to 3 it was in essence either the order of the Chief Engineer dated 17-9-2001 by which four of his Executive Engineers were directed to carry out 100% verification of tubewells in the command area of the petitioner and/or the verification reports or one or more of the various annexures submitted by them with said verification reports. As regards charge no. 4 proposed reliance in essence was upon a letter dated 22-10-2001 of Finance Controller by which certain budget was allocated and CCL inputs of the months of September and October, 2001. However, it is observed that no witness at all has been proposed in the chargesheet for proving any of the aforesaid documents.

12. A perusal of the enquiry report ipso facto reveals that in his reply to the chargesheet the petitioner had not only denied the charges but had also denied the verification reports to be correct and in accordance with the spot position. The reply to show cause notice given by the petitioner to the disciplinary authority, copy of which is annexure 6 to the petition also reveals that in it also he had reiterated his denial. We are thus unable to accept the contention of learned Additional Chief Standing Counsel that since the imputing facts had not been denied by the petitioner there was no necessity for the Enquiry Officer to record any oral evidence. In our opinion it was clearly not a case covered by the provisions of Rule 7 (vi) of the Rules. Instead it was a case covered by the provisions of Rule 7(vii) of the Rules wherein the Enquiry Officer in view of the denial of charges was under a statutory obligation to record oral evidence of the witnesses to whom the department proposed to summon in order to prove the documentary evidence relied upon by it.

13. Even if a delinquent employee does not request for personal hearing, the burden of proving charges is upon the department. Under the rules, it is obligatory for the Enquiry Officer to fix a date for such an enquiry and also to inform about the same to the delinquent employee. The Enquiry Officer is also under statutory obligation to examine the documentary as well as oral evidence, if any, adduced in support of the charges. In case, the delinquent employee does not participate in the enquiry, even then, the Enquiry Officer is under statutory duty to discharge his obligation as an Enquiry Officer to ascertain the truth in respect of the charges levelled against the delinquent employee on the basis of the evidence and to come to the conclusion as to whether the said charges are proved against the delinquent employee or not. Even if the

delinquent employee has not demanded the opportunity of personal hearing or does not give the list of names of the witnesses with a brief note indicating the points on which he desires to examine or cross-examine the witnesses, the Enquiry Officer is still statutory bound to fix a date of enquiry and to intimate the said date to the delinquent employee and in case, the delinquent employee does not appear on the date fixed or moves an application for adjournment, the Enquiry Officer may, in his discretion, either adjourn the enquiry to some other date or to proceed ex-parte against the delinquent employee.

14. In Nair Service Society Vs. Dr. T. Beermasthan (2009) 5 Supreme Court Cases 545 relied upon by the petitioner, their lordships of Hon'ble Supreme Court, in para 48 of the report, held as under:

"48. Several decisions have been cited before us by the respondents, but it is well established that judgments in service jurisprudence should be understood with reference to the particular service rules in the State governing that field....."

15. In State of Uttar Pradesh and Others Versus Saroj Kumar Sinha (2010) 2 Supreme Court Cases 772, also relied upon by the petitioner, their lordships of Hon'ble Supreme Court in para nos. 27, 28, 29 and 30 of the report, while discussing the statutory responsibility of an Enquiry Officer conducting an enquiry and the rule of natural justice affording a reasonable opportunity to the delinquent, held as under:

"27. A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge-sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.

28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/ disciplinary authority/ Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are provided. In the present case the aforesaid procedure has not been observed. Sine no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above, by virtue of Article 311 (2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable

opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a department enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/ removal from service."

16. In Kaptan Singh Versus State of U.P. & Another [2014(3) LBESR 94 (All.)], yet another decision relied upon by the petitioner in which facts were very closely similar to the present case a Division Bench of this court has held that even where the delinquent employee does not dispute the veracity of the documentary evidence, oral enquiry is necessary as he may still have an explanation to offer.

17. In the present case not only a serious violation of the procedure prescribed by the rules has been made but the documentary evidence of verification report relied upon by the department has illegally been taken to be proved without any departmental witness having been examined in support thereof and that too when on the face of the record the factual matrix stated in the said verification report had not been admitted by the petitioner to be in accordance with the spot position. In the absence of any oral evidence, the documents remained not proved, and as such could not have been taken into consideration to conclude the charges to have been established. In any case placing reliance by the Enquiry Officer or the Disciplinary Authority on the aforesaid verification report would tantamount to placing reliance on a preliminary enquiry on the basis of which a decision was taken to initiate final enquiry.

18. In Nirmala J. Jhala Versus State of Gujarat And Another [2013 (31) LCD 762], Hon'ble Supreme Court on the basis of consistent view taken by it in its previous decisions rendered in Amlendu Ghosh Vs. District Traffic Superintendent, North-Eastern Railway, Katiyar, AIR 1960 SC 992, Chiman Lal Shah Vs. Union of India AIR 1964 SC 1854 and Narayan Dattatraya Ramteerathakhar Vs. State of Maharashtra & Ors., AIR 1997 SC 2148 in para 23 and 25 of the report observed as under:-

"23. In view of above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.

25. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry."

19. In view of above we are of the opinion that a grave error was committed by the Enquiry Officer as well as the

Disciplinary Authority in placing reliance upon verification reports which evidence was part of preliminary enquiry and had lost its significance during the final enquiry. Any reliance could have been placed on the said documents only after they had been duly proved by the witnesses and an opportunity had been given to the delinquent to make cross-examination with them. The procedure adopted was clearly a violation of the principles of natural justice.

20. As regards, the arguments advanced by learned Additional Chief Standing Counsel that only preponderance of probabilities have to be considered and strict proof of evidence would not be required in departmental proceedings reference again may be made of the case of Nirmala J. Jhala (Supra) wherein the Hon'ble Apex Court while distinguishing the standard of proof required in disciplinary proceedings and a criminal trial after considering several earlier decisions rendered by it, held in para 6(i)G of the report about disciplinary proceedings to be quasi-judicial in which doctrine of proof beyond reasonable doubt, does not apply and instead principle of preponderance of probabilities would apply. The relevant extract of the said para is reproduced as under:

"6 (i) G. In view of the above, the law on the issue can be summarised to the effect that the disciplinary proceedings are not a criminal trial, and in spite of the fact that the same are quasi-judicial and quasi-criminal, doctrine of proof beyond reasonable doubt, does not apply in such cases, but the principle of preponderance of probabilities would apply. The court has to see whether there is evidence on record to reach the conclusion that the delinquent had committed a misconduct. However, the said conclusion should be reached on the basis of test of what a prudent person would have done."

21. It would be pertinent also to note that in the above decision itself in para 29(iv) of the report Hon'ble Apex Court on the question of onus of proof in departmental proceedings has held in its conclusion that the onus to prove the charge lies on the department.

22. It has to be thus clearly borne in mind that during the course of final enquiry in the departmental proceedings although principle of preponderance of probabilities would apply yet the basic rules of pleadings and evidence cannot be allowed to be circumvented by the enquiry or Disciplinary Oficer during such proceedings. The onus of proving the charge would invariably be on the department unless the charge has been in very clear, unequivocal and unambiguous terms admitted by the delinquent.

23. Lastly, we may emphasise that we are alive to the legal proposition as argued by learned Additional Standing Counsel that this court cannot scrutinise the matter in its writ jurisdiction as if it is sitting in appeal. We are of the considered view that taking into consideration a preliminary enquiry during a regular enquiry and that too without conducting any oral enquiry in contravention of the prescribed Rules would be a mere casual exercise violating also the rules of natural justice envisaged under Article 311(2) of the Constitution of India. Such an enquiry report cannot be sustained in the eyes of law. Resultantly, the impugned order of punishment also deserves to be quashed.

24. Accordingly, allowing the writ petition, the impugned order of punishment dated 04-01-2006 is quashed on the ground that no enquiry was held. In the peculiar facts and circumstances of the case, we are also of the view that since the petitioner has retired long ago, it would not be justifiable to continue with the departmental enquiry anymore. The petitioner is entitled to receive all his pensionary dues without any reduction.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2015

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 454 of 1977

Lalji & Anr. ...Petitioners
Versus
The Deputy Director of Consolidation Alld. & Ors. ...Respondents

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

Counsel for the Respondents:
S.C., Sri R.N. Shukla, Sri D.D. Chauhan, Sri Diwakar Singh, Sri P.R. Maurya, Sri R.K. Shukla, Sri R.P. Mishra

U.P. Consolidation of Holdings Act-Section 48(3)-Reference made by consolidation officer without notice opportunity to petitioner-held illegal-provisions of Section 48(3) being mandatory order impugned unsustainable-quashed.

Held: Para-12
From the bare perusal of the records and the submissions made by the learned counsel for the parties, it transpires that before making reference, no opportunity was offered to the petitioner, therefore, the reference itself was void in nature.

Case Law discussed:
1977 AWC 259; 2013 (6) ADJ 457; (2000(91) RD 165); Writ C No. 5651 of 2009.

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

1. Heard Sri V.K. Singh, learned senior counsel assisted by Sri A.P. Singh, learned counsel for the petitioner, learned Standing Counsel appearing for the State-respondents, Sri Diwakar Singh learned counsel for the Gaon Sabha and Sri P.R. Maurya, learned counsel as an intervenor.

2. By means of this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 25.3.1977 passed by the Deputy Director of Consolidation in Reference No. 1307 (State Vs. Lalji and Others), by which the aforesaid reference has been allowed and the leases granted in favour of the petitioners on 17.10.1976 have been cancelled.

3. The facts giving rise to this case are that the respondent-Gaon Sabha has made a proposal for grant of agricultural lease in favour of the petitioner no. 1 over gata nos. 319, 320, 322, 334/1, 334/2, 335M, 337/3337/2, 324, 333M, 323/1, 323/2 and 325. The same kind of proposal was made for grant of lease in favour of petitioner no. 2 also on gata no. 74, 75M, 76/1, 76/2, 77, 78, 326/1, 326/2, 337, 338, 330/2, 331 and 332/7. The proposal of the gaon sabha was approved by the Sub Divisional Officer and consequently, the leases were also executed in favour of the petitioners. The petitioners names were also mutated in the revenue records on 8.1.1976 on the basis of the aforesaid.

4. It further transpires that the village has gone under consolidation

operation and pending consolidation, a complaint was made before the Sub Divisional Officer for cancellation of the petitioners' leases on the ground that the persons, in whose favour leases have been granted, do not belong to that very village. The Sub Divisional Officer had made an inquiry and reported the matter before the Consolidation Officer. The Consolidation Officer, in turn, made a reference while exercising power vested in him under sub-section (3) of section 48 of the U.P. Consolidation of Holdings Act, 1953 (in short, 'the Act') vide order dated 10.6.1976. In turn, the Deputy Director of Consolidation had decided the reference after hearing all concerned and allowed the same, cancelling the leases granted in favour of the petitioners.

5. Before the Deputy Director of Consolidation, two contradictory decisions of this Court were cited; one of the year 1970, wherein this Court has held that the Deputy Director of Consolidation has no jurisdiction to cancel the lease granted under the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1950. Another decision was cited in which it was held that the Deputy Director of Consolidation has jurisdiction to adjudicate upon the validity of the lease. The Deputy Director of Consolidation, placing reliance upon the second judgment of this Court, which was later in time, has assumed the jurisdiction and passed the impugned order.

6. While assailing the impugned order, learned counsel for the petitioners has made following submissions:

1) the order of reference dated 10.6.1976 was without jurisdiction as before passing the impugned order, no opportunity of hearing was given to the petitioners, which was mandatorily required in view of the provisions contained under sub section (3) of section 48 of the Act;

2) in view of the Full Bench decision of this Court in the case of Simlesh Kumar Vs. Gaon Sabha and Others (1977 AWC 259), the Deputy Director of Consolidation had no jurisdiction to adjudicate upon the validity of the lease or allotment of land granted by a Land Management Committee.

7. So far as the first submission of learned counsel for the petitioners with regard to affording opportunity of hearing before passing the order of reference is concerned, learned counsel for the petitioners contended that the petitioners were neither associated at the time of inquiry made by the Sub Divisional Officer pursuant thereto reference was made, nor before making the reference, the Consolidation Officer has ever issued notices or heard the petitioners.

8. On being confronted as to whether the petitioners were associated at the time of inquiry or at the time of making reference, learned Standing Counsel appearing for the State-respondents, Sri Diwakar Singh, learned counsel for the gaon sabha and Sri P.R. Maurya, learned counsel who appears as an intervenor, could not show from the perusal of the impugned order that before making the reference, the petitioners were noticed and heard.

9. For appreciating the controversy, it would be appropriate to go through the provisions contained under sub-section (3) of Section 48 of the Act, which reads as under:

"(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1)."

10. From the bare reading of the aforesaid provision, it is apparent that the authority subordinate to the Director of Consolidation may, before making reference, shall provide an opportunity of hearing to the parties concerned.

11. This Court in Ram Pratap Vs. Deputy Director of Consolidation and Others (2013(6)ADJ 457), dealing with the provisions contained under sub-section (3) of Section 48 of the Act, has held as under:

"12. It is also well-settled that if any thing has not been done in the manner provided for under the Statute and the Statute has provided a consequence for non-performance of such act as provided for, then those provisions are mandatory and not directory. This Court in the case of Smt. Dukhani and another v. State of U.P. and others, passed in Writ Petition No. 42057 of 2012 has held that the provisions contained under sub-section (1) and sub-section (3) of Section 48 are mandatory in nature and unless the procedure as prescribed under the statute is followed, that order would be void order."

12. From the bare perusal of the records and the submissions made by the learned counsel for the parties, it transpires that before making reference, no opportunity was offered to the petitioner, therefore, the reference itself was void in nature.

13. So far as second submission based on the Full Bench decision of this Court in the case of Simlesh Kumar Vs. Gaon Sabha and Others (1977 AWC 259) regarding jurisdiction, wherein it has been held that the Deputy Director of Consolidation has no jurisdiction to adjudicate upon the validity of the lease or allotment granted by the Land Management Committee is concerned, learned counsel for the respondents placing reliance upon the judgment of the Apex Court in the case of U.P. Sugar Corporation Ltd. Vs. Dy. Director of Consolidation and Others (2000(91) RD 165), has submitted that the Deputy Director of Consolidation had jurisdiction to look into the validity of the lease/allotment of land. In support of his submissions, he has placed reliance upon para 44 of the aforesaid judgment, which reads as under:

"44. The decision of this Court in Garakh Nath Dube's case (supra) was also followed by the Allahabad High Court in Ramanand Vs. DDC and Others, and it was held that a document which is void and is, therefore, liable to be ignored by the courts, would not affect the jurisdiction of the Consolidation Courts and they would be within their jurisdiction in adjudicating upon that document so as to finally decide the rights of the parties. The Full Bench decision of the High Court in Similesh Kumar's case (supra) was distinguished."

14. Learned counsel for the petitioner has also placed reliance upon the judgment of this Court rendered in Writ C No. 5651 of 2009 (Noor Mohd. and Others Vs. Addl. Commissioner and Others, decided on 13.11.2014). So far as the judgment of Apex Court is concerned,

there the Apex Court has held that if a document is void, in that eventuality, the Deputy Director of Consolidation will have jurisdiction to look into the same and ignore the same.

15. Sri Mourya, taking shelter of the judgment in the case of Noor Mohd (supra), has submitted that the Deputy Director of Consolidation had jurisdiction as the leases were void. In the case of Noor Mohd (supra), His Lordship was dealing with the procedural lapse in the process of grant of lease, wherein it was found that the required Z.A. Forms 57 and 58 were not signed, in that eventuality, the Court held that such lease was void in nature.

16. Here in this case, not even a single whisper has been made regarding procedural lapse, i.e., non-signing of Z.A. Forms 57 or 58, nor anything has been argued before this Court that there was no resolution of the gaon sabha, or the Sub Divisional Officer has not approved the leases, nonetheless, the allegation in the application seeking cancellation of the lease was that the petitioners do not belong to the village where the land is situated; in other words, they are of the different villages. In my considered opinion, whether a particular person belongs to the village concerned or not, was a question of fact and was to be adjudicated upon on the basis of the evidence produced by the parties and such allegation will not render the lease void. Therefore, in view of the Full Bench decision of this Court in the case of Simlesh Kumar (supra), the Deputy Director of Consolidation had no jurisdiction to adjudicate upon the matter and the impugned order passed by him is without jurisdiction. The cases cited by Sri Mourya are of no help to him.

17. In view of the foregoing discussions, the writ petition succeeds and is allowed. The order dated 25.3.1977 passed by the Deputy Director of Consolidation in Reference No. 1307 (State Vs. Lalji and Others) is hereby quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2015

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No. 540 of 2015
(U/s 482 CR.P.C.)

(Smt.) Leena Katiyar ...Applicant
Versus
State of U.P. & Ors. ...Opp. Parties

Counsel for the Applicant:
Akanksha Yadav, Sri Prem Prakash Yadav

Counsel for the jOpp. Parties:
A.G.A., Sri Narendra Kumar Singh, Sri R.K. Dubey, Sri S.K. Pandey.

Indian Evidence Act-Section 65-B- application-taking voice sample of accused persons-offence under Section 364-A, 302, 201 IPC school going boy kidnapped-demand of ransom Rs. 10 lacs by telephonic mode rejection-on ground in absence of laboratory in District in question-earlier order recalled-held-illegal u/s 165 of evidence Act audio CD admissible in evidence-in view of law by Apex Court taking voice sample not hit by Art. 20(3) of Constitution-order impugned quashed with necessary directions.

Held: Para-33
These days the manner in which the crime is being committed by the accused persons by adopting high materialized techniques and there is a great deal of technological advanced in means of communication and criminals are using new methodology in

committing crimes. Use of landlines, mobile phone and voice over internet protocol (VOIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. The present case also falls in one of the such categories of crimes which has been committed by adopting advance means of communication and to ascertain the complicity of the accused persons in the crime and to do justice it is essential that the voice sample of the accused persons should be taken by the trial court and be sent for testing to the authorized laboratory with the recorded voice in audio C.D. by the police which is marked as Ex. Ka. 2. With utmost regard to Hon'ble Mr. Justice Aftab Alam, this Court in its humble opinion also agrees with the view taken by Hon'ble Mrs. Justice Ranjana Desia in the case of Ritesh Sinha vs. State of U.P. (Supra).

Case Law discussed:
S.L.P. (Crl.)No. 7259 of 2010; 2010 (7) SCC 263.

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

1. This application under Section 482 Cr.P.C. has been filed for quashing the order dated 7.1.2015 purporting to have been passed by the Special Judge Fatehgarh in S.S.T. No. 140 of 2007 under Sections 364-A, 302, 201 I.P.C., police station Kotwali Fatehgarh (State vs. Amit Katheria & others) and the learned Special Judge be directed that the accused persons arrayed as O.P. Nos. 2 to 8 be sent by the police of police station Kotwali Fatehgarh for taking their voice sample for voice testing to the headquarter of either of the 5 laboratories and get the voice of the accused persons compared with the voice recorded in the C.D. which is the part of record of the aforesaid case.

2. Brief facts of the case are that an F.I.R. was lodged by the applicant, who is the first informant of the case on 23.4.2007 which was registered as Case Crime No. 467 of 2007 at police station Fatehgarh, district Farrukhabad for offence under Sections 364-A/302, 201 I.P.C. alleging that on 11.4.2007 her son, namely, Madhusudan was kidnapped by accused Happy @ Shivam @ Harsh along with 7 other associates for ransom. The applicant had initially lodged a missing report of her son at the police station Kotwali Fatehgarh which was initially endorsed in the G.D. of the said police station on 23.4.2007. On 6.5.2007, the dead body of her son Madhusudan was dug out at the pointing out of the accused persons which was buried in about 4-5 feet deep in the ground and his shirt, belt & spectacles were kept in a gunny bag buried under mud. The said recovery was made from the jungles of village Chauspur, police station Kamalganj, District Farrukhabad. It is alleged that the main architect of the crime is accused Happy @ Shivam @ Harsh, who was also a resident of Fatehgarh city. He had taken admission in B.A. (Part-I) in Venkateshwar College of Delhi University and within a short span of time, he developed friendly terms with the applicant's son. It is stated that on 22.4.2007, the applicant received a telephonic call which was later on traced to have been made from Pandu Nagar, New Delhi asking the applicant to pay a sum of Rs. 10 lacs for the release of her son. The applicant expressed her inability to arrange the said amount within the short period which was required to pay for the release of her son. On receiving the said information, the Superintendent of Police Fatehgarh after obtaining approval from the Inspector General of Police, Kanpur Zone, Kanpur started making electronic surveillance of the applicant's mobile number and got taped the calls which were received at her number.

3. On 25th and 28th April, 2007 other calls were received at applicant's Cell No. 98399710406 which was made from Kanpur city whereby the demand of the ransom towards the release of her son was again made. Thereafter another call was received by the applicant traced to be made from Kanpur on 30.4.2007 by telephone number 915126992864 reiterating the demand of ransom. The taping of these calls have also been made by the police and the Superintendent of police Fatehgarh constituted a team of 5 police officers as "Special Operation Group" for laying trap for arresting the accused persons. On 1.5.2007 in about 6 calls were made at the applicant's mobile No. 9839710406 making the demand of ransom. A few of such calls were even heard by Additional Superintendent of police Fetehgarh, who was keeping surveillance upon the calls. The mobile nos. and basic telephone nos whereby the calls were made at applicant's mobile were as follows:-

	Telehpone No.	Time
1.	91-9236390816	10:10 hrs.
2.	91-512-6992909	10:43 hrs.
3.	91-512-3018529	19:27 hrs.
4.	91-512-2306951	21:11 hrs.
5.	91-9935292501	21:34 hrs.

4. One of the calls which was received by the applicant at about 3:30 p.m. on 1.5.2007, and the money was demanded to be paid on that day at Khakar Katti, Bus Station, Kanpur City. The applicant had told the person making the call that she is not in such physical position as to undertake journey upto Kanpur. Whereupon the caller told that the money can be sent through some other person of confidence and the applicant was further asked to handover her mobile to that person so that his identity could be ascertained.

5. In the meanwhile accused Happy @ Shivam @ Harsh was arrested and was remanded to custody on 1.5.2007. The police made efforts that this information may not leak out. Thus the team of S.O.G. headed by S.I. Mahendra Singh Yadav took steps to nab the other members of the gang of aforesaid accused. The police of Kanpur City was accordingly contacted by the S.O.G. and they proceeded for the place wherefrom the ransom money was demanded & it was required to be paid to the person demanding the money.

6. One person, namely, Rakesh Katiyar, who had seen the accused persons accompanying the kidnapee on the date of incident, was given the applicant's mobile, who could talk with the persons, who were making call demanding the ransom. He had received calls at 7:27 p.m. & 9:11 p.m. inquiring as to how much distance was left to be covered from arriving at Kanpur. The place of avenue of paying the money was meanwhile changed by the accused persons. They asked Rakesh Katiyar to come at Platform No. 7 of Kanpur Central Railway Station. The bag containing the money was asked to be kept on the upper berth adjoining the last gate of general compartment behind the last sleeper coach of Pushpak Express leaving for Mumbai. The person with money Rakesh Katiyar boarded the train at Anwarganj railway station. Two persons of S.O.G. in plain clothes accompanied Rakesh Katiyar and the other had directly gone to platform No. 7 but the trap had failed as the accused persons did not turn up to collect the money.

7. On the next date, i.e., 2.5.2007, the applicant had met the Superintendent

of Police, Farrukhabad, who revealed that one police constable, namely, Shyam Babu Kanaujia, who is member of Scheduled Caste to which Caste the accused Happy @ Shivam @ Harsh belonged and was posted in the Confidential Section of his Office located at his residence had leaked the message of trap. At the said instance, the applicant realize that how deep the links and influences of accused Happy @ Shivam @ Harsh or the members of his family had been with the few police personnel of Farrukhabad.

8. The police submitted charge-sheet on 12.5.2007 in the Court of Special Judge (D.A.A.) Fatehgarh, who took cognizance on 17.5.2007 and the trial was numbered as S.S.T. No. 40 of 2007 under Section 364-A, 302/201 I.P.C.

9. Call-detail- records prepared by the investigating agency have been made the part of the record. As such in the order dated 13.9.2013 has been recorded upon the order-sheet of this case, i.e., S.S.T. No. 140 of 2007 requiring the copies to be furnished to all the accused persons on 19.10.2013.

10. It appears that the applicant approached the Apex Court for redressal of her grievances by filing S.L.P. (Crl.) No. 7599-7600 of 2008 which was connected with S.L.P. (Crl.) No. 7862 of 2008 & S.L.P. (Crl.) No. 1590 of 2009 (Leena Katiyar vs. State of U.P.) whereby the Apex Court on 3.5.2010 allowed her to raise all the issues which may be available to her before the trial court in accordance with law. The applicant also filed S.LP. (Crl.) No. 2670 of 2010 Leena Katiyar vs. Narendra Kumar Khanna which was disposed of by the Apex Court 23.3.2012 observing that the trial court may conclude the trial as early as possible preferably within a period of nine months. It further appears from the record that accused Happy @ Shivam @ Harsh took plea of juvenile before the Principal Judge, Juvenile Justice Board, Farrukhabad. It further transpires from the record that on 23.8.2013, accused Happy @ Shivam @ Harsh was declared juvenile and the applicant being aggrieved by the said order had filed a crl. revision before this Court being numbered as Crl. Revision No. 2490 of 2013 Leena Katiyar vs. State of U.P. which is still pending.

11. The applicant being so much disturbed on accused Happy @ Shivam @ Harsh being declared juvenile by the Court under the Juvenile Justice (Care and Protection of Children) Rules, 2007 which came into effect on 26.10.2007, challenged the validity Act of 2000 in C.M.W.P. No. 60458 of 2013 Smt. Leena Katiyar vs. Union of India & others in which this Court has issued notices to the Central Government as well as State Government vide order dated 31.10.2013 for filing counter affidavit but till date no counter affidavit has been filed and the matter is still sub judice before this Court. It appears from the record that the trial of accused Happy @ Shivam @ Harsh and accused Arif has been separated from the remaining accused persons, who are facing trial. The trial court could not decide the case within the aforesaid time frame work, hence it sought for extension of further time for deciding the case and the Apex Court on 1.8.2014 extended further three months.

12. It appears that the trial is in progress and the evidence of 24 witnesses have been recorded by the trial court.

13. The trial court on 8.10.2014 passed an order that the voice samples of six accused persons, who are facing trial before it should be taken for examination with the audio CD Ex. Ka. 2 to fix their identity in the crime and further directed the prosecution to take necessary steps for the same.

14. A letter from the Deputy Director of Government Science Laboratory, Lucknow dated 18.10.2014 was received in the Court of Special Judge that the facility of voice testing is not available in the laboratory in the State of U.P. and had given the details of five laboratories of the Central Government from where the voice testing could be made. The Special Judge directed the D.G.C. (Crl.) to get the voice sample of accused and tested by taking necessary steps on which the A.D.G.C. (Crl.) on 11.11.2014 wrote a letter to the District Magistrate Farrukhabad for getting the voice sample recorded and further letters were also sent to the C.O. City Fatehgarh as well as Inspector-in Charge of police station Fatehgarh requesting them for getting the voice sample of the accused and tested with the voice recorded in audio C.D. Ex. Ka. 2. The Police officials on 3rd and 6th January, 2015 after making detailed enquiry sent letters to the A.D.G.C (Crl.) and further enclosing the letter of Dy. Director of Govt. Forensic Science Laboratory dated 18.10.2014 (annexure-7-A to the application) stating that no facility of testing voice sample is available in district Farrukhabad on which an application was moved by the prosecution on 7.1.2015 before the trial court which passed an order that there appears no reason to grant any further time for getting the voice sample and tested but to proceed with the trial. Being aggrieved by the said order, the applicant has filed the instant 482 Cr.P.C. application for quashing of the impugned order dated 7.1.2015 passed by the Special Judge/trial court.

15. Heard Sri Prem Prakash Yadav holding brief of Smt. Akansha Yadav, learned counsel for the applicant, Sri Narendra Kumar Singh, learned counsel for the opposite party no. 3 and Sri U.P. Singh, learned brief holder for the State.

16. Learned counsel for the applicant submits that looking to the nature of the case and the crime committed by the accused persons, the trial court vide order dated 8.10.2014 has directed the prosecution to get the voice sample of the accused persons tested. When the prosecuting agencies have reported the matter that they have no facility in the district for getting the voice sample tested and there is no laboratory in the State of U.P. for the said purpose, the trial court without making its own effort for getting the same tested has passed the impugned order and observed that as the voice sample cannot be tested and there is no such facility in the State of U.P. for the same, no further time is required to be given to the prosecution and it proceeded with the trial. He further argued that when the prosecution agency has failed to get the voice sample tested it was the duty of the trial court under Section 311 Cr.P.C. and Section 165 of the Evidence Act to take steps itself for getting the voice sample of the accused be taken and be tested with the recorded audio C.D. Ex. Ka. 2. It was argued that the impugned order passed by the trial court on 7.1.2015 amounts to review its earlier order dated 8.10.2014 by which it has directed for taking of the voice sample of accused

Amit Sahu, Narendra Kumar, Sumit Kumar, Amit Kumar, Sajeb and Mujahid Hussain and get it tested with the audio C.D. Ex. Ka.2 from Vidhi Vigyan Prayogshala Lucknow which also amounts to recalling of the said order which has become final and is barred by Section 362 Cr.P.C., hence the same is illegal and without jurisdiction and is liable to be quashed by this Court. He further urged that the order of the Apex Court dated 23.3.2012 expediting the trial in no way had taken away the right of the applicant by which the Apex Court vide order dated 3.5.2010 allowed the applicant to raise all the issues which may be available to her before the trial court in accordance with law. Hence he prayed that the accused be summoned for taking of voice sample and be sent for testing by the trial court to fix their identity in the crime to any one of the five laboratories in the country as mentioned in the letter of the Dy. Director of Vidhi Vigyan Prayogshala Lucknow.

17. Per contra, counsel for accused-opposite party no.3 has vehemently opposed the prayer for quashing of the impugned order and has refuted the arguments advanced by learned counsel for the applicant. He has pointed out that after passing of the order dated 8.10.2014, the trial court on 31.10.2014 again passed an order directing the prosecution to take the voice sample within 15 days and sent it to the concerned laboratory for its testing and submit a report of the concerned laboratory within four months from the date of said order which is also not disputed by the learned counsel for the applicant. The said order has not been filed by learned counsel for the applicant along with the present application but a photocopy of the same has been filed by learned counsel for the opposite party no.2 which it taken on record. He further argued that as sufficient opportunity has been given to the prosecution for taking the voice sample of accused and be tested by the trial court and when the prosecution failed to get the voice recorded in the audio C.D. Ex. Ka. 2 tested, the trial court was right in not granting any further indulgence to the prosecuting agency for the said test as the trial is being delayed and there is also an order of the Apex Court which was passed on the application of the applicant for concluding the trial of the present case within nine months. Moreover, the evidence of 24 witnesses have been recorded by the trial court and the applicant is lingering on the trial. He further argued that there is no provision in the Cr.P.C. for getting the voice sample of the accused be taken and tested, hence the application moved by the applicant for the said purpose is against law, hence the present application lacks merit and it should be dismissed. In support of contention he has placed reliance on the judgment of the Apex Court in the Case of Ritesh Sinha vs. State of U.P. in Criminal Appeal No. 2003 of 2012 arising out of S.L.P. (Crl.) No. 7259 of 2010.

18. Learned A.G.A. tried to justify the impugned order passed by the trial court but could not dispute the fact that the trial court has twice pass orders for testing of voice sample of the accused persons with the audio C.D. Ex. Ka. 2.

19. After having considered the submissions advanced by learned counsel for the parties and perusing the record, it is evident that the trial court taking into account the nature of offence committed by the accused in its wisdom had initially

ordered on 8.10.2014 and 31.10.2014 directing the prosecuting agency to get the voice sample of the accused be taken and be tested with the audio C.D. Ex. Ka. 2 from the authorized laboratory but when the prosecution as well as the State agencies reported that there was no such facility available in the State of U.P. for getting the voice recorded in the said audio C.D. Ex. Ka. 2 tested then the trial court passed the impugned order on 7.1.2015 dropping the idea for taking the voice sample of the accused and tested and started to proceed with the trial.

20. In this context two important questions of law were formulated by the Apex Court in the Case of Ritesh Sinha vs. State of U.P. (Supra):-

(I) Whether Article 20 (3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?

(II) Assuming that there is no violation of Article 20 (3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?

21. On the above two questions of law which are to be adjudicated by the Court there appears to be different views of the High Courts of the country and further the said issues also came up before the Apex Court in the Case of Ritesh Sinha vs. State of U.P (supra). which has been preferred against one of the judgment of this Court. The said S.L.P. was filed and the matter was came up before the Bench of Hon'ble Mrs. Justice Ranjana Prakash Desai and Hon'ble Mr. Justice Aftab Alam and their lordships after examining the various judgments of the High Courts and of the Apex Court had same view with respect to first question framed by them with respect to Article 20 (3) Cr.P.C. is that taking of voice sample of an accused by the police during investigation is not hit by Article 20 (3) Cr.P.C. of the Constitution which was followed by the Apex Court in a recent decision in the case of Selvi and others vs. State of Karnataka 2010 (7) SCC 263 but so far as the second question is concerned their Lordships differed with each other and they had given their reasons for their views.

22. The view taken by Hon'ble Mrs. Justice Ranjana Prakash Desai is quoted hereinbelow:-

"In the facts of this case, I am not inclined to give a narrow construction to the provisions of the Prisoners Act and Section 53 of the Code. Judicial note can be taken of the fact that there is a great deal of technological advance in means of communication. Criminals are using new methodology in committing crimes. Use of landlines, mobile phones and voice over internet protocol (VoIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. Therefore, in order to strengthen the hands of investigating agencies, I am inclined to give purposive interpretation to the provisions of the Prisoners Act and Section 53 of the Code instead of giving a narrow interpretation to them. I, however, feel that Parliament needs to bring in more clarity and precision by amending

the Prisoners Act. The Code also needs to be suitably amended. Crime has changed its face. There are new challenges faced by the investigating agency. It is necessary to note that many local amendments have been made in the Prisoners Act by several States. Technological and scientific advance in the investigative process could be more effectively used if required amendments are introduced by Parliament. This is necessary to strike a balance between the needs to preserve the right against self incrimination guaranteed under Article 20 (3) of the Constitution and the need to strengthen the hands of the investigating agency to bring criminals to book.

In the view that I have taken, I find no infirmity in the impugned order passed by the High Court confirming the order passed by learned Chief Judicial Magistrate, Saharanpur summoning the appellant to the court for recording the sample of his voice. The appeal is dismissed."

23. The view taken by Hon'ble Mr. Justice Aftab Alam is as follows:-

"5. As regards the first question, relying primarily on the eleven (11) Judges' Bench decision of this Court in State of Bombay vs. Kathi Kalu Oghad & others which was followed in the more recent decision in Selvi and others vs. State of Karnataka she held that taking voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution.

6. I am broadly in agreement with the view taken by her on Article 20 (3) but, since I differ with her on the second question, I think the issue of constitutional validity in compelling the accused to give his/her voiced sample does not really arise in this case.

16. I am completely unable to see how Explanation (a) to Section 53 can be said to include voice sample and to my mind the ratio of the decision in Selvi does not enlarge but restricts the ambit of the expressions 'such other tests' occurring in the Explanation.

42. Should the Court still insist that voice sample is included in the definition of "measurement" under the identification of Prisoners Act and in the Explanation to Section 53 of the Code of Criminal Procedure? I would answer in the negative.

43. In light of the above discussion, I respectfully differ from the judgment proposed by my sister Desai, J. I would allow the appeal and set aside the order passed by the Magistrate and affirmed by the High Court.

44.Let copies of this judgment be sent to the Union Law Minister and the Attorney General and their attention be drawn to the issue involved in the case.

45, In view of the difference of opinion between us, let this case be listed for hearing before a Bench of three Judges after obtaining the necessary direction from Honourable the Chief Justice of India.

24. It is noteworthy that in the case of Ritesh Sinha vs. State of U.P. (Supra), the question before the Apex Court was whether the Magistrate can summon and direct the accused during the course of investigation for giving his or her voice sample on an application made by police officers before him and in the said matter there was difference of opinion between two Hon'ble Judges of the Apex Court as is apparent from the preceding paragraphs, the matter has been referred

for hearing before a Bench of three Judges after obtaining the necessary direction from Hon'ble The Chief Justice of India and the matter is still sub judice before the Apex Court.

25. In the instant case the position appears to be altogether different as the accused opposite parties are facing trial before the trial court and an application was moved on behalf of the applicant/complainant for taking their voice sample and be sent for being compared with the recorded voice in the audio C.D. which has been obtained during the course of investigation and has been marked as Ex. Ka. 2 either by any of the five laboratories of the country mentioned by the Dy. Director of Vidhi Vigyan Prayogshala Lucknow. On the said application, the accused persons filed their objection and were heard by the trial court which ordered for taking of voice sample by the prosecuting agency and be sent to the Vidhi Vigyan Prayogshala Lucknow for being compared with the voice recorded in the audio C.D. vide order dated 8.10.2014 and by another order dated 31.10.2014 respectively but the prosecuting agency has showed its inability to get the voice test done because of the lack of facility either in the district or in the State of U.P., hence the trial court passed by the impugned dated 7.1.2015 dropping the idea of taking of voice sample of the accused persons and be tested with the audio C.D. Ex. Ka. 2 and further there is an order of the Apex Court to conclude the trial within nine months which was passed on the application filed by the applicant.

26. So far as first question framed above it is now a well settled law as has been held in the case of Ritesh Sinha vs. State of U.P. (Supra) that taking of voice sample of an accused by the police during investigation is not hit by Article 20 (3) of the Constitution.

27. So far as the contention of the accused opposite party no.3 that there is no provision in the Code for directing the accused to give his voice sample for being tested with the voice recorded in the audio C.D. Ex. Ka. 2 by the trial court is against law, hence the trial court cannot order for taking of the voice sample of the accused and the said view was also taken by one of the Hon'ble Judge of the Apex Court in the case of Ritesh Sinha (Supra) with respect to the second question of law formulated in the case of Ritesh Sinha (Supra) by the Apex Court has to be considered by this Court.

28. Learned counsel for the applicant has vehemently refuted the said argument of learned counsel for accused-opposite party no. 3 and argued that once the trial court has formed an opinion for getting the voice sample of the accused and be compared with the recorded audio C.D. Ex. Ka. 2 and it passed orders twice to that effect, i.e., on 8.10.2014 and 31.10.2014 respectively taking into account the nature of offence and the evidence collected during the course of investigation against the accused persons and in order to determine their complicity in the crime, the trial court had committed error in passing the impugned order rejecting the recording of voice sample of the accused for being sent to examination simply because the prosecuting agency has reported that there is no such facility in the district or in the State of U.P. for the same. He submitted that the impugned order passed by the trial court is barred by Section 362 Cr.P.C. He further submitted

that in view of Section 165 of the Evidence Act, the trial court has powers to pass orders for getting the voice sample of the accused recorded and be sent for testing with the recorded audio C.D. Ex. Ka. 2.

29. The question as to whether the trial court can order for taking the voice sample of accused, who are facing trial for being compared to the voice recorded in the audio C.D. Ex. Ka. 2 during investigation. Section 165 of the Evidence Act becomes relevant to be considered in this context which reads as follows:-

Section 165. Judge's power to put questions or order production.--The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved: Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the questions were asked or the documents were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

30. Taking into account the powers of trial Judge as has been laid down in Section 165 of the Evidence Act, it is clear that the trial Judge is well within its jurisdiction in order to discover or to obtain proper proof of relevant facts call upon the accused persons to give their voice sample in the Court in order to determine their involvement in the crime and also to arrive a just decision of the case. It will be relevant to mention here that the accused is not being asked by the trial court about any fact which within his knowledge and if he compel to answer the same prejudice would be caused to him. In other words, the accused is not being asked by the trial court to be a witness against himself. In my opinion the voice sample is physical non-testimonial evidence, hence taking of voice sample cannot be held to be conceptually different from physical non testimonial evidence like DNA, semen, sputum, hair, blood, finger nails etc. Taking of voice sample does not involve any testimonial responses. In this regard Section 65-B of the Evidence Act is relevant which is quoted hereinbelow:-

"Section 65B Admissibility of electronic records:-

(1)Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be

admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: -

(a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;

(b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) 'throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether--

(a) by a combination of computers operating over that period; or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period; or

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in the section to a computer shall be construed accordingly.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,- -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c)dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a mailer to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,-

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation.-For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.]"

31. Thus, from the above, it is clear that the voice recorded in the audio C.D. Ex. Ka. 2 is admissible under Section 65-B of the Evidence Act, hence if the said evidence is to be proved by the prosecution then taking of voice sample of the accused by the trial court becomes essential to arrive at just decision of a case otherwise the said audio C.D. in which there is recording of conversation between the accused and applicant regarding demand of ransom of money for release of abductee/kidnapee would be a futile effort by the police to ascertain the complicity of the accused, hence the trial court was right in ordering to take voice sample of the accused persons. Hence, it appears from Section 165 of the Evidence Act that the trial Judge is empowered to order for taking of voice sample of accused for being compared to the recorded voice in audio C.D. Ex. Ka. 2 to ascertain the complicity of the accused persons in the present crime and once the trial court has ordered for the same it was not correct in dropping the idea for getting voice sample of the accused be taken and send for testing simply because of lack of facility in the district as well as in the State for getting the voice sample tested, hence the impugned order passed by the trial court is not sustainable in the eyes of law. Thus, the impugned order dated 7.1.2015 passed by the trial court is illegal and the orders dated 8.10.2014 and 31.10.2014 directing for taking of voice sample of accused persons was correct.

32. The Court cannot loose sight of the fact which appears from the facts and circumstances of the case that a school going boy was kidnapped and murdered for ransom of Rs. 10 lacs by the accused persons and continuous demand of ransom was made on the mobile phone of the applicant, who is mother of the deceased and was working woman posted as Manager (RBB) Allahabad Bank Barhpur Branch Farrukhabad and her husband being employed as Class-I Officer at New Delhi and the deceased was living along with his grand mother in the city of Farrukhabad when the incident has taken place.

33. These days the manner in which the crime is being committed by the accused persons by adopting high materialized techniques and there is a great deal of technological advanced in means of communication and criminals

are using new methodology in committing crimes. Use of landlines, mobile phone and voice over internet protocol (VOIP) in the commission of crimes like kidnapping for ransom, extortion, blackmail and for terrorist activities is rampant. The present case also falls in one of the such categories of crimes which has been committed by adopting advance means of communication and to ascertain the complicity of the accused persons in the crime and to do justice it is essential that the voice sample of the accused persons should be taken by the trial court and be sent for testing to the authorized laboratory with the recorded voice in audio C.D. by the police which is marked as Ex. Ka. 2. With utmost regard to Hon'ble Mr. Justice Aftab Alam, this Court in its humble opinion also agrees with the view taken by Hon'ble Mrs. Justice Ranjana Desia in the case of Ritesh Sinha vs. State of U.P. (Supra).

34. In view of the forgoing discussion, the impugned order dated 7.1.2015 passed by the trial court is hereby set aside and the trial court is directed to summon the accused persons facing trial before it for taking their voice sample within two week from the date of production of a certified copy of this order and send the same to be compared with the recorded voice in audio C.D. marked as Ex. Ka. 2 to one of the authorized laboratory which has been stated by the Deputy Director Forensic Science Laboratory U.P. dated 18th October, 2014, namely, 1. Kendriya Nyayalik Vigyan Prayogshala, Sector 36-A, plot-2, Dakshin Marg, Chandigarh. 2. Kendriya Nyayalik Vigyan Prayogshala, (C.B.I) CGO Complex, Lodhi Road, New Delhi, 3. Vidhi Vigyan Prayogshala, Delhi Rajya Madhuban Chowk, Rohini, New Delhi, 4. Police Vidhi Vigyan Prayogshala Jaipur Rajasthan and 5. Police Vidhi Vigyan Prayogshala Gujrat Rajya, Police Bhawan, Gandhi Nagar, Gujrat in order to ascertain the involvement of the accused persons in the present crime which also appears to be essential for arriving at a just decision of the case.

35. The trial court shall send the voice sample of the accused along with the recorded voice in the audio C.D. marked as Ex. Ka. 2 to the Chief Secretary of the State of U.P. through District Magistrate Farrukhabad for being tested and the Chief Secretary of the State of U.P. within two months from the date of receiving of the said order from the trial court concerned shall seek a report within three months from either of the two laboratories situated at Delhi or any other laboratory in the country as mentioned above.

36. This Court hopes and trust that the Director of the laboratory where the said sample is sent by the Chief Secretary of State of U.P. shall make all endeavour for submitting its report to the Chief Secretary of the State of U.P. within three months thereafter for being forwarded to the trial court concerned as the incident is dated 11.4.2007 and more than 7 years have already elapsed and the applicant, who is the mother of the deceased is running to the Court of law for seeking justice.

37. Looking to the crimes which are committed in the State by such technological advance means of communication and was, the Court also directs the Chief Secretary of the State of U.P. to make all endeavour for making arrangement for the voice sample tested in the laboratory in the State of U.P. and it shall also send a report regarding the steps

taken by him in this respect to the Registrar General of this Court for being placed before me within three months from the date of receipt of a certified copy of this Court.

38. The Registrar General of this Court is directed to send a copy of this order to the Chief Secretary of State of U.P. and to the concerned trial court for information and its compliance forthwith.

39. The present 482 Cr.P.C. application stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2015

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Civil Misc. Writ Petition No. 563 of 2015

M/s Gaur Arunima Impex Int. Pvt. Ltd., New Delhi ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan, Sri Atul Mehra

Counsel for the Respondents:
C.S.C., Sri A.P. Srivastava

Constitution of India, Art.-226- Cancellation of higher bid-petitioner committed default in payment of installments for about 7 years-only reasons disclosed pendency of civil suit-as well as interim order passed by High Court-plots in question not free from all encumbrances held-misconceived if so petitioner could have withdraw his claim of hither bid, or to got stay vacated-but once choose to press claim of higher bid-on default-cancellation-held proper-petition dismissed.

Held: Para-11, 12 and 13

11. If the petitioner was aggrieved in any manner with the non-information of the injunction, which was granted in the matter of delivery of possession and therefore, mislead in offering the highest bid, which had been approved, the proper course available to the petitioner was to have withdrawn his bid on the plea of ground of wrong information about the status of the plots. But he has chosen not to do so. On the contrary he wanted to stic to his offer, he only desired waving of the penal interest as is reflected from the prayer clause in Complaint Case No. 327 of 2013 (Supra). In this petition also there is no such prayer.

12. The other course open to him was to make an application in the pending writ petition and to have got the interim order vacated. Mere pendency of the writ petition no. 887 of 2008 cannot be the cause for non-deposit of the balance bid amount as per its offer.

13. We may record that terms of the contract entered into between the petitioner and the Housing and Development Board, as per highest bid accepted were binding and did not stand diluted because of pendency of writ petition filed by Sukhbir Singh referred to above in any manner. The liability of the petitioner to deposit the money in terms of the bid offered by him and in accordance with the terms agreed upon at the time of auction, could not have been avoided in the garb of pendency of the writ petition filed by a third party.

Case Law discussed:
AIR 1989 SC 1076; AIR 1977 SC 1496; AIR 1980 SC 738; AIR 1981 SC 1368; (2006) 8 SCC 647.

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

1. Heard Sri W.H. Khan, learned Senior Advocate assisted by Sri Atul Mehra, learned counsel for the petitioner, Sri A.P. Srivastava, learned counsel for

respondent-U.P. Housing And Development Board and learned Standing Counsel for the State-respondents.

2. U.P. Housing and Development Board published an advertisement on 3rd July, 2008 for sale of four plots under the category, institutional land demarcated for office only.

3. Petitioner, before this Court, took part in the auctions, which were held on 15th July, 2008 and offered the highest bid for plot no.14/I.N.S./Office-3 on 45 meter Road,measuring 1584.52 square meters. Bid offered by the petitioner was approved and allotment of the plot was made in his favour under letter dated 12th August, 22008 for total price of Rs. 10,78,26,586/-. Petitioner deposited only 10% of the bid money. No installments were deposited thereafter for the reason that three plots situated over Khasara No. 433/2, Village Prahlad Garhi were submit matter of suit proceedings bearing Original Suit No. 327 of 2003 instituted by one Sukhbir Singh along with others against Utter Pradesh Housing & Development Board. According to the petitioner, he was mislead by the Housing and Development Board, while assuring in the advertisement that the land was free from all encumbrances. It was brought to the notice of the petitioner that Sukhbir Singh had filed a writ petition before the High Court being Writ Petition No. 887 of 2008 (Under Article 227 of the Constitution of India (Sukhbir Singh & Others vs. Additional District Judge & Others) in the matter of grant of temporary injunction in the pending suit. The High Court had passed an order dated 18th September, 2008 to the following effect:

"As interim measure, the respondents are restrained from making any auction in pursuance of advertisement dated 1.8.2008, contained in Annexure-II of the writ petition, so far as it pertains to the plot of petitioners. They are also restrained from making delivery of possession to any third party, if at all auction has been held in respect of the plot of the petitioners."

4. From the records, it is apparent that a notice dated 16th November, 2012 was issued to the petitioner demanding balance consideration of Rs. 10,29,26,586/- along with interest to the tune of Rs. 4,47,99,572/-. Petitioner instead of depositing the money in response to the notice so issued, approached the National Consumer Disputes Redressal Commission, New Delhi by means of Consumer Complaint No. 327 of 2013 and the reliefs prayed for in the said complaint case read as follows:

"a. Set aside the impugned demand of interest of Rs. 4,47,99,572/- out of the total demand of Rs. 14,77,26,158, as mentioned in notice dated 16.11.2012 and further allow the complainant to deposit the balance sale consideration of Rs. 10,29,26,586/- pursuant to schedule of time prescribed in the letter of allotment dated 12.08.2008, with an undertaking that no matter whatsoever is sub-judice before any Court of law with regard to the plot in question and plot in question is free from all charges/encumbrances.

b. Award compensation/damages on account of escalation in the rates of material/labour after holding an enquiry as required under Order XX of Code of Civil Procedure.

c. Award compensation of Rs. 2.00 lacs on account of mental harassment.

d. Pass an interim order directing the respondent not to cancel and further

allot, sale, create, mark any third party interest in the aforesaid plot.

e. Pass such and further order(s) as this Hon'ble Court may deem fit in the present facts and circumstances."

5. The complaint case came to be rejected by the National Consumer Disputes Redressal Commission vide order dated 11th November, 2013 on the ground that petitioner does not answer the description of "consumer". Petitioner thereafter filed a writ petition before the Delhi High Court being Writ Petition (C) 1891 of 2014, which has been got dismissed vide order dated 26th March, 2014 with liberty to approach the Court having territorial jurisdiction in the matter. Therefore, the petitioner has approached this Court by means of the present writ petition with following reliefs:

"i. to call for the records and issue a writ, order or direction in the nature of certiorari to quash the allotment letter dated 21.10.2014 issued in favour of respondent no.4 (Annexure no. 23 to the writ petition);

ii. to call for the records and issue a writ, order or direction in the nature of certiorari to quash the order dated 17.12.2013 as stated in the letter dated 1.1.2015 (Annexure no. 20 to the writ petition) and the respondents be directed to bring on record the order dated 17.12.2013 before the Hon'ble court;

iii. to issue a writ, order or direction in the nature of mandamus directing the respondents not to demand the balance amount, interest and penal amount till the dispute inter-se between Sukhvir Singh and other and Uttar Pradesh Awas Evam Vikas Parishad, is resolved;

iv. to issue any such other and further writ, order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case; and

v. to award the cost of the petition in faour of the petitioner."

6. We may first deal with the prayer made by the petitioner for quashing of the order dated 17th December, 2013, as has been noticed in the letter dated 1st January, 2015 enclosed as Annexure-20 to the present writ petition.

7. It is apparent that after offering the highest bid as noticed herein above and after depositing only 10% of the bid money in pursuance thereof in the year 2008, for the last 7 years, petitioner has not deposited even a single penny with the respondent-Housing and Development Board in garb of pendency of the writ petition filed by Sukhbir Singh detailed above and the interim order passed therein.

8. It is admitted on record that the petitioner did not make any attempt to deposit the installments in accordance with the agreed terms and even today, there is no offer to deposit the money with interest as demanded.

9. What has been contended before this Court is that since the land was encumbered, the respondent-Housing and Development Board could not have put the same for auction and therefore, the petitioner is justified in not depositing the money in terms of the bid offered, in the alternative, demand of penal interest is unjustified. According to the petitioner, since under the order of the High Court, delivery of possession was stayed, it was

advised not to deposit the balance amount of the bid.

10. We may record that in the order of the High Court dated 18th September, 2008 itself, it has been noticed that the property has already been put to auction and the matter has been finalized.

11. If the petitioner was aggrieved in any manner with the non-information of the injunction, which was granted in the matter of delivery of possession and therefore, mislead in offering the highest bid, which had been approved, the proper course available to the petitioner was to have withdrawn his bid on the plea of ground of wrong information about the status of the plots. But he has chosen not to do so. On the contrary he wanted to stic to his offer, he only desired waving of the penal interest as is reflected from the prayer clause in Complaint Case No. 327 of 2013 (Supra). In this petition also there is no such prayer.

12. The other course open to him was to make an application in the pending writ petition and to have got the interim order vacated. Mere pendency of the writ petition no. 887 of 2008 cannot be the cause for non-deposit of the balance bid amount as per its offer.

13. We may record that terms of the contract entered into between the petitioner and the Housing and Development Board, as per highest bid accepted were binding and did not stand diluted because of pendency of writ petition filed by Sukhbir Singh referred to above in any manner. The liability of the petitioner to deposit the money in terms of the bid offered by him and in accordance with the terms agreed upon at the time of auction, could not have been avoided in the garb of pendency of the writ petition filed by a third party.

14. The Apex Court has repeatedly held that writ proceedings under Article 226 of the Constitution of India cannot be resorted to for the purposes of avoiding contractual obligations (Ref. Bareilly Development Authority & anr Vs. Ajay Pal Singh & ors, AIR 1989 SC 1076. M/s. Radha Krishna Agarwal & ors Vs. State of Bihar & ors, AIR 1977 SC 1496; Premji Bhai Parmar & ors Vs. Delhi Development Authority & ors, AIR 1980 SC 738; and The Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., AIR 1981 SC 1368.).

15. We are of the considered opinion that in the facts of the case the petitioner has committed default in payment of the installments in violation to the terms agreed upon between the parties. The respondent-Housing and Development Board is justified in cancelling the acceptance of the bid of the petitioner and in forfeiting the earnest money which it had so deposited.

16. Since only one view is possible on the admitted facts, issue of opportunity of hearing having not been afforded to the petitioner is not of much relevance. The Apex Court in the case of In Punjab National Bank and others. Vs. Manjeet Singh and another (2006) 8 SCC 647, has opined as follows:-

"The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The Court will not insist on compliance with the principles on natural justice in view of the situation

where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principles of natural justice".

17. Once the Court comes to the conclusion that the petitioner has lost his rights in the matter of allotment of the plot in question because of the canellation of the same, subsequent auction of the plot in favour of third person cannot be objected to by the petitioner on the ground that there is an interim order in the matter of delivery of possession in respect of the plot in question, inasmuch as that would be an issue between the person, who has filed the said writ petition before the High Court referred to above, and the respondent Housing and Development Board and the subsequent allottee.

18. Learned counsel for the petitioner then contended that in respect of an other person, who had been allotted the land similarly situate, respondent-Housing and Development Board has taken a decision to refund the earnest money even after they had committed default in payment of the installments as agreed upon at the time of auction.

19. If such is the situation, the petitioner is at liberty to make an application before respondent no.3, which shall be dealt with in the same manner as it has been dealt with in respect of other person similarly situate if any.

20. With the aforesaid observations, the present writ petition is disposed of.

APPELLATE JURISDICTION

CIVIL SIDE
DATED: LUCKNOW 03.12.2014

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ARVIND KUMAR TRIPATHI (II), J.

Special Appeal No. 723 of 2014

Smt. Jhamania 3634(S/S01991) Appellant
Versus
Chief Accounts Examination Officer Cooperative & Anr. .Respondents

Counsel for the Appellant:
Shree Prakash Singh

Counsel for the Respondents:
C.S.C.

High Court Rule-Chapter VIII Rule 5-
Appeal against judgment-refusing to condone delay-in restoration application-petitioner being aged about 59 years continued in service without being aware of the fact of dismissal of writ petition in default-petitioner being class 4th employee-cause found sufficient-delay condoned-dismissal without notice opportunity-held-principle of natural justice violated.

Held: Para-7 & 11
7. As indicated above, the matter is very old and is of the year 1991. The appellant is a lady, who has continued in service as a class-IV employee. In our considered opinion, the dispensation of her service, at the fag end of her career, would be a travesty of justice and would also be inequitable. The explanation given by the appellant in support of the delay condonation for restoring the matter appears to be bona fide inasmuch as she was getting salary till September, 2014. This explanation does not appear to have been appropriately considered by the learned single Judge while proceeding to reject the restoration application. We, therefore, find sufficient grounds that were available and were

justified for restoring the case after condoning the delay.

11. The order of dispensation and cancellation of appointment of the petitioner does not appear to have been passed after giving any notice or opportunity to the appellant. The same is clearly in violation of the principles of natural justice and, therefore, violative of Article 14 of the Constitution of India. Apart from this, the appellant is a petty class-IV employee, who, in the aforesaid background, does not deserve to be non-suited now at the fag end of the career.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned Counsel for the appellant and the learned Standing Counsel for the respondent Nos. and 2.

2. The appellant was extended the benefit of compassionate appointment after the death of her husband by the order dated 20.4.2001. The appellant was admittedly appointed as a Class-IV employee. Her services were dispensed with by cancelling the said appointment on the ground of an alleged deficiency in educational qualification.

3. The appellant filed the writ petition giving rise to the present controversy, being Writ Petition No.3634 of 1991, and the writ petition was entertained and the appellant was also favoured with an interim order as a consequence whereof she continued in service and has received salary as a class-IV employee/Peon.

4. The writ petition appears to have been listed on 15.4.2009 for hearing on which date in the absence of the learned Counsel for the appellant, the petition was dismissed for want of prosecution.

5. The appellant has stated in her Affidavit that she is now 59 years of age and is at the verge of attaining superannuation and that she was not informed about the dismissal of the writ petition in default. Not only this even the respondents did not take any action which may have resulted in any information to the appellant, inasmuch as, she continued to be in service and was receiving salary month by month. It is only when she was restrained from signing on the Attendance Register on 15.9.2014 that she came to know of the dismissal of the said writ petition in default. Thereafter, she contacted another counsel, who filed the restoration application before the learned single Judge for setting aside the ex-parte order dated 15.4.2009.

6. The learned single Judge vide order dated 30.10.2014 has observed that he did not find any valid reason to condone the delay and has also rejected the restoration application. The appellant, therefore, prays for setting aside the order dated 30.10.2014 as well as the order dated 15.4.2009 with all other consequential reliefs claimed originally in the writ petition.

7. As indicated above, the matter is very old and is of the year 1991. The appellant is a lady, who has continued in service as a class-IV employee. In our considered opinion, the dispensation of her service, at the fag end of her career, would be a travesty of justice and would also be inequitable. The explanation given by the appellant in support of the delay condonation for restoring the matter appears to be bona fide inasmuch as she was getting salary till September, 2014. This explanation does not appear to have been appropriately considered by the

learned single Judge while proceeding to reject the restoration application. We, therefore, find sufficient grounds that were available and were justified for restoring the case after condoning the delay.

8. We, accordingly, do so and set aside the order dated 30.10.2014 whereby the restoration application has been rejected.

9. We also, accordingly, condone the delay and treat the application within time. We further find from the reasons disclosed in the restoration application that the situation was beyond the control of the appellant and, therefore, the writ petition ought to have been restored to it's original number. We, therefore, set aside the order dated 15.4.2009 and restore the writ petition to it's original number.

10. Having considered the submissions so raised on the facts of the present appeal, it is evident that the appellant is 59 years of age and, therefore, no useful purpose would be served in remitting the matter back to the learned single Judge and, therefore, with the consent of the parties, we are disposing of the writ petition alongwith this appeal finally ourselves.

11. The order of dispensation and cancellation of appointment of the petitioner does not appear to have been passed after giving any notice or opportunity to the appellant. The same is clearly in violation of the principles of natural justice and, therefore, violative of Article 14 of the Constitution of India. Apart from this, the appellant is a petty class-IV employee, who, in the aforesaid background, does not deserve to be non-suited now at the fag end of the career.

12. We, therefore, in exercise of our extra ordinary jurisdiction under Article 226 of the Constitution of India and in view of the reasons aforesaid, set aside the order dated 30.4.1991 and allow the writ petition. This discretion is being exercised on the peculiar facts of this case as noted above. We direct the respondents to treat the appellant to continue in service and extend all consequential benefits to the appellant in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2015

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

Special Appeal Defective No. 1040 of 2014

State of U.P. & Ors. ...Appellants
Versus
Devesh Kumar Ojha & Anr. .Respondents

Counsel for the Appellants:
Sri Bhola Nath Yadav, S.C.

Counsel for the Respondents:
Sri A.C. Mishra.

Uttar Pradesh Chhatrvitti Yojna Niyamawali, 2012-claim of reimbursement-denied saying admission against paying seat-while it was against free seat-due to negligence of college functioning-wrong feeding can not be basis for denial-admittedly, monthly income less than 30,000/-held-Single Judge rightly-exercised its writ jurisdiction-appeal dismissed.

Held: Para-6
After hearing learned counsel for the parties and on perusal of the aforesaid finding of the Writ Court we are of the considered opinion that under the Uttar Pradesh Samanya Varg Dashmottar

Chhatrivitti Yojna Niyamawali, 2012' it is the State which is to pay the reimbursement of the scholarship fee. Admittedly, no fraud has been played by the petitioner (respondent no.1 in the present appeal) and he has been denied reimbursement to which he is otherwise entitled to, only on the ground that there has been a mistake in uploading of his particulars by the Institution which is an agency acting on behalf and in connection of the work of the State for the success of the scheme and so it cannot be made responsible for reimbursement of fee, payment of which is primary duty of the State. Therefore, the order dated 3rd December, 2013 of the Joint Direction of Education directing the respondent no.3 Institution to compensate the petitioner monetarily out of its own fund, as the mistake in uploading was of the institution, cannot be sustained. This order would rather be against the spirit of the claim itself which provides for economic help provided by the State to candidates eligible under the scheme whose family earning is less than Rs.30,000/- per annum.

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

1. The petitioner (respondent no.1 of this appeal) had filed writ petition seeking a writ of mandamus directing the respondents to grant scholarship/fee reimbursement amount of Rs.80,900/- in Account No.10686663349 of respondent Devesh Kumar Ojha in State Bank of India, Sirsa Branch, for the Session 2012-13.

2. It appears that respondent no.1 was a student of B. Tech. in Electrical and Electronics Trade in the Session 2012-13. He was entitled for fee reimbusement under the scheme of the State Government known as 'Uttar Pradesh Samanya Varg Dashmottar Chhatrivitti Yojna Niyamawali, 2012' as his father was having income less than Rs.30,000/- per annum. This application for fee reimbursement was not accepted by the State Authorities on the ground that he has been granted admission on a paid seat and not on a free seat.

3. Subsequently it transpired that the admission of the petitioner was against a free seat by respondent no.3 but the Institution while uploading the details had incorrectly shown him to be admitted against a paid seat. The State Authorities found that if correct description of the petitioner had been uploaded by the institution, then the respondent Devesh Kumar Ojha was entitiled to payment of fee reimbursement. Therefore, the Joint Director of Education vide order dated 3rd December 2013 directed respondent no.3 the Institution, to compensate the petitioner monetarily out of its own fund, as the fault was of the institution, as a result of which the petitioner has been denied fee reimbursement.

4. After exchange of the affidavits the Court in para 6 and 7 recorded finding that the scholarship/fee reimbursement is actually awarded by the State through the department concerned, on the basis of information uploaded by the institution imparting education, which is a agency of the government for gathering information as appeared from the provisions of the scheme itself. Therefore, in this view of the matter it issued a writ of mandamus directing the respondent no.2 to reimburse a sum of Rs.80,900/- due to the petitioner.

5. Standing Counsel on behalf of appellant-State has submitted that since the Institution uploaded wrong information about respondent no.1, therefore, State is not liable to pay the scholarship/fee reimbursement and the

order of the Joint Director of Education dated 3rd December 2013 directing respondent no.3 to compensate the petitioner out of its own fund is just and proper. Per contra the counsel for the respondent submits that the Writ Court, on basis of record and perusal of the scheme has rightly come to the conclusion that the Institution is actually an agency of the State and, therefore, in the facts that mistake has occurred by the Institution it is the State which has to pay the scholarship/fee reimbursement under the scheme.

6. After hearing learned counsel for the parties and on perusal of the aforesaid finding of the Writ Court we are of the considered opinion that under the Uttar Pradesh Samanya Varg Dashmottar Chhatrivitti Yojna Niyamawali, 2012' it is the State which is to pay the reimbursement of the scholarship fee. Admittedly, no fraud has been played by the petitioner (respondent no.1 in the present appeal) and he has been denied reimbursement to which he is otherwise entitled to, only on the ground that there has been a mistake in uploading of his particulars by the Institution which is an agency acting on behalf and in connection of the work of the State for the success of the scheme and so it cannot be made responsible for reimbursement of fee, payment of which is primary duty of the State. Therefore, the order dated 3rd December, 2013 of the Joint Direction of Education directing the respondent no.3 Institution to compensate the petitioner monetarily out of its own fund, as the mistake in uploading was of the institution, cannot be sustained. This order would rather be against the spirit of the claim itself which provides for economic help provided by the State to candidates eligible under the scheme whose family earning is less than Rs.30,000/- per annum.

7. For all the reasons stated above, we do not find any illegality or infirmity in the findings recorded by the Writ Court.

8. The appeal is accordingly, dismissed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2015

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SUNEET KUMAR, J.

Special Appeal No. 1206 of 2014

Smt. Qamaru Nisha ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Keshav Kumar Srivastava

Counsel for the Respondents:
C.S.C.

High Court Rules-chapter VIII Rule 5-Special Appeal-dismissal of petition-claim of interest-dismissal on account of non disclosure of actual amount of death cum-post retiral benefits-apart from highly belated stage-admittedly the amount of gratuity and pension given in 2011 after facing contempt proceeding consuming 29 years-held-approach of Single Judge wholly erroneous-petition could not be dismissed-appellant being heir of deceased employee can not disclose accurate figure of claim-it is for the state-order passed by Single Judge set-a-side-with direction to decide writ petition on merit.

Held: Para-3 & 4

3.The learned Single Judge has erred in finding fault of the appellant for not specifying what were the exact balance dues. As a matter of fairness, it was for the State to indicate in the form of a computation, the dues as computed and to which the appellant was entitled and that the entirety of the dues had been paid. This ought to have been placed on the record before the learned Single Judge. In any event having due regard to the facts of this case, it was the duty of the State to explain why no payment had been made for a period of 29 years since the date of death of the employee.

4. In these circumstances, the heirs of an employee cannot be non-suited on the ground of delay when there has been a failure on the part of the State to pay the retiral dues within a reasonable period. In this view of the matter, we are of the view that the impugned order of dismissal of the writ petition is unsustainable and would have to be set aside.

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

1. The appellant had filed a writ petition seeking a direction to the second respondent, namely, the Deputy Director of Consolidation, Farukhabad, to pay the balance of the death-cum-post retiral dues on account of the services rendered by her spouse and for a decision on a claim for the payment of interest for a delay of 29 years till the payment of the retiral dues. The writ petition has been dismissed by the learned Single Judge by the impugned order dated 2 December 2014 on the ground that (i) the appellant has not indicated what is the balance of death-cum-post retiral benefits; (ii) the claim having been set up in the writ petition in 2014 is barred by laches; and (iii) the appellant is not entitled to interest on the amount, if it is due, since the appellant is at fault for not having approached the Court at the relevant point of time.

2. The appellant in the writ proceedings averred that her spouse was working as a peon in the establishment of the Deputy Director of Consolidation, Farukhabad and died in 1983 during the tenure of his service. It was her case that after the death of her husband, she had fulfilled all necessary requirements for the payment of the retiral dues, in spite of which, no payments have been made to her even in respect of the admitted amount of GPF, pension, group insurance policy etc. The appellant filed a writ petition, which was disposed of on 30 July 2008 (Civil Misc. Writ Petition No.35682 of 2008) with a direction to consider and dispose of the representation. Though the appellant moved a representation on 4 November 2008, it was not decided, after which, she was constrained to move a contempt application. At that stage in 2011, an amount of Rs.5,75,000/- was paid to her, as stated in paragraph 21 of the writ petition. The grievance of the appellant was that even 29 years after the death of her spouse, full payment of the death-cum-retiral benefits have not been made, as a result of which, she was entitled to the payment of the balance amount together with interest. The appellant, in support of her contention, annexed at Annexure 4, relevant details in regard to the payments made under the directions of the Treasury Officer, Gorakhpur.

3. On these facts, we find merit in the contention of the learned counsel for the appellant that the learned Single Judge was clearly not justified in dismissing the petition on the ground of delay and laches. Payment of retiral benefits,

including benefits which accrue on account of the death of an employee, is not a matter of largesse or charity but constitutes a vested right on account of the years of service rendered as an employee of the State. The facts on the record would make it clear that it was the State which took a long period of 29 years to make payment of the retiral dues. As pleaded by the appellant, an amount of Rs.5,75,000/- was paid to her in 2011 though the death of the employee had occurred in 1983. The grievance of the appellant is that this did not represent the full amount of the payments due and outstanding towards death-cum-retiral benefits. The learned Single Judge has erred in finding fault of the appellant for not specifying what were the exact balance dues. As a matter of fairness, it was for the State to indicate in the form of a computation, the dues as computed and to which the appellant was entitled and that the entirety of the dues had been paid. This ought to have been placed on the record before the learned Single Judge. In any event having due regard to the facts of this case, it was the duty of the State to explain why no payment had been made for a period of 29 years since the date of death of the employee.

4. In these circumstances, the heirs of an employee cannot be non-suited on the ground of delay when there has been a failure on the part of the State to pay the retiral dues within a reasonable period. In this view of the matter, we are of the view that the impugned order of dismissal of the writ petition is unsustainable and would have to be set aside.

5. We, accordingly, set aside the judgment of the learned Single Judge dated 2 December 2004 and restore Writ ? A No.64921 of 2014 for fresh disposal on merits. We direct the respondents to file a counter affidavit on or before 9 March 2015. The counter affidavit shall specify the computation of the death-cum-retiral dues. The affidavit shall also contain an explanation, if any, of the State for the delay of well over 29 years in the payment of the dues to the appellant. The issue as to whether full payment has been made to the appellant and whether the appellant should be entitled to the award of interest, shall be decided by the learned Single Judge after the counter affidavit is filed. We grant liberty to the appellant to move the learned Single Judge upon the expiry of the period fixed by this order for the filing of a counter affidavit. The learned Single Judge may, having due regard to the facts of the case, and more particularly that the appellant is a poor widow who is fighting for the payment of her entitlement, take an appropriate view while directing the listing of the writ petition for final disposal at an early date. The special appeal is, accordingly, disposed of. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2015

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 1261 of 1989

Smt. Lalita Devi ...Plff. Appellant
Versus
Smt. Sayeeda Khatoon ...Respondents

Counsel for the Appellant:
Sri R.N. Upadhyay, Sri Amarnath Bhargava, Sri A.N. Bhargava

Counsel for the Respondents:
Sri Shakeel Ahmad Azmi, Sri S.A. Ansari, Sri Shakeel Ahmad Azami, Sri S.U. Khan

C.P.C.-Section-100-Second Appeal-concurrent finding of facts regarding execution of deed agreement to sale-but Lower Appellate Court raised surprised question-about identity of plot-reverse the findings of Trail Court and direction to return earnest money with interest-held-quashed.

Held: Para-35
Now there is another aspect of matter regarding interference with decree of Trial Court on the ground of identifiability though no such objection or pleading was taken by defendant-respondent. It is now well settled that Court cannot make out a case outside the plea of parties and it is the case pleaded by both of them which has to be seen. I am fortified in taking the aforesaid view by the decision in Messrs. Trojan and Co. Vs. RM. N. N. Nagappa Chettiar AIR 1953 SC 235, Raruha Singh Vs. Achal Singh AIR 1961 SC 1097 and Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and others (1977) 3 SCC 532.

Case Law discussed:
1912 (34) ILR (All) 32; (1979) 1 SCC 166; (1982) 1 SCC 232; (1998) 8 SCC 222; (2003) 9 SCC 606; 1965 (3) SCR 550; (2007) 11 SCC 75; AIR 1953 SC 235; AIR 1961 SC 1097; (1977) 3 SCC 532.

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

1. Heard Sri A.N. Bhargava, learned counsel for appellant. None appeared on behalf of respondent though the case has been called in revised. Hence, this Court proceed ex-parte against respondent.

2. This appeal under Section 100 of Code of Civil Procedure has arisen at the instance of plaintiff-appellant against the judgment and decree dated 8.2.1989 passed by Sri Hari Shanker Lal Srivastava, First Additional District Judge, Jaunpur whereby partly allowing the appeal, Lower Appellate Court (hereinafter referred to as "LAC") has set aside the judgment and decree of Trial Court insofar as it had directed defendant-respondent to execute sale-deed in respect to plots in dispute in favour of plaintiff, but simultaneously has directed defendant-respondent to refund Rs. 4,000/- which was received as earnest money, along with interest, at the rate of 6 per cent per annum, to plaintiff-appellant.

3. After hearing the appeal under Order 41 Rule 11 C.P.C. on 31.3.1987, this Court found adjudication of the following substantial questions of law having arisen, in this appeal:

"(A) Whether the Appellate Court having confirmed findings of Trial Court about genuineness of agreement was right in refusing relief of granting execution of sale-deed simply on the ground of identifiability and when there was only slight reduction of area of only two plots?

(B) Whether any permission was required when the agreement was with regard to sale of land after the consolidation was over within a period of five years.

(C) Whether absence of permission creates any bar for entering into an agreement and sale also specially by Court?"

4. Subsequently, vide order dated 30.10.2014, one more substantial question of law was formulated as under:

"(D) Whether the lower appellate court can dismiss the relief for specific performance granted by trial court when no appeal was preferred by Defendant-Appellant against the grant of relief for specific performance by trial court."

5. Plaintiff-appellant, Smt. Lalita Devi, instituted Original Suit No. 66 of

1983 in the Court of Civil Judge, Jaunpur seeking a decree of rectification in the document dated 31.5.1978 by substituting the numbers 200/1-26 and 200/2-4 instead of 208/1-26 and 208/2-4. She also sought a decree of specific performance of contract, directing defendant to execute sale-deed after receiving a sum of Rs. 6,000/- in respect to disputed plots.

6. The plaint case set up was that disputed property was owned by Smt. Jahida, widow of Munshi and mother of defendant Smt. Sayeeda. Smt. Jahida having died, her property succeeded to defendant Smt. Sayeeda, whose name was mutated as owner of disputed property. Defendant's mother entered into a registered agreement for sell dated 31.5.1978, for a consideration of Rs. 10,000/- for transfer of her property by sale. Since consolidation proceedings were going on, it was agreed that sale-deed shall be executed after consolidation proceedings are over, or within five years, after obtaining permission. A sum of Rs. 4,000/- was received by mother of defendant as part consideration and Rs. 6,000/- was to be paid at the time of registration of sale-deed. After death of Smt. Jahida (the erstwhile owner), now the defendant is bound by the said agreement. Defendant's mother also gave possession of disputed property to plaintiff and she is continuously in possession thereof since then, i.e., 1978. Repeatedly plaintiff requested defendant's mother and thereafter defendant to execute sale-deed but they avoided on one or the other pretext. The property, subject matter of agreement to sell dated 31.5.1978, was numbered as 205/-20 and 206/1/-25, but during consolidation, its area reduced and now numbered as 205/-11 and 206/1/-26. Plaintiff is ready to proceed for purchase of reduced area and also to pay the agreed consideration. In the agreement, due to mistake of Deed-Writer, Khata numbers were wrongly mentioned as 208/1/-26 and 208/2/-4 though it ought to be 200/1/-26 and 200/2/-4. The correct numbers were 200/1/-26 and 200/2/-4. The aforesaid mistake, however, would not be material so far as the agreement is concerned and defendant is bound to honour the said agreement. Since within five years, the document of sale has not been executed and defendant is not agree to do so, hence the suit.

7. At the bottom of plaint, detail of property, allegedly agreed to be sold by mother of defendant, was mentioned as under:

मद (अ)

199/—01, 201/—61, 203/—14, 204/—13, 205/—20, 206/1/—25, 206/2/—33, 206/3/—02, 208/1/—26, 208/2/—04, 183/1/—02, 202/—11, 202/1/.58— 13 गाटा /2—70

8. It was also stated that in place of the aforesaid numbers, after rectification, the corrected numbers and others would be as under:

मद (ब)

199/—01, 201/—61, 203/—14, 204/—13, 205/—11, 206/1/—23, 206/2/—33, 206/3/—02, 200/1/—26, 200/2/—04, 183/1/—02, 202/2/—11, 202/1/—58, — 13 गाटा /2—59

9. The copy of the original "Agreement to Sell" was placed on record as Exhibit-10.

10. The defendant contested the suit and filed written statement. The execution of agreement was seriously disputed. It is said to be a fictitious document. Mother of defendant had no son. The plaintiff used to reside in the house of defendant's

mother and used to take her care. She was not capable of moving for the last 4-5 years before death and died in 1979. She was an illiterate pardanashin lady and had a weak eyesight at the time of her death. She wanted to install a diesel pumping set for agricultural purposes in the agricultural holding but having financial difficulty, Sri Sajjad, son-in-law, assured her that he can arrange funds from Government in instalments and on such misrepresentation, got document dated 31.5.1978 executed. She (the defendant) clearly denied that at any point of time she was required to execute sale-deed as claimed by plaintiff.

11. Trial Court formulated the following four issues:

''1. क्या तारीख 31.5.1978 का मु0 जाहिदा बीबी मादर मुद्दालेहा ने जायदाद मुतादाबिया रू0 10,000/– में बेचने का मामला तय किया था और उस दिन मवाहदानामा वय तहरीर किया गया था और उस सिलसिले में रू0 4000/– बयाना भी लिया था?

2. क्या मुद्दाईया हमेशा मुआहिदानामा के मुताबिक बैनामा लिखाने की ख्वाहिशमंद और तैयार रही है और अब भी मुआहिदानामा के मुताबिक अपना ''पार्ट परफार्म'' करने को तैयार है?

3. क्या दावा दफा 38/ 41 कानून दादरसी खास से आरिज है?

4. मुद्दईया किस दादरसी का हकदार है?''

"1. Whether Zahida Bibi, mother of the defendant had on 31.05.1978 agree d to sell out the property in question for Rs. 10,000/- and on the same day its draft had been scribed and in relation thereto she had taken Rs. 4,000/- as advance payment ?

2. Whether the lady plaintiff has always been keen and ready to get a sale deed executed as per the agreement and is still ready to perform her part as per the agreement?

3. Whether the claim is barred u/s 38/41 of the Specific Relief Act?

4. To what relief the plaintiff is entitled?"

(English Translation by the Court)

12. Trial Court answered Issue No. 1 in favour of plaintiff and held that an agreement for sell dated 31.5.1978 was executed by Smt. Jahida Bibi for a total sale consideration of Rs. 10,000/- whereagainst Rs. 4,000/- was already received by her and thereupon registered agreement was executed. Issue no. 2 was answered in favour of plaintiff holding that she was always ready and willing to execute sale-deed. So far as Issue no. 3 is concerned, whether suit was barred under Section 38/41 of Specific Relief Act, 1963 (hereinafter referred to as "Act, 1963"), defendant did not adduce any evidence or pressed it, hence it was decided against defendant and in favour of plaintiff. Then considering Issue No. 4, Trial Court held that in the agreement, there was mention of the land, i.e., Arazi No. 208/1 area 0.26 acres and 208/2 area 0.04 acres, which Smt. Jahida Bibi did not own and this fact was admitted between the parties. Plaintiff claimed that these two numbers were wrongly mentioned and instead ought to have been 200/1 area 0.26 acre 200/2 area 0.4 acres but this story of mistake could not be proved by plaintiff as to why such mistake occurred. It then held that question of rectification in the document was not permissible. It further held that since plaintiff is still ready to pay Rs. 6,000/- for execution of sale-deed for remaining land, therefore, relief to this extent can be granted. Consequently, Sri, M.Q. Siddiqui, 3rd Additional Civil Judge, Jaunpur vide judgment and decree dated 16.4.1987 decreed the suit in respect to relief (B) and (C) and dismissed in respect to relief (A). It directed the defendant to execute

sale-deed pursuant to registered agreement to sell dated 31.5.1978, within 45 days, in respect to land/ property mentioned in the said agreement except plots no. 208/1 and 208/2, after receiving balance Rs. 6000/- and expenses of execution of sale-deed and its registration.

13. The plaintiff preferred Civil Appeal No. 198 of 1987 against judgment and decree dated 16.4.1987 insofar as it has dismissed the suit of plaintiff with respect to relief A. The defendant neither filed appeal nor any cross-objection under Order 41 Rule 22.

14. The LAC formulated following two points for determination for deciding the appeal:

(1)Whether the impugned document which is an agreement to sell is liable to be rectified?

(2)Whether the impugned agreement to sell dated 31.5.1978 is genuine one and is enforceable?

15. LAC after considering evidence came to the conclusion that plaintiff-appellant has succeeded to establish his case that Smt. Jahida Bibi executed a deed of agreement to sell on 31.5.1978. It consequently held, "Therefore, I hold that deed of agreement to sell was executed by Smt. Jahida Bibi." It then proceeded to decide whether defendant-respondent is liable to execute sale-deed after taking Rs. 6,000/- from plaintiff on the basis of agreement to sell dated 31.5.1978 executed by her mother. On this aspect LAC held that during consolidation proceedings, the land has undergone substantial change. The agreement was executed on 31.5.1978. The Executant Smt. Jahida died on 12.10.1979. Notice for specific performance was given for the first time on 20.6.1981. No application for permission was ever moved before consolidation authorities. It shows that there was no effort for getting the sale-deed executed. In any case, after change of circumstances, due to consolidation operation, execution of sale-deed was not proper. Consequently, it held that plaintiff is entitled for refund of Rs. 4,000/- but not for execution of sale-deed and rectification. Lower Appellate Court then dismissed the suit in respect to Prayer (A) and (B), both, and held that only relief, the plaintiff-appellant entitled, is, refund of earnest money/ advance money, it had paid to defendant's mother. Consequently, it passed following judgment and decree:

"In view of discussion made above, appeal is partly allowed. Judgement and decree dated 16.4.87 passed by learned Civil Judge, relating order for executing sale-deed of the disputed plots by defendant-appellant Smt. Saiyada Khatoon is set aside. But the defendant-appellant is directed to pay Rs. 4000/- (Four thousand) which was paid to her mother Smt. Jahida Bibi as an earnest money along with interest at the rate of six percent per annum from 31.5.78 till today to plaintiff-respondent Smt. Lalita Devi. In the peculiar circumstances of the case parties will bear their own costs of the appeal. "

16. It is contended by Sri A.N. Bhargava, learned counsel for appellant, that once both Courts below found that agreement to sell was executed by defendant's mother, there was no justification to deny relief (A) and (B) by LAC on the assumed circumstance that consolidation operations have resulted in substantial alteration in property when no such issue

was raised by defendant-respondent by filing either appeal against the judgment and decree of Trial Court or cross-objection. Even in the written statement, there was no such pleading that property mentioned in agreement to sell is not identifiable at all on account of consolidation proceedings, therefore, performance of agreement is not possible and agreement has frustrated. He next contended that LAC has completely erred in law in setting aside even that part of judgment of Trial Court whereby relief of execution of sale-deed was granted, since defendant-respondent had not preferred any appeal or cross-objection and, therefore, judgment of Trial Court in this regard attained finality. The LAC could not have granted such a relief to defendant-respondent.

17. In order to examine the aforesaid submissions, two provisions, in my view, are relevant to be looked into, i.e, Order 41 Rule 22 and Order 41 Rule 33 C.P.C., as they stood at relevant time, which read as under:

"22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.- (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour; and may also take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

Explanation: A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree, is, wholly or In part, in favour of that respondent.

(2) Form of objection and provisions applicable thereto--Such cross objection shall be in the form of the memorandum, and the provisions of Rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto. .

(3) Unless the respondent files with the objection a written acknowledgement from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served as soon as may be after the filing of the objection on such party on his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit,

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule."

"33. Power of Court of Appeal.- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this

power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are, passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:

Provided that the Appellate Court shall not make any order under Section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order." (emphasis added)

18. A perusal of Rule 22 makes it clear that the right of a party to challenge findings of Trial Court by contending that the same ought to have been decided in his/her favour is to support the decree and not to get the decree reversed. Filing of cross objection is not necessary but wherever the same is filed, it would be in respect to the relief negatived to him/her. A cross-objection can be filed in respect to a finding on which the decree appealed against is based.

19. In the case in hand, defendant, against the decree of Trial Court, neither filed any appeal nor cross-objection. She could have challenged findings of Trial Court which were against her but in absence of any appeal or cross-objection, the decree passed against defendant, to which she has surrendered, ought not have been reversed by LAC by reversing findings of Trial Court suo moto. It is no doubt true that a registered agreement to sell, dated 31.5.1978, has been found by both the Courts below, bona fide and genuine, having been executed between the parties. It is also true that the said agreement to sell mentioned certain numbers of plots which were not owned by defendant-respondent and for rectification thereof, both the Court below have given a concurrent finding against the plaintiff that no such rectification is permissible. Thus relief 'A' stands denied to plaintiff. In respect to the remaining plots for which there was no dispute of any error, etc., Trial Court held that agreement is executable and enforceable but LAC took an otherwise view and reversed judgment and decree of Trial Court though there was neither any appeal filed by defendant-respondent nor any cross-objection. In fact defendant-respondent surrendered to the judgment and decree of Trial Court insofar as it had directed for enforcement of agreement to sell in respect to plots which were owned by defendant-respondent by succession, from her mother. The legal submission of appellant to this extent is quite sound and the LAC apparently has committed a manifest error therein.

20. A similar issue came for consideration before this Court in a Full Bench in Rangam Lal Vs. Jhandu 1912 (34) ILR (All) 32. Therein a Zamindar brought a suit against tenant for rent. He claimed Rs. 294-7-0 towards rent. Defendant contested the suit claiming that he has already discharged the claim. Assistant Collector found that defendant was entitled to certain credits, but still there was a balance of Rs. 96-11-11 for which a decree was passed. Plaintiff appealed against the decree to the extent the part of his claim was dismissed. Defendant neither filed cross appeal nor objection under Order 41 Rule 22. The

First Appellate Court, i.e., District Judge held that plaintiff's claim was fully discharged by defendant and consequently exercising power under Order 41 Rule 33 dismissed appellant's suit in toto. Plaintiff came in Second Appeal. Order 41 Rule 33 as it was introduced in Code of Civil Procedure, 1908 at the relevant time read as under:

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order that case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection."

21. The Court held that though the words in Rule 33 are very wide but while exercising power under Rule 33, the Court cannot lose sight of other provisions of the Code as also that of Court Fees Act and law of limitation etc. The Court then referred to Order 41 Rule 22 which at that time read as under:

"Any respondent, though he may not have appealed from any part of decree, may not only support the decree on any of the grounds decided against him before the court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal or within such further time as the appellate court may see fit to allow."

22. It held that Rule 22 makes it clear that the respondent cannot allow to take exception so much so of a decree as was against him without complying with the provisions of Rules. Having said so, in para 6, 7 and 8 of the judgment, the Court held:

"6. In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections, we think the court should hesitate before all owing him to object at the hearing of the appeal filed by the appellant. The object of Rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal. "Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection. Of such cases the 'illustration to the rule is a type. To the supposed case the appellate court could not do justice to the appellant without doing injustice to the respondent unless it was enabled to make a decree against " Y."

7. The rule itself is for the most part taken from Order LVIII, Rule 4, of the rules of the Supreme Court of Judicature in England. The case of the Attorney General v. Simpson [1901] L.R. 2 Ch. D.671. is another illustration of the class of cases which calls for the exercise of the powers conferred by Rule 33. That was a case in which an action was brought on behalf of the public for a declaration that the public were entitled to use certain locks on the river Ouse without payment of tolls. A further declaration was claimed that the defendant was under an obligation to repair, and keep in repair

the locks. The court of first instance made a decree declaring that the public were entitled to use the locks without payment of tolls; but it, at the same time, contrary to the plaintiff's claim, declared that the defendant was under no obligation to repair the locks. The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant. At the same time they were of opinion that the defendant was under an obligation to repair the locks. The plaintiff, however, not unnaturally, had taken no exception to that part of the declaration of the court of first instance which absolved the defendant from the obligation to keep the looks in repair. The Court of Appeal felt that they were justified, while declaring that the public were liable to pay tolls, to declare that the defendant was liable to keep the locks in repair, notwithstanding that no appeal or objection had been taken to that part of the decree by the plaintiff.

8. In our opinion the dismissal by the learned District Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by Order XLI, Rule 33. If the defendant was aggrieved by the decree against him for Rs. 96, there was no reason why he should not have appealed or filed objections."

23. Order 41 Rule 33 then came to be considered in Tummalla Atchaiah Vs. Venka Narasingarao (1979) 1 SCC 166. Therein the plaintiff instituted a suit for cancellation or setting aside of a registered assignment deed dated 31.10.1957 and for recovery of possession of scheduled properties and for mesne profits. Trial Court decreed the suit in part and granted a decree for cancellation of assignment-deed on plaintiff's payment of Rs. 13,000/- to the defendant. Under the decree, defendant was required to deliver possession of suit property to plaintiff, subject to payment of Rs. 13,000/-. Defendant filed appeal and plaintiff filed cross objection wherein only two grounds were taken, namely costs and mesne profits. Plaintiff in his cross objection took no ground attacking the decree of Trial Court in respect to payment of Rs. 13,000/- and defendant's liability to deliver possession of suit property on such payment. High Court hearing the First Appeal, varied decree of Trial Court, in purported exercise of power under Order 41 Rule 33 C.P.C., in respect to direction of payment of Rs. 13,000/-, though in plaintiff's cross-objection no such ground was taken. High Court granted decree of mesne profit under Order 41 Rule 33 and dismissed the appeal of defendant. The Supreme Court held that recourse to Order 41 Rule 33 C.P.C. by interfering with the decree of Trial Court in relation to payment of Rs. 13,000/- was impermissible for the High Court while exercising its power of First Appeal. The Court said that plaintiff was a party in the appeal, filed cross objection but did not attack decree of Trial Court making him liable to return Rs. 13,000/- before he could take back possession from defendant. It then held, "Without a specific ground in the cross objection and without payment of Court-fees on the said amount he was not entitled to get any relief by the Court under Order 41, Rule 33, C.P.C."

24. A similar view was taken in Choudhary Sahu (Dead) by Lrs. Vs. State of Bihar (1982) 1 SCC 232. The appellant was a land holder in terms of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961.

A notice under Section 8(1) of the said Act was issued to appellant therein calling upon him to submit return with all the particulars of land held by him. The response was filed. After verification, Additional Collector came to the conclusion that appellant was entitled to five units and ordered for publication of draft statement under Section 10 of the said Act. Another notice was served upon appellant under Section 10 (2) of the Act. An objection was filed. Collector after considering objection, held, that appellant was entitled for 12 units instead of 5 units. Appellant still dissatisfied, went in appeal before Commissioner. State of Bihar, however, did not file any appeal against the order of Collector. It also failed to appear before Appellate Authority, i.e. Commissioner despite issuance of notice. Commissioner, however, allowed appeal and set aside order of Collector, remanded the matter for disposal again. It was pointed out that appellant had challenged the order of Collector on various grounds insofar as Assistant Collector's order was against him but the order of Collector insofar as it was in favour of appellant was not challenged, still Commissioner set aside findings of Collector even in respect to 12 units which was decided in favour of appellant, though no appeal was filed by State of Bihar. The order of Commissioner, therefore, was challenged by appellant in High Court in a writ petition but the same was dismissed. Hence the matter went to Supreme Court. The only question considered was, in absence of any appeal or cross-objection by State of Bihar, whether, Commissioner was justified in reversing findings of Collector which were in favour of appellant. The Court considered Rules 22 and 33, Order 41, in the aforesaid case. With reference to Order 41 Rule 22, the Court said that first part of Rule authorizes respondent to support decree not only on the grounds decided in his favour but also on any of grounds decided against him in the Court below. First part, thus, authorizes the respondent only to support the decree. It does not authorizes him to challenge the decree. If the respondent wants to challenge the decree, he has to take recourse of second part, i.e., he has to file a cross-objection, if has not already filed an appeal against the decree. Where the respondent has neither filed any appeal nor cross-objection, the decree passed against respondent cannot be challenged but it can only support the decree by referring to Rule 22(1) of Order 41 C.P.C.

25. Then coming to Order 41 Rule 33, the Court in para 12, 13 and 14 of judgment said as under:

"12. The object of this rule is to avoid contradictory and inconsistent decisions on the same questions in the same suit. As the power under this rule is in derogation of the general principle that a party cannot avoid a decree against him without filing an appeal or cross-objection, it must be exercised with care and caution. The rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the court appealed from.

13. Ordinarily, the power conferred by this rule will be confined to those cases where as a result of interference in favour of the appellant further interference with the decree of the lower court is rendered necessary in order to adjust the rights of the parties according to justice, equity and good conscience. While exercising

the power under this rule the Court should not lose sight of the other provisions of the Code itself nor the provisions of other laws, viz., the Law of the Limitation or the Law of Court Fees etc.

14. In these appeals the Collector on the basis of the material placed before him allowed certain units to the various appellants. In the absence of any appeal by the State of Bihar, there was no justification for the Commissioner to have interfered with that finding in favour of the appellants. The facts and circumstances of these appeals are not such in which it would be appropriate to exercise the power under order 41, rule 33. The Commissioner as well as the High Court committed a manifest error in reversing the finding regarding allotment of units to the various appellants in the absence of any appeal by the State of Bihar when the same had become final and rights of the State of Bihar had come to an end to that extent by not filing any appeal or cross-objection within the period of limitation." (emphasis added)

26. In State of Punjab and others Vs. Bakshish Singh (1998) 8 SCC 222, it was held that Appellate Court cannot, in the garb of exercising power under Order 41 Rule 33, enlarge scope of appeal.

27. Almost a similar case, as is one up for consideration in this appeal, came up for consideration in Banarasi and others Vs. Ram Phal (2003) 9 SCC 606. A suit for specific performance of an agreement-to-sell was filed. The total sale consideration was Rs. 2,90,000/- out of which 2,40,000/- was acknowledged by vendor leaving balance of Rs. 50,000/- which was to be paid at the time of execution and registration of sale-deed. A cross suit was filed by vendor seeking cancellation of aforesaid agreement-to-sell. Trial Court upheld agreement-to-sell but instead of enforcing agreement by specific performance, it directed the vendor to return part consideration of Rs. 2,40,0000/-, he had received, along with interest. Specific performance was denied on the ground that land was being cultivated by vendor and in case execution of sale-deed is directed, vendor would suffer great hardship. Vendor filed two appeals against the judgment of Trial Court but vendee neither filed any appeal nor cross objection. Lower Appellate Court though dismissed both the appeals of vendor but modified operative part of Trial Court's judgment by directing that plaintiff-vendee's suit for specific performance is also decreed and suit of vendor is dismissed in entirety. In the appeal preferred before High Court, modification of decree of Trial Court by First Appellate Court was upheld by High Court with reference to Order 41 Rule 33 C.P.C. In further appeal before Supreme Court, question up for consideration was power of Appellate Court to interfere with, reverse and modify decree, appealed against, in absence of any cross-appeal or cross-objection by respondent under Order 41 Rule 22 and scope of power of Appellate Court under Order 41 Rule 33. Order 41 Rule 22 was substituted by Act 104 of 1976 with effect from 1.2.1977. The Court considered various provisions of C.P.C. and held that an appeal is to be filed by a person aggrieved by decree. Unless one is prejudiced or adversely affected by a decree, he is not entitled to file an appeal. No appeal lies against a mere finding. The appeal lies against the decree and not against judgment. Considering the nature of cross-objection and right of a person to support decree

even if no appeal has been filed, it was observed that any respondent, though may not have filed an appeal from any part of decree, may still support the decree to the extent to which it is already in his favour by laying challenge to a finding recorded in the impugned judgment against him. Where a plaintiff seeks a decree against defendant on grounds (A) and (B), any one of two grounds being enough to entitle plaintiff to a decree, and the Court passed a decree on ground (A) deciding it for the plaintiff while ground (B) has been decided against the plaintiff, in an appeal preferred by defendant, inspite of finding on Ground (A) being reversed, plaintiff as a respondent can still seek to support the decree by challenging finding on ground (B) and persuade Appellate Court to form an opinion that inspite of finding on ground (A) being reversed to the benefit of defendant-appellant, the decree could still be sustained by reversing finding on Ground (B) though the plaintiff-respondent has neither preferred an appeal of his own nor taken any cross-objection. A right to file cross-objection is the exercise of right to appeal though in a different form. Right given to a respondent in a appeal to file cross objection is a right given to same extent as is right of appeal to lay challenge to the impugned decree if he can be said to be aggrieved thereby. Taking a cross-objection is the exercise of right of appeal and takes the place of cross-appeal though the form differs. Just as an appeal is preferred by a person aggrieved by the decree, so also a cross-objection is preferred by one who can be said to be aggrieved by decree. A party who has fully succeeded in the suit, needs neither to prefer an appeal nor take any cross objection though certain finding may be against him. Appeal or cross-objection both are filed against decree and not against judgment. It was not to be filed against any finding recorded in a judgment and this was well settled exposition of law under un-amended Order 41 Rule 22 C.P.C. The amendment in 1976 also has not materially or substantially altered the position. There is only some marginal difference. Under the amended provision, Sub-rule (1) has permitted respondent to file cross-objection against a finding. Respondent may defend himself without filing any cross-objection to the extent to which decree is in his favour. If he proposes to attack any part of decree, he must take cross objection. Explaining the scope and effect of amendment made in 1976, the Court said:

"The amendment inserted by 1976 amendment is clarificatory and also enabling and this may be made precise by analysing the provision. There may be three situations:-

(i) The impugned decree is partly in favour of the appellant and partly in favour of the respondent;

(ii) The decree is entirely in favour of the respondent though an issue has been decided against the respondent;

(iii) The decree is entirely in favour of the respondent and all the issues have also been answered in favour of the respondent but there is a finding in the judgment which goes against the respondent.

11. In the type of case (i) it was necessary for the respondent to file an appeal or take cross objection against that part of the decree which is against him if he seeks to get rid of the same though that part of the decree which is in his favour he is entitled to support without taking any cross objection. The law

remains so post amendment too. In the type of cases (ii) and (iii) pre-amendment CPC did not entitle nor permit the respondent to take any cross objection as he was not the person aggrieved by the decree. Under the amended CPC, read in the light of the explanation, though it is still not necessary for the respondent to take any cross objection laying challenge to any finding adverse to him as the decree is entirely in his favour and he may support the decree without cross objection; the amendment made in the text of sub-rule (1), read with the explanation newly inserted, gives him a right to take cross objection to & finding recorded against him either while answering an issue or while dealing with an issue. The advantage of preferring such cross objection is spelled out by sub-rule (4). In spite of the original appeal having been withdrawn or dismissed for default the cross objection taken to any finding by the respondent shall still be available to be adjudicated upon on merits which remedy was not available to the respondent under the unamended CPC. In pre-amendment era, the withdrawal or dismissal for default of the original appeal disabled the respondent to question the correctness or otherwise of any finding recorded against the respondent."

28. The Court then proceeded to hold, if to some extent a decree is against respondent and he wishes to get rid of it, he should have either filed an appeal of his own or have taken cross objection failing which the decree to that extent cannot be insisted on by respondent for being interfered, set aside or modified to his advantage.

29. In the context of suit for specific performance it was categorically held in Banarasi and others Vs. Ram Phal (supra) that a plaintiff has a right to file appeal against original decree if relief of specific performance is refused and any other relief is granted. The plaintiff would be a person aggrieved by decree inspite of one of the alternative having been allowed to him since larger relief having been denied, smaller relief has been preferred by Court granting decree. A defendant against whom decree of specific performance has been granted, can file appeal to challenge the decree in its entirety or to claim that instead of larger relief of specific performance smaller relief ought to have been granted to plaintiff. In an appeal filed by defendant, laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, plaintiff as a respondent cannot seek relief of specific performance of a contract or modification of the impugned decree except of filing an appeal of his own or by taking cross-objection. Then considering the scope of Order 41 Rule 33, the Court said as under:

"... Wider the power, higher the need for caution and care in discretion while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person

not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 of Order 41."

30. The Court also referred to a 3-Judge decision in Nirmala Bala Ghose and another Vs. Balai Chand Ghose and another 1965 (3) SCR 550 wherein it was held that rule does not confer an unrestricted right to re-open decrees which have become final merely because the Appellate Court does not agree with the opinion of the Court appealed from.

31. In S. Nazeer Ahmed Vs. State Bank of Mysore and others (2007) 11 SCC 75, the appellant S. Nazeer Ahmed borrowed from Bank a sum of Rs. 1,10,000/-. Bank filed suit for recovery of money due. Suit was decreed. Bank proceeded against hypothecated Bus in execution of decree. However, Bus could not be traced and hence decree could not be executed. Bank then tried to proceed against mortgaged properties. The borrower resisted execution on the ground that there was no decree on the mortgage hence Bank cannot proceed to sell the properties. The objection of borrower was upheld. Bank then filed another suit for enforcement of equitable mortgage. Borrower resisted suit of Bank pleading that it is barred by Order 2 Rule 2. He also contended that transaction of loan stood satisfied by a tripartite settlement and transfer of vehicle to one Fernandes, that there was no valid equitable mortgage created and no amount can be recovered from him and the suit is barred by limitation. Trial Court held that the suit was not hit by Order 2 Rule 2. It also held that borrower could not prove that loan transaction has come to an end due to satisfaction. However, it dismissed the suit on the ground of limitation. It also held that there was no valid equitable mortgage since it was not registered. Bank filed appeal. Appellate Court held that no registration of equitable mortgage was required in the memorandum. It also held that suit was within limitation. It also held that suit was hit by Order 2 Rule 2 but since the appellant has not challenged finding of Trial Court on the issue of Order 2 Rule 2, hence invoking Order 41 Rule 33, it granted decree to the Bank against appellant but refused decree against guarantor. Court also held that in the case in hand, Order 41 Rule 33 has no application at all. It said:

"Order XLI Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed. There is no need to have recourse to Order XLI Rule 33 of the Code, in a case where the suit of the plaintiff has been dismissed and the plaintiff has come up in appeal claiming a decree as prayed for by him in the suit. Then, it will be a question of entertaining the appeal considering the relevant questions and granting the plaintiff the relief he had sought for if he

is found entitled to it. In the case on hand therefore there was no occasion for applying Order XLI Rule 33 of the Code."

32. In the present case, in respect to the decree of Trial Court with regard to relief (B) and (C), neither any appeal was filed by plaintiff since he has no occasion to do so nor any appeal or cross objection was filed by defendant-respondent. Appeal of plaintiff was only in respect to relief (A), i.e., rectification in the agreement to sell which by itself has nothing to do with relief (B) and (C). In the garb of considering question of validity of agreement to sell dated 31.5.1978 insofar as it was relevant in the context of considering Relief-(A), LAC was not entitled to look into the aforesaid aspect and to that extent, defendant even if had filed any appeal or cross-objection could have defended finding in her favour but in the garb of considering question of relief (A), I have no manner of doubt that it was not open to LAC to clothe itself with the power of considering whether relief (B) and (C) in entirety or partly should have been granted or a smaller relief thereof should have been granted since that was not the subject matter of appeal of either side.

33. Therefore on the principle of exposition of law as argued by Sri A.N. Bhargava, I find substance that LAC erred in law in modifying decree of Trial Court in respect to relief (B) and (C) when defendant-respondent has not filed either cross appeal or cross objection. The judgment of LAC, therefore, to this extent cannot sustain.

34. However, so far as rectification of agreement to sell is concerned, there is a concurrent finding recorded by both the Courts below on this aspect and this Court has not been shown any legal or otherwise error therein or that any admissible evidence has been ignored or there is any misreading of evidence etc. Hence I do not find any justification to interfere with the concurrent findings of both the Courts below for denying relief (A) to the plaintiff-appellant.

35. Now there is another aspect of matter regarding interference with decree of Trial Court on the ground of identifiability though no such objection or pleading was taken by defendant-respondent. It is now well settled that Court cannot make out a case outside the plea of parties and it is the case pleaded by both of them which has to be seen. I am fortified in taking the aforesaid view by the decision in Messrs. Trojan and Co. Vs. RM. N. N. Nagappa Chettiar AIR 1953 SC 235, Raruha Singh Vs. Achal Singh AIR 1961 SC 1097 and Siddu Venkappa Devadiga Vs. Smt. Rangu S. Devadiga and others (1977) 3 SCC 532. In the later case, i.e. Siddu Venkappa Devadiga (supra), which is a judgment of three Hon'ble Judges, the Court said:

"..the decision of a case cannot be based on grounds outside the plea of the parties, and that it is the case pleaded which has to be found. The High Court therefore went wrong in ignoring this basic principle of law, and in making out an entirely new case which was not pleaded and was not the subject matter of the trial."

36. The substantial question of law, therefore, are answered in favour of plaintiff-appellant. The appeal is partly allowed. The judgement of Lower Appellate Court dated 8.2.1989 to the extent it has dismissed the suit of plaintiff-appellant in respect to Relief (B)

and (C) is hereby set aside and judgment of Trial Court dated 16.4.1987 is hereby restored and confirmed.

37. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 17.01.2015

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Criminal Misc. Case No. 1576 of 2012

Rakesh Kumar ...Petitioner
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Petitioner:
Sri Balram Yadav

Counsel for the Respondents:
Sri Rajendra Kumar Dwivedi, AGA

Cr.P.C.-Section 482- Quash of criminal proceeding-offence under section 363, 366 IPC-on principle of 'stare decisis' - other co accused got fair acquittal-difference between 'resjudicata' and 'stare decisis'-expalined-proceeding can not be quashed.

Held: Para-17
It has been contended by learned counsel for the petitioner that a perusal of the judgement of acquittal reveals that main accused Virendra Kumar Dwivedi married with the prosecutrix later on. The charges framed against the petitioner is not only of Section 376, 363 or 366 IPC but also for other sections. The court passed acquittal on the ground of document in the form of marriage certificate. The case of the present applicant is not based on the same defence. Moreover as discussed above, it could not be said that the case is squarely covered under Section 300 of Cr.P.C., therefore, I am of the view that the present proceeding does not warrant any interference on the basis of doctrine of stare decisis.

Case Law discussed:
[2005 (Suppl.)ACC 895 (All)]; [2004 (Suppl.) ACC 391 (All.)]; [2008 (63) ACC 612 (SC)]; [1991 (28) ACC 111 (SC)]; [2012 (76) ACC 598 (SC)]; AIR 2014 SCC 1106; [2008 (3) JIC 267 (All) (DB)]; (2006)1 SCC 191 ; [2003 (1) JIC 2006 (SC)]; [AIR 1954 SC 397 (Vol. 47, C.N. 95]; AIR 1965 SC 1037.

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

1. Heard Sri Balram Yadav, learned counsel for the petitioners and Sri Rajendra Kumar Dwivedi, learned A.G.A. for the State.

2. By means of this petition, under Section 482 of Code of Criminal Procedure (In short 'Cr.P.C.'), the petitioner has prayed for quashing the proceedings of Criminal Case No.2215 of 2011 pending in the court of learned Additional Chief Judicial magistrate-III, Raebareli as well as the charge-sheet dated 10.07.1997 and cognizance order dated 22.09.2011 passed by learned Additional Chief Judicial Magistrate-III, Raebareli.

3. Brief facts for deciding this petition are that the opposite party no.2 lodged a first information report against the petitioner Rakesh Kumar and Smt. Krishna Devi in Case Crime No.232 of 1997, under Sections 363, 366 IPC, Police Station Kotwali Lalganj, District Raebareli. After investigation, the police submitted charge-sheet against Smt. Krishna Devi and Virendra Kumar Dwivedi alias Chhotey Babuwa on 09.07.1997. Thereafter the police

submitted another charge-sheet with same case crime number against the petitioner Rakesh Kumar under Sections 363, 366, 376, 506, 368, 466, 468 IPC. The trial of co-accused Smt. Krishna Devi and Virendra Kumar Dwivedi was conducted and they have been acquitted by the trial court vide Judgement and order dated 16.11.2005.

4. It has been contended by learned counsel for the petitioner that on the basis of aforesaid judgement of the trial court, the proceedings initiated against the petitioner is liable to be quashed. The principle of stare decisis is applicable in this case. Learned counsel relied upon the judgement of this Court in the case of Mohammad Amzad and another Vs. State of U.P. and another [2005 (Suppl.) ACC 895 (All)] wherein it has been observed that the trial of other accused on the same very evidence or on the future statement of witnesses if comes to contrary shall be barred by the principle of stare decisis. Learned counsel also relied upon the judgement of this Court in the case of Narayan Rai Vs. State of U.P. and others [2004 (Suppl.) ACC 391 (All)] and the judgement of the Apex Court in the case of State of Adhra Pradesh Vs. Bajjoori Kanthaiah [2008 (63) ACC 612 (SC)] wherein the Apex Court has held that if any case falls within the category of latest judgement of State of Haryana Vs. Bhajan Lal [1991 (28) ACC 111 (SC)], the proceedings may be quashed.

5. Another judgement of the Apex Court has also been cited by learned counsel for the petitioner rendered in Rajesh Talwar Vs. CBI (Delhi) and another [2012 (76) ACC 598 (SC)]. On the strength of this judgement, it has been stated that the learned Magistrate must have applied his mind before taking cognizance against an accused. He also relied upon the judgement of the Apex Court in the case of Umesh Kumar Vs. State of Andhra Pradesh; AIR 2014 SCC 1106. On the strength of this judgement, it has been urged that once the petition under Section 482, Cr.P.C. is filed before framing of the charges, petition cannot be rejected on the ground that the accused can argue legal and factual issues at the time of framing of charge.

6. On the contrary, learned A.G.A. relying upon judgements rendered in the cases of Km. Rinki Vs. State of U.P. and others [2008 (3) JIC 267 (All) (DB)], Rajan Rai Vs. State of Bihar; (2006) 1 SCC 191, K.G. Premshanker Vs. Inspector of Police and another [2003 (1) JIC 2006 (SC)] and the judgement of Constitution Bench of the Apex Court in the case of M.S. Sheriff and another Vs. State of Madras and others [AIR 1954 SC 397 (Vol.41, C.N. 95] submitted that the principle of stare decisis cannot be applied in this case.

7. In this case, the only plea of stare decisis has been taken for quashing the proceedings. Hence, it is necessary to discuss the principle of stare decisis.

8. The Black's Laws Dictionary defines 'stare decisis' as under:-

Under doctrine a deliberate or solemn decision of court made after argument of question of law fairly arising in the case, and necessary to its determination, is an authority, or binding precedent in the same court or in other courts of equal or lower rank in subsequent cases where the very point is again in controversy. Doctrine is one of

the policy, grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed, though later found to be not legally sound, but whether previous holding of court shall be adhered to, modified, or overruled is within court's discretion under circumstances of case before it. When point of law has been settled by decision, it forms precedent which is not afterwards to be departed from, and, while it should ordinarily be strictly adhered to, there are occasions when departure is rendered necessary to vindicate plain, obvious principles of law and remedy continued injustice. The doctrine is not ordinarily departed from where decision is of long- standing and rights have been acquired under it, unless considerations of public policy demand it. The doctrine is limited to actual determinations in respect to litigated and necessarily decided questions and is not applicable to dicta or obiter dicta.

"Stare Decisis' is only doctrine derived from 'stare decisis et non quieta movere,' which differs from that of doctrine of res judicata in the following ways:

(1) Res judicata applies to the decision in the dispute, while stare decisis operates as to the rule of law involved.

(2) The former binds only the parties and their successors, whereas the latter binds everyone.

(3) Res Judicata applies to all Courts, but stare decisis is brought into operation only by the decisions of higher Courts.

(4) The former takes effect after the time for appeal is past; the latter operates at once. Dias of Jurisprudence, Edn., 1964.

9. The principles of stare decisis has been considered in several cases by this Court as well by the Hon'ble Supreme Court.

10. The Hon'ble Suprem Court in K.K. Premshanker's case (Supra) considered the relevancy of judgements in light of the provisions of section 41 to 43 of the Indian Evidence Act relying upon its earlier judgement of M.S. Sheriff's case (Supra) and gave conclusive opinion as under:-

"Para 26. "What emerges from the aforesaid discussion is - (1) the previous judgement which is final can be relied upon as provided under Sections 40 to 43 of the Indian Evidence Act; (2) in civil Suits between the same parties, principle of res- judicata may apply; (3) in a criminal case Section 300 Cr. P.C. makes provision that once a person is convicted or acquitted he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgement of the civil court would be relevant if conditions of any of the Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in section 41. Section 41 provides which judgement would be conclusive proof of what is stated therein."

11. In the M.S. Sheriff's Case (supra), the Hon'ble Supreme Court held that no hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal Courts is not a relevant consideration. The law envisages "such an eventuality when it expressly refrains from making the

decision of one Court binding on the other, or even relevant, except for limited purpose such as sentence or damages."

12. In the case of Karan Singh Vs. State of Madhya Pradesh AIR 1965 SC 1037, Hon'ble Supreme Court considered the same question, the relevant paragraph 6 of which is extracted below:-

6. "We are therefore of opinion that the judgment in Krishna Govind Patil's case, AIR 1963 SC 1413 does not assist the appellant at all. On the other hand we think that the judgments earlier referred to on which the High Court relied, clearly justify the view that in spite of the acquittal of a person in one case it is open to the Court in another case to proceed on the basis - of course if the evidence warrants it - that the acquitted person was guilty of the offence of which he had been tried in the other case and to find in the later case that the person tried in it was guilty of an offence under S. 34 by virtue of having committed the offence along with the acquitted person. There is nothing in principle to prevent this being done. The principle of Sambasivam's case, 1950 AC 458 has no application here because the two cases we are concerned with are against two different persons though for the commission of the same offence. Furthermore, as we have already said, each case has to be decided on the evidence led in it and this irrespective of any view of the same act that might have been taken on different evidence led in another case."

13. In Rajan Rai's case (Supra), the police after registering the case took up the investigation and on completion thereof submitted the charge-sheet against all the six accused on receipt whereof cognizance was taken and all of them were committed to the Court of Sessions to face trial. As one of the accused was absconding, his trial was separated from that of other five accused persons, out of whom one died before the commencement of trial, as such, the trial proceeded against the remaining four accused persons and all were convicted. Against the said judgement they preferred the appeals. During the course of pendency of appeals, the other one co-accused was apprehended and was put on trial ultimately the trial court convicted him. He also filed an appeal before the High Court. The appeals preferred by the other four convicted accused persons challenging their convictions, which were decided by the High Court and the same were allowed and their convictions and sentences set aside. The appeal filed by the other co-accused was taken up later. The High Court upheld his convictions and sentences. Then, he preferred appeal by Special Leave before the Hon'ble Supreme Court to attack the impugned Judgement on three counts. One of the ground was that in appeal arising out of the earlier trial, the High Court acquitted the other four accused persons on merit, therefore, it was not permissible for it to uphold the conviction of the appellant on the basis of evidence of the same witnesses examined during the course of trial of the appellant. In considering the case the Hon'ble Supreme Court also cited the provisions of section 40 to 44 of the Evidence Act 1872, which are under the heading "Judgements of courts of justice when relevant" and found that it has not been shown that the judgement of the acquittal rendered by the High Court in appeals arising out of the earlier sessions trial could be said to be relevant under the other provisions of the Evidence Act, it

was clearly "irrelevant" and could not have been taken into consideration by the High Court while passing the impugned judgement. The Hon'ble Court also considered other earlier judgements rendered in the trial and ultimately formulated the following opinion.

"We are clearly of the view that the judgement of acquittal rendered in the trial of the other four accused persons is wholly irrelevant in the appeal arising out of the trial of the appellant Rajan Rai as the said judgement was not admissible under the provisions of sections 40 to 44 of the Evidence Act. Every case has to be considered on the evidence adduced therein. Case of the four acquitted accused persons was decided on the basis of evidence led there while the case of present appellant has to be decided only on the basis of evidence adduced during the course of his trial".

14. The relevancy of judgement of course of justice derives a power from the provisions of Sections 40 to 43 of the Indian Evidence Act, which are reproduced herein under:-

40. "Previous judgments relevant to bar a second suit or trial.- The existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial."

41. Relevancy of certain judgments in probate, etc., jurisdiction.- A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgement, order or decree is conclusive proof-

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person; that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

42. "Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.- Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state."

43. "Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.- Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant,

unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.""

15. After considering several decisions, the Division Bench of this Court in Kumar Rinki's case (Supra) concluded its opinion on the point as under paragraphs 13 &14:

"13. The inference that is deducible from discussion of the above decisions that the judgement of acquittal rendered in the trial of other co-accused is wholly irrelevant as the said judgment would not be admissible under the provisions of Sections 40 to 44 of the Evidence Act. It also leaves no manner of doubt that every case has to be decided on the evidence adduced therein and therefore, the case of the petitioner has to be decided on the basis of evidence which may be adduced during the course of trial.

14. "The principles that are distilled from the discussion of the above decisions are:

"(i) the acquittal of a co-accused in a separate trial cannot be made basis for quashing the proceedings against another co-accused who is being separately tried on the principle that each case has to be decided on the evidence adduced in that case;

(ii) Judgement of acquittal rendered in one case is not relevant in the case of co-accused separately tried inasmuch as Sections 40 to 44 of the evidence Act deal with relevancy of certain judgments in probate, matrimonial, admiralty and insolvency jurisdiction and therefore, inapplicable to a criminal case.""

16. In this case, a separate charge-sheet has been filed against the petitioner, therefore, separate case has been registered against him.

17. It has been contended by learned counsel for the petitioner that a perusal of the judgement of acquittal reveals that main accused Virendra Kumar Dwivedi married with the prosecutrix later on. The charges framed against the petitioner is not only of Section 376, 363 or 366 IPC but also for other sections. The court passed acquittal on the ground of document in the form of marriage certificate. The case of the present applicant is not based on the same defence. Moreover as discussed above, it could not be said that the case is squarely covered under Section 300 of Cr.P.C., therefore, I am of the view that the present proceeding does not warrant any interference on the basis of doctrine of stare decisis.

18. Hence, petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.01.2015

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE ASHOK PAL SINGH, J.

Service Bench No. 1654 of 2012

Ex Major Viveky Rai (Ta No. 42343)
...Petitioner
Versus
Union of India ...Respondent

Counsel for the Petitioner:
Sri Prahlad Nath Chaturvedi, Dr. L.P. Mishra, Sri Kamal Kumar Singh Bisht, Sri Vinod Shanker Misra

Counsel for the Respondent:

A.S.G., Sri Neerav Chaturvedi

Constitution of India, Art. 226-Service law-dismissal order passed on ground of conviction-criminal trail conducted at Jammu-Kashmir-disciplinary proceeding conducted with full participation of petitioner at Delhi. Simply because dismissal order served at native place at Lucknow-held-in view of Full Bench decision-Allahabad High Court- no jurisdiction-petition dismissed.

Held: Para-19
In the present case, a criminal case has been proceeded in Jammu and Kashmir, while the petitioner was posted at Jammu and Kashmir. Entire disciplinary proceeding was carried on at Delhi wherein the petitioner participated. The impugned order has been passed at Delhi by the authority situated at Delhi, therefore, the cause of action has only arisen at Delhi. The petitioner, on earlier occasion also, approached the Delhi High Court against the termination order. Merely because the petitioner resides at Lucknow and the order of termination has been communicated to him at Lucknow, no cause of action has arisen at Lucknow and thus, the writ petition filed at Lucknow is not maintainable.

Case Law discussed:
(2005) 1 UPLBEC 108; AIR 1961 SC 1313; AIR 2014 SC 3607; AIR 1995 SC 577; (1994) 4 SCC 710.

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

1. Heard Sri Umesh Narain Sharma, learned Senior Advocate, appearing on behalf of the petitioner and Sri Neerav Chitravanshi, learned counsel appearing on behalf of the respondent.

2. In the present writ petition, the following reliefs have been claimed:-

"(i) Issue a writ, order or direction in the nature of 'Certiorari' quashing the Government of India letter/order No. 16(3)/2012/D (GS-III) dated 27.4.2012, the true copy of which is contained as Annexure No. 19.

(ii) Issue a writ, order or direction in the nature of 'Mandamus' directing the respondents to reinstate the petitioner into service with all consequential service and monetary benefits, including full pay and allowances for the entire period w.e.f. 19.11.2003 till the date of reinstatement into service with 18% interest calculated with effect from the said date.

(iii) Issue any such other order or direction which this Hon'ble Court may deem fit and just in the facts and circumstances of the case in favour of the petitioner.

(iv) Allow the writ petition with cost in favour of the petitioner."

3. By the impugned order dated 27.4.2012 passed by the Government of India, Ministry of Defence New Delhi, the services of the petitioner have been terminated with effect from 11.9.2009. Copy of the said order had been sent to the petitioner at the address of 2/272-A Vishal Khand-2 Gomtinagar, Lucknow, which is apparent from the letter dated 3.5.2012, which is at page 152 of the writ petition.

4. It appears that while the petitioner was posted at Jammu, he had been tried by the Court of First Additional Sessions Judge, Jammu under Section 302 IPC for the charges of having murdered his wife Smt. Sarita Rai. The Sessions Court vide its order dated 24.11.2008 acquitted him giving benefit of doubt. Against the said order, Appeal No. 14 of 2009 has been filed by the State of Jammu and Kashmir in the State of Jammu, which is pending. On the facts and circumstances and

considering the nature and gravity of heinous charges against the petitioner, acquittal order dated 24.11.2008 based on account of benefit of doubt and prolonged detention in jail, further retention of the petitioner in Territorial Army was considered prejudicial to discipline and against the organizational interest and on this ground vide order dated 11.9.2009, the petitioner's services have been terminated. The petitioner has challenged the said order vide Writ Petition No. 815 of 2010 in Delhi High Court. The Delhi High Court has quashed the impugned order dated 11.9.2009 and directed the respondent to take fresh decision in the matter of his reinstatement. By the impugned order, the case of the petitioner has been re-considered and the petitioner's services have been terminated with effect from 11.9.2009, against which the present writ petition is being filed.

5. Learned counsel for the respondent raised a preliminary objection about the maintainability of the writ petition on the ground of territorial jurisdiction. It is contended that no cause of action has arisen in the State of U.P., and particularly at Lucknow, therefore, this Court has no territorial jurisdiction to entertain the writ petition and the writ petition is accordingly not maintainable. It is contended that merely because the petitioner resides at Lucknow, would not give the territorial jurisdiction to this Court to adjudicate the matter. The cause of action has arisen at Delhi where the impugned order has been passed.

6. Reliance has been placed on the Full Bench decision of this Court in the case of Rajendra Kumar Mishra Vs. Union of India and others, reported in (2005) 1 UPLBEC 108.

7. Sri Umesh Narain Sharma, learned counsel for the petitioner submitted that the impugned order has been served upon the petitioner at the address of 2/272-A Vishal Khand-2 Gomtinagar, Lucknow where the petitioner resides. He submitted that the order of dismissal dated 27.4.2012 became effective only when the said order came to knowledge of the petitioner when it has been served at Lucknow and, therefore, partial cause of action did arise at Lucknow.

8. Reliance has been placed in the case of State of Punjab Vs. Amar Singh Harika, reported in AIR 1961 SC 1313 and the recent decision of the Apex Court in the case of Nawal Kishore Sharma Vs. Union of India, reported in AIR 2014 SC 3607.

9. Learned counsel for the respondent submitted that the decision of the Apex Court in the case of State of Punjab Vs. Amar Singh Harika (Supra) was not relevant to the present situation inasmuch as the question of territorial jurisdiction was not involved. With regard to the decision of the Apex Court in the case of Nawal Kishore Sharma Vs. Union of India (Supra), it is submitted that the petitioner had made the claim for grant of various reliefs, including 100% disability, compensation and pecuniary damages. In respect of the said claim, several correspondences had been made from the State of Bihar to the registered office of the Corporation seaman. Communication with regard to rejection of his claim was made at his residential address in the State of Bihar and on these facts the Apex Court has held that the part of cause of action has arisen in the State of Bihar and accordingly held that the Patna High

Court had the jurisdiction to adjudicate the matter, but such situation is not available in the present case. In the present case, there was no correspondence from Lucknow to New Delhi. The case has been contested at New Delhi and merely because the petitioner resides at Lucknow and the order has been communicated at the address of Lucknow, it does not give any right to any cause of action and, therefore, the Lucknow Bench of the High Court of Allahabad had no territorial jurisdiction to entertain the petition.

10. We have considered rival submissions and perused the record.

11. In the present case, there is no dispute that all the disciplinary proceedings took place at New Delhi. The termination order was passed at New Delhi. The petitioner is claiming partial cause of action at Lucknow on the ground that he resides at Lucknow and the impugned order has been served at the address of Lucknow. The question for consideration is whether any cause of action, partially or wholly arises at Lucknow and this Court had the jurisdiction to entertain the petition. The Full Bench of this Court in the case of Rajendra Kumar Mishra Vs. Union of India and others (Supra), on consideration of several decisions rendered prior to and after the amendment in Article 226 has arrived to the conclusion that merely because the petitioner was residing in Ballia that would not give jurisdiction to Allahabad High Court inasmuch as the petitioner was on duty at Kanchanpura at Calcutta in West Bengal and was given a charge sheet and the impugned order was passed by the authority of Delhi. The Full Bench decision is squarely applicable to the present case.

12. In Board of Trustee for the Port of Calcutta Vs. Bombay Flour Mills Pvt. Limited, reported in 1995 SC 577, the Apex Court has held that whether the cause of action has arisen within the territory of the particular Court will have to be determined in each case on its own facts in the context of the subject matter of the litigation, and relief claimed.

13. In the case of Oil and Natural Gas Commission V. Utpal Kumar Basu, reported in (1994) 4 SCC 711, the Apex Court has held that in determining the objection of lack of territorial jurisdiction the Court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. Thus, the question of territorial jurisdiction must be decided on the facts pleaded in the petition, the truth or otherwise of the averments made in the petition being immaterial.

14. Lt. Col. Khajoor Singh Vs. Union of India, AIR 1961 SC 532 is a decision rendered by Seven Judges of the Supreme Court. In paragraph 13 of the aforesaid decision, the Supreme Court observed as under:

" 13-Now it is clear that the jurisdiction conferred on the High Court by Article 226 does not depend upon the residence or location of the person applying to it for relief; it depends only on the person or authority against whom a writ is sought being within those territories. It seems to us, therefore, that it is not permissible to read in Article 226 the residence or location of the person affected by the order passed in order to determine the jurisdiction of the High

Court. That jurisdiction depends on the person or authority passing the order being within those territories and the residence or location of the person affected can have no relevance on the question of the High Court's jurisdiction. Thus if a person residing or located in Bombay, for example, is aggrieved by an order passed by an authority located, say, in Calcutta, the forum in which he has to seek relief is not the Mumai High Court though the order may affect him in Bombay but the Calcutta High Court where the authority passing the order is located. It would, therefore, in our opinion be wrong to introduce in Article 226 the concept of the place where the order passed has effect in order to determine the jurisdiction of the High Court which can give relief under Article 226."

(Emphasis Provided)

15. In Board of Trustee for the Port of Calcutta V. Bombay Flour Mills Pvt. Limited, AIR 1995 SC 577, the Supreme Court examined a case which related to a claim for waiver of port charges and release of the goods seized by the Board of Trustees of the Port of Calcutta. The consignment of imported goods by the plaintiff had been unloaded at Calcutta Dock, the respondents' representations to the Port Trust Authority to waive the port charges and release the goods were refused by the Board of Trustees of the Port at Calcutta. The suit was filed for waiver of the port charges and release of goods in the District Court, Bharatpur (Rajasthan). Obviously no part of the cause of action relating to the seizure of the goods by the Port Trust of Calcutta which were unloaded at Calcutta for non-payment of port charges had arisen within the territory of Rajasthan. The Court found that the cause of action had arisen at Calcutta. The Supreme Court affirmed the principle that the place where the whole or part of the cause of action arises, gives jurisdiction to the Court within whose territory such place is situate. Whether the cause of action has arisen within the territory of the particular Court will have to be determined in each case on its own facts in the context of the subject matter of the litigation, and relief claimed.

16. In Aligarh Muslim University V. Vinay Engineering Enterprises (P) Ltd., (1994) 4 SCC 710, the Apex Court noticed that the contracts in question were executed at Aligarh, the construction work was to be carried out at Aligarh, and even the contracts provided that in the event of dispute the Aligarh Court alone will have jurisdiction. The Arbitration was from Aligarh and was to function there. Merely because the respondent was a Calcutta based firm, the High Court of Calcutta had no jurisdiction in the matter.

17. Both the aforesaid judgments are after the amendment in Article 226 of the Constitution of India in the year 1976.

18. In the case of Nawal Kishore Sharma Vs. Union of India (Supra), it has been observed that in order to maintain a writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the respondents within the territorial limit of the Court's jurisdiction. In the said case, the petitioner was residing at Gaya. From Gaya, he made several correspondences with the registered office of the Corporation situated at Bombay claiming various reliefs, including 100% disability, compensation and pecuniary damages. Rejection of his claim was also

communicated by the Corporation at his residential address at Gaya in the State of Bihar. On these facts, the Apex Court has held that part of cause of action has arisen in the State of Bihar and accordingly writ petition filed by the petitioner claiming relief has been held maintainable in Patna High Court.

19. In the present case, a criminal case has been proceeded in Jammu and Kashmir, while the petitioner was posted at Jammu and Kashmir. Entire disciplinary proceeding was carried on at Delhi wherein the petitioner participated. The impugned order has been passed at Delhi by the authority situated at Delhi, therefore, the cause of action has only arisen at Delhi. The petitioner, on earlier occasion also, approached the Delhi High Court against the termination order. Merely because the petitioner resides at Lucknow and the order of termination has been communicated to him at Lucknow, no cause of action has arisen at Lucknow and thus, the writ petition filed at Lucknow is not maintainable.

20. We are of the view that the decision of the Apex Court in the case of Nawal Kishore Sharma Vs. Union of India (Supra) is distinguishable on the facts.

21. We are of the view that the Full Bench decision of this Court in the case of Rajendra Kumar Mishra Vs. Union of India and others (Supra), which is binding upon us, squarely covers the issue.

22. In the result, the writ petition is dismissed for want of jurisdiction as not maintainable.

REVISIONAL JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 16.01.2015

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Revision No. 2524 of 2014

Satya Narayan Umar ...Revisionist
Versus
State of U.P. & Ors. ...Opp. Parties.

Counsel for the Revisionist:
Sri Shailesh Kumar Tripathi

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

Cr.P.C.-Section 401/397-Criminal Revision against order rejection of discharge application-offence u/s 272 IPC adulteration in muster oil-Public analyst found adulteration but not found to be noxious-no offence u/s 272 IPC made out-apart from that against same allegation complaint still going on by opposite party no. 2-parallel proceedings against revisionist-quashed.

Held: Para-8

The contention of learned counsel for the revisionist also find substance from the material on record that the sample in question was also taken under the provisions of Prevention of Food Adulteration Act, 1954 as is evident from the Form 7 memo which was prepared by the Food Inspector of raiding party and the sample was also sent to the Public Analyst and all the exercise was done by the raiding party when the raid was done under the provisions of Prevention of Food Adulteration Act, 1954 and the papers were also prepared according to the said Act, copies of which has been annexed as S.A. 1 supplementary affidavit and the present FIR appears to have been lodged by opposite party no.2 by misinterpreting the Government Order dated 11.5.2010 though the complaint filed against the revisionist under the Prevention of Food

Adulteration Act for the offence in question is still pending and going on, hence the proceedings against the revisionist on the basis of charge sheet for prosecuting him u/s 272 IPC is bad in the eyes of law. Moreover no offence u/s 272 IPC is made out against the revisionist. Thus the impugned order passed by the court below and the proceedings of the aforesaid case is hereby quashed.

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

1. Heard Sri Shailesh Kumar Tripathi, learned counsel for the revisionist and Sri R.K. Maurya, learned A.G.A for the State.

2. The revisionist by means of this revision has challenged the order dated 25.8.2014 passed by Addl. Sessions Judge, Court No.6, District Jaunpur illegally rejected the discharge application of the revisionist which was filed by the revisionist in S.T. No.379 of 2010 (State Vs. Satya Narain) as Case Crime No.361 of 2010, u/s 272 IPC, P.S. Sujanganj, district Jaunpur

3. The brief facts of the case are that on 18.3.2010 at about 1.25 noon opposite party no.2 Shri Kishun Chauhan who was then posted as Supply Inspector in the area Mungra Badshahpur, district Jaunpur raided the shop of the revisionist suspecting some adulteration in the mustard oil (Kacchi Ghani). The raiding team took the sample and sent the same to the Public Analyst, Lucknow. Thereafter the opposite party no.2 lodged FIR on 19.7.2010 at about 1 p.m. against the revisionist with regard to the said incident, which was registered as case crime no.361 of 2010 at Police Station Sujanganj, district Jaunpur under Section 272 I.P.C. The sample in question which was sent by the Supply Inspector to the Public Analyst, Lucknow, was found to be adulterated as per the report of Public Analyst dated 17.4.2010. In pursuance of the Government Order No.G-617/88, 10-55 Kha/10 dated 11.5.2010, the Supply Inspector, opposite party no.2 was directed to lodge the FIR against the revisionist. During investigation of the case, the statement of the informant as well as other members of the raiding team were recorded u/s 161 Cr.P.C. who supported the prosecution case. The statement of the Public Analyst Dr. S.C. Tiwari who prepared the report dated 17.4.2010 statement was recorded u/s 161 Cr.P.C. and has stated that the sample was found to be adulterated. After completion of investigation on 31.7.2010, a charge sheet was submitted against the revisionist u/s 272 IPC. The revisionist who released on bail by this Court on 16.9.2010. The revisionist approached this Court by filing Criminal Misc. Application No.141 of 2011 Sandhya Narayan Umar Vs. State of U.P. and another which was disposed of by this Court vide order dated 5.4.2011 to move discharge application. In pursuance of the said order the revisionist moved discharge application before the court below. The opposite party no.2 also filed complaint u/s 7/16 of Prevention of Food Adulteration Act, 1954 before the Addl. Chief Judicial Magistrate, Ist, Jaunpur on 18.10.2010 on the basis of the report of the Public Analyst dated 17.4.2010 and the said complaint is pending before the said court till today. The discharge application was rejected by the trial court by the impugned order passed on 25.8.2014, hence the present revision has been filed by the revisionist challenging the same.

4. It has been argued by learned counsel for the revisionist that the sample

in question which was seized from the shop of the revisionist by the Supply Inspector and sent to the Public Analyst, a report of which was received on 17.4.2010 shows that the sample was found to be adulterated but the same was not found to be noxious. As per statement of the Public Analyst Dr. S.C. Tiwari recorded u/s 161 Cr.P.C. he too also stated that the sample was found to be adulterated but the substance found was not noxious. As a complaint has also been filed u/s 7/16 of P.F.A. Act by the opposite party no.2 before the court of Addl. Chief Judicial Magistrate Ist, Jaunpur on 18.8.2010 on the basis of the report of the Public Analyst dated 17.4.2010 which is proceeding against the applicant, hence the present prosecution of the applicant u/s 272 IPC is wholly unwarranted. Moreover, no offence u/s 272 IPC is made out against the revisionist and the learned trial court without considering the said fact has rejected the discharge application in a most mechanical manner without applying its mind. He further argued that the sample was taken by the Supply Inspector under the provisions of Prevention of Food Adulteration Act, 1954 on 8.3.2010.

5. Learned AGA opposed the prayer for quashing of the impugned order but could not dispute the fact that as per Public Analyst report, the sample in question was found to be adulterated but it was not found to be noxious.

6. Considered the submissions advanced by learned counsel for the parties and perused the material brought on record. It is an admitted fact that a criminal complaint has been filed by opposite party no.2 under Section 7/16 of Prevention of Food Adulteration Act, 1954 before the Addl. Chief Judicial Magistrate, Ist, Jaunpur on 18.8.2010, copy of which is annexed as annexure no.7 to the accompanying affidavit. The Supply Inspector who has taken the sample from the shop of the applicant has sent the sample to the Public Analyst, Lucknow and as per report of Public Analyst, he has opined that "Saponification value unsaponifiable matter and bellier turbidity temperature of the sample exceed the prescribed maximum limits of 177.0, 1.2% and 27.5º c respectively for mustard oil and the sample is adulterated.

7. From the perusal of the report, it is clear that the sample exceeds the prescribed standard provided under the Prevention of Food Adulteration Act, 1954. Moreover the report of the Public Analyst also shows that he did not found anything noxious which may warrant the prosecution of the revisionist u/s 272 IPC. The parallel proceeding initiated by opposite party no.2 Supply Inspector one under the Prevention of Food Adulteration Act against the revisionist and other by lodging the FIR is not permissible under law for the same offence. Moreover the offence u/s 272 IPC is a seperate and substantive offence. Even if the applicant is to be prosecuted u/s 272 IPC, there should be material evidence to show that the sample is noxious and simply because it is found to be adulterated does not warrant the prosecution of the applicant for offence under Section 272 IPC.

8. The contention of learned counsel for the revisionist also find substance from the material on record that the sample in question was also taken under

the provisions of Prevention of Food Adulteration Act, 1954 as is evident from the Form 7 memo which was prepared by the Food Inspector of raiding party and the sample was also sent to the Public Analyst and all the exercise was done by the raiding party when the raid was done under the provisions of Prevention of Food Adulteration Act, 1954 and the papers were also prepared according to the said Act, copies of which has been annexed as S.A. 1 supplementary affidavit and the present FIR appears to have been lodged by opposite party no.2 by misinterpreting the Government Order dated 11.5.2010 though the complaint filed against the revisionist under the Prevention of Food Adulteration Act for the offence in question is still pending and going on, hence the proceedings against the revisionist on the basis of charge sheet for prosecuting him u/s 272 IPC is bad in the eyes of law. Moreover no offence u/s 272 IPC is made out against the revisionist. Thus the impugned order passed by the court below and the proceedings of the aforesaid case is hereby quashed.

9. The petition stands allowed.

10. It is made clear that the proceedings against the revisionist u/s 7/16 of Prevention of Food Adulteration Act, 1954 which is stated to be pending shall go on in accordance with law and be concluded expeditiously in accordance with law within the period of six months from the date of production of certified copy of this order before the trial court without granting unnecessary adjournment to either of the parties if there is no legal impediment.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.02.2015

BEFORE
THE HON'BLE PANKAJ NAQVI, J.

Criminal Revision No. 3781 of 2014

Mustakim ...Revisionist
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri Sumit Goyal

Counsel for the Respondents:
A.G.A.

Cr.P.C. -Section 125-Maintenance-whether can be claimed by unmarried Muslim daughter -even on achieving her majority-held-'yes'.

Held: Para-11
The Apex Court in the case of Noor Saba Khatoon (supra), after examining the personal law of muslims, has already held that a muslim father is liable to maintain his major daughter till such time she is not married. It is not disputed that O.P. No.2 is major and that she is not yet married.

Case Law discussed:
2009 (3) SCC (Crl.) 868; 2008 (62) ACC 591; 1997 (6) SCC 233; 2002 (5) SCC 422; 2004 Crl. L.J. 573; 2008 (62) ACC 591.

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

Heard Sri Sumit Goyal, learned counsel for revisionist and Ms. Anjum Haq, learned A.G.A.

"Whether an unmarried major Muslim daughter who is unable to maintain herself, can claim maintenance from her father under Section 125 Cr.P.C, is an issue which has fallen for consideration in this revision."

1. Ms. Anjum/O.P. No.2, daughter of the revisionist, claimed maintenance

from her father under Section 125 Cr.P.C. The trial court on 30.6.2007 granted maintenance @ Rs.1000/- per month, which was paid for certain duration. However, as maintenance awarded, was insufficient to maintain O.P. No.2, she filed an application for enhancement which came to be rejected on 28.5.2013 on the ground that after she had attained majority, she forfeits her right to claim maintenance. On 14.5.2013 as arrears of Rs.12000/- for the period 31.5.2012 to 31.5.2013 remained unpaid, she initiated proceedings for recovery of the said amount. The application was opposed on the ground that once she had attained majority on 10.3.2011, she is not entitled to claim maintenance. The Principal Judge (Family Court), Saharanpur dismissed the objection of the father on 16.9.2004 on the ground that the liability of a father to maintain his daughter under Section 125 Cr.P.C, continues till her marriage, which is impugned herein.

2. It is urged on behalf of revisionist that the liability of a father to maintain a daughter under Section 125 Cr.P.C. continues till such time, she has not attained majority and the view taken by the court below is in the teeth of the judgments of the Apex Court in the case of Amarendra Kumar Paul v. Maya Paul and others, 2009(3) SCC (Crl.) 868 and that of this Court in the case of Amod Kumar Srivastava v. State of U.P. and others, 2008 (62) ACC 591.

3. Per contra, learned A.G.A. would submit that the view taken by the court below is sustainable in law and the revision is liable to be dismissed.

4. An issue similar, to the one raised herein, came up for consideration before the Apex Court in the case of Noor Saba Khatoon v. Mohd. Quasim, 1997 (6) SCC 233. For ready reference, the issue is extracted hereunder:

1. Short but interesting question involved in this appeal, by special leave, is whether the children of Muslim parents are entitled to grant of maintenance under Section 125 Cr.P.C. for the period till they attain majority or are able to maintain themselves whichever date is earlier or in the case of female children till they get married or is their right restricted to the grant of maintenance only for a period of two years prescribed under Section 3(1)(b) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 notwithstanding Section 125 Cr.P.C."

5. The Apex Court after analyzing the scheme of Section 125 Cr.P.C. and that of the personal law, held that both under the personal law and the statutory law (Section 125 Cr.P.C.), the obligation of a Muslim father, having sufficient means, to maintain his minor children, unable to maintain themselves, is to last till they attain majority and in case of females till they get married. The precise answer returned by the Apex Court is extracted in paragraph 11 as hereunder:-

11. Thus, our answer to the question posed in the earlier part of the opinion is that the children of Muslim parents are entitled to claim maintenance under Section 125, Cr.P.C. for the period till they attain majority or are able to maintain themselves, whichever is earlier, and in case of females, till they get married, and this right is not restricted, affected or controlled by divorcee wife's right to

claim maintenance for maintaining the infant child/children in her custody for a period of two years from the date of birth of the child concerned under Section 3(1)(b) of the 1986 Act. In other words Section 3(1)(b) of the 1986 Act does not in any way affect the rights of the minor children of divorced Muslim parents to claim maintenance from their father under Section 125, Cr.P.C. till they attain majority or are able to maintain themselves, or in the case of females, till they are married.

6. The decision in Noor Saba Khatoon (supra) was followed by the Apex Court in the case of Jagdish Jugtawat v. Manju Lata and others, 2002 (5) SCC 422. In the latter case, an unmarried major daughter was granted maintenance by the Family Court. The father challenged the said order in revision before the High Court on the ground that once she had attained majority, she is not entitled to claim any maintenance. The High Court accepted the legal position that under Section 125 Cr.P.C, a minor daughter is entitled to maintenance from her parents till she attains majority, but declined to interfere with the order of the Family Court on the ground that her right to claim maintenance remains intact under Section 20(3) of the Hindu Adoptions and Maintenance Act. The High Court thus maintained the order of the Family Court with a view to avoid multiplicity of proceedings. An appeal preferred before the Apex Court, was dismissed.

7. A similar view has also been taken by the Karnataka High Court in the case of Smt. Fousia Banu and others v. Mohammed Saleem, ILR 2013 Karnataka 6009 and by the Patna High Court in the case of Subhash Ray Chaudhary v. State of Bihar, 2004 Crl. L.J. 573.

8. Thus, from the aforesaid analysis, position which emerges is that an order granting maintenance to an unmarried Muslim major daughter, may not be strictly justified under Section 125 Cr.P.C, yet such an order is not liable to be interfered with a view to prevent multiplicity of the proceedings, provided the daughter who is unable to maintain herself, has a right to claim maintenance from her father till her marriage under the personal law.

9. The judgment in the case of Amarendra Kumar Paul (supra) is not applicable on the facts of the present case, firstly, in view of the judgment of the Apex Court in the case of Noor Saba Khatoon (supra) and that of the Jagdish Jugtawat (supra), and secondly the case of Amarendra Kumar Paul (supra) related to the period of limitation for filing an execution application under Section 125 Cr.P.C., which has no application to the issue involved in the present case.

10. Now a look at the judgment of this Court in the case of Amod Kumar Srivastava v. State of U.P. and others, 2008 (62) ACC 591. This judgment takes a view that upon attaining majority an illegitimate / legitimate child including an unmarried daughter, is not entitled to claim maintenance, but it does not take into consideration the judgments of the Apex Court in the cases of Noor Saba Khatoon and Jagdish Jugtawat (both supra), wherein it has been held that notwithstanding the ineligibility of a major unmarried daughter to claim maintenance under Section 125 Cr.P.C, yet an order granting maintenance to such

a daughter is not liable to be interfered with a view to avoid multiplicity of proceedings provided she has a right to claim maintenance from her father under the personal law.

11. The Apex Court in the case of Noor Saba Khatoon (supra), after examining the personal law of muslims, has already held that a muslim father is liable to maintain his major daughter till such time she is not married. It is not disputed that O.P. No.2 is major and that she is not yet married.

12. It is held that notwithstanding the ineligibility of a muslim major unmarried daughter to claim maintenance under Section 125 Cr.P.C, yet an order granting maintenance to her is not liable to be interfered, with a view to avoid the multiplicity of proceedings, as such a daughter, who is unable to maintain herself can claim maintenance from her father under the personal law.

13. Thus in view of the aforesaid discussion, there is no illegality/ impropriety in the impugned order.

14. No other plea is urged.

15. The revision is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.12.2014

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 4735 of 2013

Ram Sewak Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.S. Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-withholding-amount of gratuity and pension-on date of retirement neither any departmental nor criminal proceeding pending-nor after retirement initiated after seeking permission under Regulation 351-A of Civil Services Regulation-contention of Respondent-towards loss caused based upon audit report-amount withheld-held-misconceived unless in departmental proceeding such liability of less fixed audit report can not be relied-order withholding pension and gratuity quashed-payment be made within 6 weeks.

Held: Para-8 & 17

8. Admittedly, no departmental proceedings were instituted, neither the same were pending against the petitioner on the date of retirement. It is also not denied that no departmental proceedings, after seeking approval of the competent authority under Regulation 351-A of the Civil Service Regulations, have been initiated against the petitioner.

17. Merely on the basis of said audit report without the charge of causing loss being established in a full-fledged departmental inquiry, no recovery of alleged loss caused to the State Exchequer can be made.

Case Law discussed:
Spl. Appl D 1278 of 2013; 1993 (7) SLR 706; 2006 (110) FLR 101.

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel appearing for the respondents.

2. The petitioner, who has retired on 30.06.2012 from the post of Marketing Inspector, has filed this petition with the prayer that the order dated 24.07.2013 passed by the Regional Food Controller, Faizabad Region, Faizabad whereby part of the gratuity amount of Rs.2,62,271/- has been withheld for recovering the same on account of the alleged loss caused to the State Exchequer by the petitioner, be quashed. The petitioner has also prayed that the pension payment order dated 04.01.2013 be also quashed to the extent it withholds the amount of leave encashement. Further prayer has been made for commanding the opposite party no.4 to accord the benefit of IIIrd Assured Career Progression to the petitioner with effect from 01.12.2008 in terms of the prevalent Government Order and further that the petitioner be permitted to withdraw the GPF amount.

3. So far as the prayer relating to withholding of the leave encashement amount is concerned, learned counsel for the petitioner states that the said amount has been released. Accordingly, the prayer made in this petition in respect of the same has been rendered infructuous. As regards the prayer relating to grant of the benefit of IIIrd Assured Career Progression to the petitioner, it has been informed that the said benefit has also been given to him which renders the prayer made in this regard infructuous. The petitioner, has, since been permitted to withdraw the amount of GPF, hence in this view, the prayer made in this regard has also become infructuous.

4. The sole issue which now survives for consideration in this case is as to whether the part of the amount of gratuity i.e. the sum of Rs.2,62,271/- has legally been withheld by the Regional Food Controller, Faizabad Division, Faizabad by passing the impugned order.

5. It has been submitted by the learned counsel for the petitioner that at the time of retirement, the petitioner was not facing any departmental inquiry, neither any departmental proceedings were initiated after his retirement in terms of the provision contained in Regulation 351-A of the Civil Service Regulations, hence there was no occasion for the respondents to have withheld the part of the amount of gratuity.

6. Per contra, learned counsel appearing for the State has vehemently argued that on the basis of special audit report, it was determined that the petitioner has caused loss of Rs.2,62,271/- , hence the loss caused to the State Exchequer has been sought to be recovered by withholding the amount equal to the loss, from the gratuity of the petitioner by the Regional Food Controller, Faizabad Division, Faizabad by means of order dated 24.07.2013.

7. I have considered the arguments advanced by learned counsels appearing for the parties.

8. Admittedly, no departmental proceedings were instituted, neither the same were pending against the petitioner on the date of retirement. It is also not denied that no departmental proceedings, after seeking approval of the competent authority under Regulation 351-A of the Civil Service Regulations, have been initiated against the petitioner.

9. In the counter affidavit, it has been stated by the respondents that on the

basis of liability of a sum of Rs.2,62,271/-, which has been determined on the basis of audit report, the amount has been ordered to be recovered from the gratuity amount of the petitioner. No other reason has been indicated by the respondents for withholding the amount of gratuity for recovery of the alleged loss caused to the State Exchequer.

10. The U.P. Recruitment Benefit Rules 1961 provides that recovery from the gratuity of retired employee can be made only if the conditions of Regulation 351-A of the Civil Service Regulation are fulfilled. As observed above, in the instant case, there is no material which in any manner suggests that any departmental proceedings were initiated against the petitioner by taking recourse to the provisions of Regulation 351-A of the Civil Service Regulations.

11. Learned Standing Counsel appearing for the State has, however, sought to defend the impugned order of recovery from the gratuity amount on the basis of decision rendered by a Division Bench of this Court in the case of State of U.P. and others vs Jai Prakash, decided on 17.12.2013 in Special Appeal Defective No.1278 of 2013. The Division Bench in the aforesaid case has held that Government has the power to withhold the gratuity, however, the gratuity can be withheld only until conclusion of departmental or judicial proceedings or any inquiry by administrative tribunal.

12. Referring to the provision contained in Regulation 351-AA, this Court in the said case of State of U.P and others vs Jai Prakash (supra) has held that death-cum-retirement gratuity may be withheld until the conclusion of departmental or judicial proceedings and the issue of final orders thereon.

13. Thus, condition precedent for withholding or making recovery from the gratuity is pendency of departmental or judicial proceedings or any inquiry by the administrative tribunal and in absence of these inquiries or proceedings pending on the date of retirement, gratuity of the retiring employee cannot be withheld.

14. As observed above, admittedly, in the instant case, no departmental or judicial proceeding or any such inquiry was pending, hence there cannot be any justification for withholding the gratuity of the petitioner.

15. In fact, the impugned order does not withhold part of amount of gratuity; rather it seeks to recover the same citing the cause that the petitioner has been responsible for causing loss to the State Exchequer to the extent of the amount mentioned in the impugned order.

16. The question, thus, is as to whether without holding any departmental inquiry and without determining the responsibility of the petitioner for the alleged loss, solely on the basis of audit report, can any recovery from the petitioner be made.

17. It is well established that audit report cannot be used as substantive evidence of the genuineness or bonafide nature of the transactions referred to in the accounts. As has been held by this Court in the case of Dilip Singh Rana vs State of U.P. reported in 1993 (7) SLR 706, audit is only official examination of the accounts in order to make sure that the accounts have been properly maintained

according to prescribed mode and further that audit report is a statement of facts pertaining to the maintenance of accounts coupled with the opinion of the auditor and thus it can only give rise to reasonable suspicion of commission of a wrong. Merely on the basis of said audit report without the charge of causing loss being established in a full-fledged departmental inquiry, no recovery of alleged loss caused to the State Exchequer can be made.

18. In similar circumstances, recovery sought to be made from the gratuity of a retired government employee on the basis of some audit report was not approved by a Division Bench of this Court in the case of Radhey Shyam Dixit vs State of U.P. and others, reported in 2006 (110) FLR 101.

19. For the reasons disclosed above in the instant case as well, the recovery of the part of the amount of gratuity of the petitioner, which has been sought to be made by passing the impugned order dated 24.07.2013, cannot be permitted to be sustained.

20. In the result, the writ petition is allowed and the impugned order dated 24.07.2013 passed by the Regional Food Controller, Faizabad Region, Faizabad as contained in annexure no.1 to the writ petition is hereby quashed. It is directed that payment of entire gratuity amount shall be made to the petitioner within six weeks from the date of production of certified copy of this order.

21. However, there will be no order as to costs.

ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 18.02.2015

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 4788 of 2015

Kishan Lal Barwa ...Petitioner
Versus
Sharda Saharan & Anr. ...Respondents

Counsel for the Petitioner:
Sushma Singh, Sri Manish Singh

Counsel for the Respondents:
Sri Pankaj Agarwal

C.P.C. Section 47-Execution proceeding-decree obtained by fraud-whether execution Court can consider such issue of fraud-held-'yes'-execution Court being duty bound to consider-as fraud vitiates all solemn acts-such application can not be rejected-order impugned quashed with cost of Rs. 500/-with direction to expeditious disposal.

Held: Para-19
It is well settled that once the plea of fraud has been setup by the defendant-petitioner before the executing court, and credible evidence in support of such plea was also placed, it was incumbent upon the executing court to have examined the issue of fraud, on merits, and such plea ought not to have been rejected merely on the ground that a decree in favour of the plaintiff-respondent had been passed, and the executing court, as such, had no occasion to examine the plea of fraud. It is also well settled that fraud vitiates all solemn acts. Though a plea of fraud was taken up before the civil court, but such plea was not adjudicated, which is clarified in the judgment of the civil court itself. However, if a credible material has come into existence, which if is found proved vitiates the decree itself, it is the duty of the executing

court to consider such plea on merits. It was open for the executing court to have examined the report of the Directorate, Fingerprint Experts, in accordance with law, and for such purpose an opportunity was liable to have been allowed to the plaintiff-respondent. The executing court could have adjudicated as to whether the plea of fraud was made out on facts or not? but it was not open for the executing court to brush aside the objection itself and thereby refused to go into such issue itself.

Case Law discussed:
AIR 1973 Bom. 139; AIR 1970 Pat. 13 para 13; AIR 1978 Ori. 111; AIR 1986 PH 197; 2000(7) SCC 543; Lrs:JT 1995 (5) SC 496; (2011) 6 SCC 385; AIR 2000 Punjab and Haryana 271; (2006) 7 SCC 416.

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

1. The present writ petition is directed against the orders passed by Civil Judge (Senior Division), Gautam Buddh Nagar, dated 26.2.2014, rejecting objection under section 47 CPC, as well as the order dated 29.5.2014, rejecting the revision filed against it. The question falling for consideration of this Court, in the instant petition, is as to whether the executing court is justified in refusing to examine plea of fraud, setup in objection under section 47 CPC, on the basis of a subsequent report of public servant, for the reason that such defence setup before civil court was not substantiated, resulting in passing of the decree itself?

2. Facts as it emerges from record are that Noida (New Okhala Industries Development Authority) executed a lease deed of a residential plot no.39, Block-C, Sector- XV, measuring 202.50 sq. meters, in favour of Ashok Kumar, on 23.5.1981. The defendant-petitioner asserts that a registered agreement to sell was executed by the lessee Ashok Kumar in favour of the defendant-petitioner on 7.8.1984, pursuant to which, the defendant-petitioner was put in actual possession and that a five story-building was constructed by him, which exists on the spot. It further appears that in respect of the same plot, the plaintiff-respondent asserts that a power of attorney was executed by the lessee Ashok Kumar in favour of respondent no.2 Ripudman Kumar Saharan on 25.10.1984, on the basis of which, a sale deed of the plot was executed on 25.2.1986 in favour of his wife Smt. Sharda Saharan, who is plaintiff-respondent no.1 in the present petition.

3. Smt. Sharda Saharan, thereafter, filed a civil suit no.842 of 1986 for permanent prohibitory injunction, in respect of the plot in question, against the defendant-petitioner with the allegation that the plaintiff-respondent has obtained a sale deed of the plot in question on 25.2.1986, which was executed by the power of attorney holder of the lessee Ashok Kumar. It was further asserted that the plaintiff-respondent has also got a map sanctioned for raising of construction upon the plot on 8.4.1986 and a temporary construction of a store was raised upon it. The suit was filed against the defendant-petitioner saying that he had no right over the suit property, yet, he is hellbent upon forcibly entering into possession, and therefore, the defendant-petitioner be restrained from interfering with the right of the plaintiff-respondent over the suit property. The suit was contested by the defendant-petitioner asserting that no power of attorney was ever executed by Ashok Kumar in favour of Ripudman Kumar Saharan, and the alleged power of attorney dated 25.10.1984 was a forged document. It was

also stated that no right accrues to the plaintiff-respondent over the suit property on the basis of sale deed, as the power of attorney itself was a fraudulent document. The plaintiff-respondent no.1 Smt. Sharda Saharan was the sole plaintiff and defendant-petitioner Kishan Lal Barwa was the sole defendant. An affidavit in the suit was filed by Ashok Kumar, claiming to be lessee of the suit property, stating that he has not executed any power of attorney in favour of Ripudman Kumar Saharan and the said document contains signatures of someone other than him. It was further stated in the affidavit that the property has been agreed to be sold to the defendant-petitioner and he has been put in possession of the property. The suit was tried by the civil court and five issues were framed, first of which, was whether the plaintiff-respondent is the owner in possession of the disputed plot? The civil court noticed the contention of the defendant-petitioner that only certified copies of the power of attorney as well as the sale deed pursuant thereto have been brought on record and that its originals have not been produced. The challenge to the power of attorney, on the ground that it is a fraudulent document, was not considered by the civil court, on the ground that the person, who has executed the power of attorney, had not disputed its execution by appearing before the civil court. It was, therefore, held that so long as the sale deed continues to exist in favour of the plaintiff-respondent, she would be treated to be the owner of the property. The civil court also found that the plaintiff-respondent is in possession of the suit property. The suit was ultimately decreed on 27.4.1991 in favour of the plaintiff-respondent. This judgment and decree was put to challenge in civil appeal no.74 of 1991 and the same was dismissed on 23.1.1992. A second appeal, being S.A. No.448 of 1992, filed against it, was also rejected by this Court on 18.2.2002. The decree passed by the civil court, granting prohibitory injunction to the plaintiff-respondent, against defendant-petitioner thus attained finality.

4. The plaintiff-respondent, thereafter, filed a writ petition no.38949 of 2002 with the allegation that during pendency of the proceedings, the defendant-petitioner has forcibly entered into possession of the suit property, by throwing out the plaintiff-respondent. A counter affidavit in the said writ petition was filed by the Station House Officer, stating that defendant-petitioner has remained in possession over the suit property in question since 1984 and a criminal proceeding under section 156(3) Cr.P.C. has also been got registered at the instance of the defendant-petitioner. The aforesaid writ petition was heard and was dismissed with the observation that plaintiff had, in the facts of the case, an effective remedy under Order 21 Rule 32 CPC, for execution of decree of prohibitory injunction. It is after this order of the Division Bench of this Court dated 13.3.2008 that execution case no.20 of 2010 was filed for possession, with the allegation that the judgment debtor had forcibly entered into possession over the suit property in November, 2002, with the help of local administration, unauthorizedly and in teeth of the decree, and therefore, appropriate relief for possession was claimed. It is not in dispute that during pendency of the proceedings, aforesaid, Ashok Kumar, who undisputedly was the allottee of the plot from Noida and through whom rights were claimed by rival parties, died.

5. It further appears from the record that pursuant to an application made before the Chief Judicial Magistrate under

section 156 (3) Cr.P.C., a criminal case no.499 of 2002 under section 420, 468, 467, 471 IPC was registered at the instance of the defendant-petitioner against Ripudman Kumar Saharan and Smt. Sharda Saharan. During investigation, the fingerprints of Ashok Kumar, as it appeared on lease deed executed by Noida in his favour were got tallied with the fingerprints appearing on the agreement to sell executed in favour of the defendant-petitioner and also upon the alleged power of attorney executed in favour of Ripudman Kumar Saharan on 25.10.1984. A fingerprint report was submitted by the office of Directorate, Fingerprint Experts, State of U.P., Lucknow on 30.5.2003 to the Chief Judicial Magistrate, Gautam Buddh Nagar, wherein experts of the directorate found that the fingerprints of Ashok Kumar, as appearing on the lease deed executed by Noida in his favour, do not match with the fingerprints on the power of attorney, whereas fingerprints of Ashok Kumar do match with his fingerprints on the agreement to sell executed in favour of the defendant-petitioner.

6. In execution of the decree, aforesaid, the defendant-petitioner filed objection under section 47 CPC, wherein apart from raising other issues, it was also stated that the basis of decree in favour of the plaintiff-respondent was the sale deed executed by Ripudman Kumar Saharan, on the basis of power of attorney executed by Ashok Kumar on 25.10.1984 in his favour, which has been found to be a forged document, as such, the decree itself has been obtained by playing fraud, and therefore, is nullity and inexecutable. The plaintiff-respondent filed an objection against it. The executing court found that the decree of prohibitory injunction had been passed after contest in favour of the decree holder, after returning a finding on issue no.1 that the plaintiff-respondent is the owner in possession over the suit property, and therefore, the executing court cannot go behind the decree. Consequently, the objection under section 47 CPC has been rejected. Aggrieved against it, a revision was preferred, which has also been dismissed by the revisional court with the finding that the issue of ownership of the plaintiff-respondent since had been adjudicated and determined in original suit, thereafter, it is not open for the executing court to examine the questions, which are being urged in objection under section 47 CPC. It has been further held that once the plaintiff-respondent had been held to be owner in possession of the suit property and the execution has been filed, it is not open for the executing court to reconsider all such questions, which had attained finality with the passing of the decree itself, and in such circumstances, the revisional court refused to interfere with the orders passed by the executing court. It is aggrieved by these two orders that the present writ petition has been filed by the defendant-petitioner.

7. Sri Manish Singh, learned counsel appearing for the defendant-petitioner, submits that only the issue, which was examined in the suit was as to whether the plaintiff-respondent was the owner in possession on the basis of sale deed over the suit property, and no issue with regard to genuineness of the power of attorney was raised or adjudicated. It is also submitted that though it was pleaded by the defendant-petitioner in the suit that no power of attorney was executed by Ashok Kumar and such stand was also taken by Ashok Kumar by filing an affidavit, but

this aspect of the matter was not examined by the civil court on the ground that Ashok Kumar had not denied the execution of power of attorney by appearing before the civil court. Sri Singh further submits that subsequently, in criminal proceedings, evidence has been collected in the form of a fingerprint report submitted by a public officer of the office of Directorate, Fingerprint Experts, State of U.P., at Lucknow, which clearly establishes that the sale deed in favour of the plaintiff-respondent was obtained by playing fraud, as no power of attorney was executed on 25.10.1984 in favour of Ripudman Kumar Saharan, and therefore, the decree was inexecutable. Learned counsel has placed reliance upon section 44 of the Indian Evidence Act to contend that the judgment and decree obtained by fraud cannot be executed. It is thus submitted that the courts below have grossly erred in law, in refusing to examine the plea of fraud setup by the defendant-petitioner in execution proceedings, resulting in failure of injustice being caused to the defendant-petitioner.

8. Sri Pankaj Agrawal, learned counsel appearing for the respondents, on the other hand, submits that the plaintiff-respondent is the owner in possession, which issue has already been accepted by the civil court, and has attained finality, and thereafter, the same question cannot be raised in execution, as the executing court cannot go behind the decree. He further submits that once the plea of fraud was setup in suit, it could have been established by the defendant-petitioner by leading cogent evidence, but once he failed to do so, it is not open for him to take such stand in execution. Sri Agrawal has also submitted that the defendant-petitioner in teeth of the decree has forcibly entered into possession and all frivolous objections are being raised so as to deny the benefit of the decree to the plaintiff-respondent. It is also submitted that defendant-petitioner had also got execution stalled by setting up a plea under Order 21 Rule 97 CPC by Madan Mohan, who is the son of Ashok Kumar, and now that the proceedings under Order 21 Rule 97 CPC are likely to conclude, therefore, this belated petition has been filed with the object of further harassing the plaintiff-respondent. It is also submitted that the plea of fraud though has been taken in the objection, but the same was not pressed before the courts below, and therefore, such issue cannot be permitted to be adjudicated in the writ petition arising out of such orders.

9. Learned counsel appearing for both the parties have relied upon various authorities in support of their proposition. With the consent of the learned counsel for the parties, the writ petition is being disposed of finally, at this stage. Both the parties have filed their written argument, which have been taken on record and are being considered while deciding the writ petition.

10. From the materials placed on record, it is apparent that the suit property was leased out by Noida to Ashok Kumar, pursuant to lease deed dated 23.5.1981. The judgment debtor and decree holder both are claiming their right over the suit property through Ashok Kumar. The defendant-petitioner has setup his right over the suit property on the basis of a registered agreement to sell, pursuant to which he alleges to have been put in possession by Ashok Kumar. On the other hand, the plaintiff-respondent has setup

her right, on the basis of sale deed, executed in her favour by her husband Ripudman Kumar Saharan, on the basis of a registered power of attorney claimed to have been executed by Ashok Kumar on 25.10.1984. Original Suit no.842 of 1986 had been filed by the plaintiff-respondent against the defendant-petitioner with the allegation that the defendant-petitioner had no right over the suit property, and as such, the defendant-petitioner be restrained from interfering with her possession. The suit was contested by the defendant-petitioner with the allegation that the plaintiff-respondent had no right over the suit property, as no power of attorney in favour of Ripudman Kumar Saharan was executed by Ashok Kumar and the power of attorney relied upon for executing the sale deed in favour of plaintiff-respondent is forged. It was stated that the defendant-petitioner pursuant to agreement to sell has been put in possession of the property and he is the owner in possession of the suit property. The civil court examined the question and vide issue no.1 returned a finding that the plaintiff-respondent is owner in possession over the suit property. It further appears that Ashok Kumar had filed an affidavit before the civil court, denying the execution of power of attorney in favour of Ripudman Kumar Saharan. The civil court dealt with this aspect of the matter in following words:-

'' जहॉ तक प्रतिवादी इस तर्क का प्रश्न है कि सेल डीड उसके पति द्वारा की गयी है और पॉवर ऑफ अटार्नी जिसके आधार पर सेल डीड की गयी है वह साबित नहीं है चूॅकि इसके करने वाले को पेश नही किया गया है। यही सही है कि प्रस्तुत वाद में जो पॉवर ऑफ अटार्नी की प्रमाणित प्रतिलिपि दाखिल की गयी है उसको तथा बैनामें की प्रमाणित प्रतिलिपि दोनों को पी0डब्लू0–01 जो वादनी का पति है, नहीं साबित किया है, गलत है, क्योंकि यह आपत्ति उस व्यक्ति द्वारा नहीं उठाई गयी है जिसके द्वारा पॉवर ऑफ अटार्नी दी गयी है। वही व्यक्ति यह कह सकता था कि पॉवर ऑफ अटार्नी उसके द्वारा नहीं की गयी है। चूॅकि दस्तावेज रजिस्टर्ड है। अतः जब तक उसे फर्जी साबित नहीं किया जाये तब तक यदि दस्तावेज जिसके पक्ष में किया गया है वह यह साबित करता है कि दस्तावेज उसके पक्ष में निष्पादित हुआ था सही माना जायेगा। ऐसी कोई साक्ष्य प्रतिवादी ने नहीं दी है जिससे उक्त दस्तावेज फर्जी माना जाये। यद्यपि वादनी द्वारा दाखिल साक्ष्य इतनी मजबूत नही हैं जितनी की होनी चाहिये। चूॅकि असल बैनामा दाखिल नहीं है और मूल आवंटक की साक्ष्य नहीं कराई गयी है, किन्तु प्रस्तुत साक्ष्य से यह साबित होता है कि वादनी के पक्ष में विवादित प्लाट की एक रजिस्ट्री हुई है और जिससे वह मालिक है जब तक कि अन्यथा साबित न हो।''

11. The appellate court found that Ashok Kumar had not been produced before the civil court. Appellate court has also taken note of the fact that the power of attorney executed by Ashok Kumar in favour of Ripudman Kumar Saharan had been lost, and the certified copies of the power of attorney and sale deed were placed on record. The civil court relying upon the plaintiff's evidence, treated the certified copies as admissible in evidence as secondary evidence. It was also found that Ashok Kumar had neither appeared before the civil court nor he appeared before the appellate court to challenge the averments made in the plaint, and in such circumstances, the plea set up by the defendant-petitioner was rejected. The observation of the appellate court, which is relevant for the present purposes, as is contained at page 81 of the writ petition, is that "it was not open to the defendant-petitioner to contend that these papers were forged papers. Until the original allottee Ashok Kumar had come before this Court to challenge the authenticity of these papers." The affidavit filed by Ashok Kumar before the civil court, however, has not been commented upon by the civil court or the appellate court.

The second appeal itself was also dismissed by this Court on 18.2.2002, as no substantial question of law was found to be involved in the matter.

12. A bare perusal of the record further goes to show that so far as the plea of fraud in execution of power of attorney is concerned, the civil court had refused to examine this aspect of the matter in the absence of Ashok Kumar himself disputing the due execution of the power of attorney. In such circumstances, this Court finds that the plea of power of attorney being an outcome of fraud though was pleaded by the defendant-petitioner, but the same had not been gone into for the simple reason that executor Ashok Kumar had not appeared to take such a plea. No finding with regard to genuineness of the power of attorney was returned by the civil court.

13. This Court further finds that in execution proceedings, a specific objection has been taken by the defendant-petitioner, to contend that the basis of the decree in favour of plaintiff-respondent itself is based upon fraud, inasmuch as the sale deed in favour of plaintiff-respondent was executed on the basis of power of attorney, which has been found in the report of the Directorate, Fingerprint Experts, U.P., Lucknow, to be not that of Ashok Kumar and the claim of plaintiff-respondent based upon it, therefore, is an outcome of fraud, which renders the decree inexecutable. Such an objection has been taken under section 47 CPC. Both the courts below, while narrating the contents of the objection, have taken note of the objection in this regard. Although Sri Pankaj Agrawal has strongly urged that this aspect of the matter was not pressed before the courts below, but such a contention is not liable to be accepted inasmuch as the civil court has taken note of the specific objection of the defendant-petitioner under section 47 CPC, and therefore, the executing court was required to examine this aspect of the matter. Even in revision it is to be found that the revisional court has taken note of the contention of the defendant-petitioner that the decree of the civil court was obtained by playing fraud, and as such, the decree itself is a nullity. This Court finds that the executing court as well as the revisional court were swayed by the fact that once an adjudication on the respective claim of the parties had been returned by the civil court, the same was not liable to be re-agitated, as a ground, in execution. Both the courts below have held that the nature of objection raised if is examined, as is being claimed by the defendant-petitioner, the object of decree itself would be frustrated, and therefore, the courts below have refused to go into the merits of the contention setup by the defendant-petitioner in objection under section 47 CPC as well as in revision by the District Judge.

14. This Court finds that the basis of petitioner's claim that the decree was obtained by fraud is a report submitted before the Chief Judicial Magistrate by the Directorate of Fingerprint Experts, according to which, the fingerprints of Ashok Kumar, as existing on the lease deed executed by Noida do not match with those upon the power of attorney claimed by Ripudman Kumar Saharan and rather matches with the agreement to sell executed in favour of the defendant-petitioner. This report has been prepared by the experts of Directorate of Fingerprint, who are public servants, and

the report is in due discharge of their official duties, and by virtue of section 114 of the Indian Evidence Act, a presumption of correctness of the report would be available in law, subject to further evidence which may be brought on record by the other side. The question as to whether a plea of fraud could be entertained even in collateral proceedings, at the stage of execution, after passing of the decree, is no longer res integra. It is settled that fraud and justice do not dwell together. It is equally settled that a court of law would do its utmost to ensure that injustice is not meted out to a party. Such right in a court of law has been recognized under section 44 of Evidence Act, which reads as under:-

"44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

15. Reliance has been placed upon a decision of the Bombay High Court in Shewa Lachha Banjar v. Bhawarilal Ganeshmal Marwadi: AIR 1973 Bom. 139, wherein plea of fraud was setup in execution was rejected by the courts below. In such circumstances, the Bombay High Court interfered with the matter and made following observations:-

"-----It must be observed that even in execution if it is shown that the order was made upon mistake or fraud which affects the very validity of the order under execution rendering it ineffective, it can properly be questioned by any one. Section 44 of the Evidence Act in terms applies to such matters and permits a person to lead evidence to show that the order is not binding in any such proceeding.-----"

16. Reliance has also been placed upon following decisions of the High Courts:-

(i) In Tribeni Mishra and others v. Ram Pujan Mishra and another: AIR 1970 Pat. 13, para 13 has been relied upon, which reads as under:-

"13. It may be mentioned here that Shri Kailash Roy, appearing for the defendant-respondents, has contended that the question as to whether there was any fraud in connection with the compromise could not be gone into in the present litigation in view of the fact that the previous suit had been decreed on basis of the compromise and the defendants had not brought any suit for setting aside the decree within the prescribed time limit under Article 95 of the Limitation Act, 1908. the prescribed period of time limit for institution of a suit for setting aside a decree obtained by fraud or for other relief on the ground of fraud was three years from the date when the fraud became known to the party and the same period of limitation has been prescribed under Article 59 of the new Limitation Act also. Hence, there cannot be any doubt that a suit by the defendants for setting aside the decree on basis of the compromise on the ground of fraud would have been barred by limitation unless filed within the prescribed time limit of three years from the date of knowledge of the fraud. Section 44 of the Evidence Act, however, provides as follows:

"Any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under Section 40, 41 or 42 and which has been proved by adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

The question as to whether in view of these provisions, a decree or order can be challenged on the ground of fraud in a collateral proceeding without any suit for setting aside the decree came up for consideration before a Division Bench of this Court in the case of Bishnunath Tewari v. Mst. Mirchi, AIR 1955 Pat 66. In this case, there was a divergence of opinion between the two Judges of this Court, namely, Lakshmikanata Jha, C. J. and Reuben, J. who initially heard the case, on which there was a reference to a third Judge, namely, Ramaswami, J. fas he then was) and the latter agreed with the views expressed by Lakshmikanta Jha, C. J. and observed as follows :--

"It is important to remember that fraud does not make a judicial act or transaction void but only voidable at the instance of the party defrauded. The judicial act may be impeached on the ground of fraud or collusion in an active proceeding for rescission by way of suit. The defrauded party may also apply for review of the judgment to the Court which pronounced it. But the judgment may also be impeached in a collateral proceeding in which fraud may be set up as a defence to an action on the judgment or as an answer to a plea of estoppel or res judi-cata found upon the judgment."

It was further held in this case that the provision relating to limitation as provided in Article 95 of the Limitation Act has no bearing in relation to Section 44 of the Evidence Act. As would appear from the terms of Section 44 of the Evidence Act, already quoted above, this section lays down that any party to a suit or other proceeding may show that a judgment, order or decree referred to in the section, which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The right as given by this section has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or decree etc. set aside by bringing regular suit for the purpose. I, therefore, fully agree with the views expressed in the earlier decision of this Court referred to above and hold that such a plea can be raised under Section 44 of the Evidence Act in a collateral proceeding irrespective of the time when the judgment was delivered or decree or order was passed. The aforesaid contention of Shri Kailash Roy is accordingly rejected as being quite untenable. This, however, makes no difference so far as the result of this appeal is concerned in view of the findings above that there was no fraud in connection with the compromise in question."

(ii) In Khirod Chandra Mohanty v. Banshidhar Khatua: AIR 1978 Ori. 111, para 8 has been relied upon, which reads as under:-

"8. It was urged by Mr. Mohanty that even though it was held that the ex parte decree in T.S. No. 52/64 was obtained by collusion, that decree would operate as res judicata in this case. In support of his above submission Mr. Mohanty cited the single Judge decision reported in AIR 1950 All 488 (Baboo v. Mt. Kirpa Dei). The decision in that case was rendered entirely on facts different from those in the present case. In that case the question was whether 'even if one of the

defendants to the suit was in collusion with the plaintiff, the decision could be said to be binding on the defendants on the principle of res judicata.' That question was decided in the affirmative. In the present case before me, it has been found by both the courts below that the ex parte decree in T. S. No. 52/64 was obtained by the plaintiff in collusion with all the defendants in the said suit. That being so, the above decision is not applicable to the present case.

Under Section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree, which it or was obtained by fraud or collusion. The provision of Section 44 is not an idle provision. If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains.

In Manchharam v. Kalidas ((1895) ILR 19 Bom 821) it was held that Under Section 44, Evidence Act, a party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

In Nistarini Dassi v. Nundo Lall Bose, ((1899) ILR 26 Cal 891) it was held that an innocent party may be allowed to prove in one court that a decree obtained against him in a different proceeding in another court of concurrent jurisdiction was obtained by fraud, and if the court be of opinion that such decree so obtained in the other court cannot stand it has jurisdiction to treat that decree as a nullity and render its effect nugatory.

In Section 44of the Evidence Act the word "Collusion" has been placed exactly on the same footing as the word "fraud" in the said section.

In the case reported in AIR 1955 Pat 66 (Bishunath Tewari v. Mst. Mirchi) it has been observed:--

"Thus, a survey of the authorities of the different High Courts, shows that a judgment, decree or order of a court of competent jurisdiction can be treated as a nullity under Section 44, Evidence Act and its effect rendered nugatory if it is shown that it was obtained by fraud or collusion of the antagonist".

On the above discussion I reject the above-mentioned contention of Mr. Mohanty.

(iii) In Nechhittar Singh v. Smt. Jagir Kaur and others: AIR 1986 PH 197, para 6 has been relied upon, which reads as under:-

"6. The learned counsel for the defendant appellant vehemently contended that the decree could only be challenged under S. 44 of the Evidence Act and that too by a third party and not by a party to the suit in which that said decree was passed. In support of this contention he referred to Mt. Parbati v. Garaj Singh, AIR 1937 All 28, Shripadgouda Venkangouda Aparanji v. Govindgouda Narauangouda Aparanji, AIR 1941 Bom 77, Parameswearn Naair v. Aiyappan Pillai, AIR 1959 Ker 206 and Laxmi Narain Gododia v. Mohd. Shafi Bari, AIR 1949 East Punjab 141. On this question I do not find any merit in the contention raised on behalf of the appellant. S. 44 of the Evidence Act reads as follows:--

"Fraud or collusion in obtaining judgment, or incompetency of Court, may

be proved.-Any party to a suit or other or decree which is relevant under S. 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Reading S. 40 with S. 44 it is evident the under S. 40 the previous judgments are relevant to bar a second suit or trial., In other words, the earlier judgment operates as respondent judicata. That will only be ordinarily between the same parties, and if that is so then the said judgment being relevant u/s 40 could be challenged if it was proved by the adverse party that the same was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. It is only u/ss. 41 and 42 of the Act when the judgment is relevant that even a third party can show that the same was delivered by a Court not competent to deliver it or that it was obtained by a fraud or collusion. Even the judgments relied on by the learned counsel for the appellant do not support his contention. In Laxmi Narian Goddodia's case (supra) it was held that S. 44 is the only provision of law under which a judgment or an order or a decree which is sought to be proved with a view to establish the plea of respondent judicata can be avoided. similarly, in Tribeni Mishra v. Rampuijan Mishra. AIR 1970 Patna 13. it was held that the right as given by S. 44. Evidence Act has not been fettered by any limitation whatsoever and it is manifest that such a right is quite independent of the right to get a judgment or a decree. etc., set aside by bringing a regular suit for the purpose. A decree or an order can be challenged on ground of fraud in a collateral proceeding without any suit for setting aside the decree irrespective of the time when the judgment was delivered or the order of the decree was passed. Similarly, in Mt. Parbati's case (supra) it was held that the meaning of S. 44 of the Evidence Act is that if collusion is proved between the parties to previous suit then the judgment in that suit which is relevant u/s 40 cannot act as a bar. Thus, the contention that no decree could be challenged by a party to the suit subsequently on the basis of fraud or collusion cannot be accepted as such. The authorities relied on by the learned counsel for the appellant do not lay down such a law and, in any case the same are distinguishable on facts."

17. The Apex Court in Gram Panchayat of Village Naulakha v. Ujagar Singh: 2000 (7) SCC 543 relying upon various decisions has been pleased to hold as under in para 4, 5 & 6:-

"4. On this point, we have heard the learned counsel for the respondents who contended that the principle laid down by the Full Bench in Jagar Ram's case is correct and that the earlier judgment in the present case is binding on the basis of the principle of res judicata. The panchayat cannot therefore raise a plea of collusion in the latter proceeding unless it has first filed a suit and obtained a declaration or unless it took steps to have the earlier decree set aside.

5. We may state that the view taken by the Full Bench of the Punjab & Haryana High Court in Jagar Ram's case is not correct and in fact, it runs contrary to the provisions of section 44 of the Indian Evidence Act. That section provides that: Any party to a suit or proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, 42 and which has been delivered by a Court not competent to

deliver it or was obtained by fraud or collusion. (Section 40 refers to the relevances of previous judgments which are pleaded as a bar to a second suit or trial and obviously concerns section 11 CPC).

6. It appears from commentary in Sarkar's Evidence Act (13th Ed., reprint) (at p. 509) on section 44 that it is the view of the Allahabad, Calcutta, Patna, Bombay High Courts that before such a contention is raised in the latter suit or proceeding, it is not necessary to file an independent suit. The passage from Sarkar's Evidence which refers to various decisions reads as follows:

"Under Section 44 a party can, in a collateral proceeding in which fraud may be set up as a defence, show that a decree or order obtained by the opposite party against him was passed by a court without jurisdiction or was obtained by fraud or collusion and is not necessary to bring an independent suit for setting it aside, Bansi v. Dhapo, ILR 24, All 242; Rajib v. Lakhan, ILR 17 Cal. 11; Parbati v. Gajraj, AIR (1937) All. 28; Prayag v. Siva, AIR 1926 Cal. 1; Hare Krishna v. Umesh, AIR (1921) Pat. 193; Aswini v. Banamali, 21 CWN 594; Manchharam v. Kalidas, ILR 19 Bom. 821; Ranganath v. Govind, ILR 28 Bom. 639; Kamiruddin v. Jhadejanessa, AIR (1929) Cal. 685; Bhagwandas v. Patel & Co., AIR (1940) Bom. 131; Bishunath v. Mirchi, AIR (1955) Pat. 66 and Vijaya v. Padmanabham, AIR (1955) AP 112."

Thus, in order to contend in a latter suit or proceeding that an earlier judgment was contained by collusion, it is not necessary to file an independent suit as stated in Jagar Ram's case for a declaration as to its collusive nature or for setting it aside, as a condition precedent. In our opinion, the above cases cited in Sarkar's Commentary are correctly decided. We do not agree with the decision of the Full Bench of the Punjab & Haryana High Curt in Jagar Ram's case. The Full Bench has not referred to section 44 of the Evidence Act not to any other precedents of other Courts or to any basic legal principle."

18. Similar view has also been expressed by the Apex Court in Asharfi Lal v. Koili (dead) by LRs : JT 1995 (5) SC 496.

19. It is well settled that once the plea of fraud has been setup by the defendant-petitioner before the executing court, and credible evidence in support of such plea was also placed, it was incumbent upon the executing court to have examined the issue of fraud, on merits, and such plea ought not to have been rejected merely on the ground that a decree in favour of the plaintiff-respondent had been passed, and the executing court, as such, had no occasion to examine the plea of fraud. It is also well settled that fraud vitiates all solemn acts. Though a plea of fraud was taken up before the civil court, but such plea was not adjudicated, which is clarified in the judgment of the civil court itself. However, if a credible material has come into existence, which if is found proved vitiates the decree itself, it is the duty of the executing court to consider such plea on merits. It was open for the executing court to have examined the report of the Directorate, Fingerprint Experts, in accordance with law, and for such purpose an opportunity was liable to have been allowed to the plaintiff-respondent. The executing court could have adjudicated as to whether the plea of fraud was made out on facts or not? but it

was not open for the executing court to brush aside the objection itself and thereby refused to go into such issue itself.

20. The judgment of the Apex Court relied upon by Sri Pankaj Agrawal, learned counsel for the respondents, in Atma Ram Builders Pvt. Ltd. v. A.K. Tuli and others: (2011) 6 SCC 385 and Smt. Kastoori Devi & another v. Harbansh Singh: AIR 2000 Punjab and Haryana 271, are not relevant for the present purposes, inasmuch as no plea of fraud or interpretation of section 44 of the Evidence Act was involved therein. It was observed, in the facts of the case where no issue of fraud was involved, that once the suit had been decreed, thereafter unnecessary objections should not be entertained and the benefit of decree must be ensued at the earliest. The proposition, aforesaid, is too well settled but has no application in the facts of the present case, where a plea of fraud has been taken and substantiated with prima facie evidence.

21. The Apex Court also had an occasion to consider the aspect of playing of fraud upon the court in Hamza Haji v. State of Kerala and another: (2006) 7 SCC 416. Para 10 to 24 of the said judgment is reproduced:-

"10. It is true, as observed by De Grey, C.J., in Rex Vs. Duchess of Kingston [2 Smith L.C. 687] that:

"'Fraud' is an intrinsic, collateral act, which vitiates the most solemn proceedings of courts of justice. Lord Coke says it avoids all judicial

acts ecclesiastical and temporal".

11. In Kerr on Fraud and Mistake, it is stated that:

"in applying this rule, it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm, but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."

12. It is also clear as indicated in Kinch Vs. Walcott [1929 APPEAL CASES 482] that it would be in the power of a party to a decree vitiated by fraud to apply directly to the Court which pronounced it to vacate it. According to Kerr:

"In order to sustain an action to impeach a judgment, actual fraud must be shown; mere constructive fraud is not, at all events after long delay, sufficient..... but such a judgment will not be set aside upon mere proof that the judgment was obtained by perjury."

(See the Seventh Edition, Pages 416-417)

13. In Corpus Juris Secundum, Volume 49, paragraph 265, it is acknowledged that,

"Courts of record or of general jurisdiction have inherent power to vacate or set aside their own judgements".

In paragraph 269, it is further stated,

"Fraud or collusion in obtaining judgment is a sufficient ground for opening or

vacating it, even after the term at which it was rendered, provided the fraud was extrinsic and collateral to the matter tried and not a matter actually or potentially in issue in the action.

It is also stated:

"Fraud practiced on the court is always ground for vacating the judgment, as where the court is deceived or misled as to material circumstances, or its

process is abused, resulting in the rendition of a judgment which would not have been given if the whole conduct of the case had been fair".

14. In American Jurisprudence, 2nd Edition, Volume 46, paragraph 825, it is stated,

"Indeed, the connection of fraud with a judgment constitutes one of the chief causes for interference by a court of equity with the operation of a judgment. The power of courts of equity in granting such relief is inherent, and frequent applications for equitable relief against judgments on this ground were made in equity before the practice of awarding new trials was introduced into the courts of common law.

Where fraud is involved, it has been held, in some cases, that a remedy at law by appeal, error, or certiorari does not preclude relief in equity from the judgment. Nor, it has been said, is there any reason why a judgment obtained by fraud cannot be the subject of a direct attack by an action in equity even though the judgment has been satisfied."

15. The law in India is not different. Section 44 of the Evidence Act enables a party otherwise bound by a previous adjudication to show that it was not final or binding because it is vitiated by fraud. The provision therefore gives jurisdiction and authority to a Court to consider and decide the question whether a prior adjudication is vitiated by fraud. In Paranjpe Vs. Kanade [ILR 6 BOMBAY 148], it was held that:

"It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud;"

16. In Lakshmi Charan Saha Vs. Nur Ali [ILR 38 Calcutta 936], it was held that:

"the jurisdiction of the Court in trying a suit questioning the earlier decision as being vitiated by fraud, was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree."

17. In Manindra Nath Mittra Vs. Hari Mondal [24 Calcutta Weekly Notes 133], the Court explained the elements to be proved before a plea of a prior decision being vitiated by fraud could be upheld. The Court said:

"with respect to the question as to what constitutes fraud for which a decree can be set aside, two propositions appear to be well established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken, it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence".

18. The position was reiterated by the same High Court in Esmile- Ud-Din Biswas and Anr. Vs. Shajoran Nessa Bewa & Ors. [132 INDIAN CASES 897]. It was held that:

"It must be shown that fraud was practised in relation to the proceedings in the

Court and the decree must be shown to have been procured by practising fraud of some sort upon the Court."

19. In Nemchand Tantia Vs. Kishinchand Chellaram (India) Ltd. [63 Calcutta Weekly Notes 740], it was held that:

"a decree can be re-opened by a new action when the court passing it had been misled by fraud, but it cannot be re-opened when the Court is simply mistaken; when the decree was passed by relying on perjured evidence, it cannot be said that the court was misled."

20. It is not necessary to multiply authorities on this question since the matter has come up for consideration before this Court on earlier occasions. In S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. [(1993) Supp. 3 SCR 422], this Court stated that:

"it is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree --- by the first court or by the highest court --- has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

The Court went on to observe that the High Court in that case was totally in error when it stated that there was no legal duty cast upon the plaintiff to come to Court with a true case and prove it by true evidence. Their Lordships stated:

"The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property -

grabbers, tax - evaders, Bank - loan - dodgers, and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation".

21. In Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education & Others [(2003) Supp. 3 SCR 352], this Court after quoting the relevant passage from Lazarus Estates Ltd. Vs. Beasley [(1956) 1 All ER 341] and after referring to S.P. Chengalvaraya Naidu (Dead) by LRs. Vs. Jagannath (Dead) by LRs & Ors. (supra) reiterated that fraud avoids all judicial acts. In State of A.P. & Anr. Vs. T. Suryachandra Rao [(2005) 6 SCC 149], this Court after referring to the earlier decisions held that suppression of a material document could also amount to a fraud on the Court. It also quoted the observations of Lord Denning in Lazarus Estates Ltd. Vs. Beasley (supra) that:

"No judgment of a Court, no order of a minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. According to Story's Equity Jurisprudence, 14th Edn., Volume 1, paragraph 263:

"Fraud indeed, in the sense of a Court of Equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another."

23. In Patch Vs. Ward [1867 (3) L.R. Chancery Appeals 203], Sir John Rolt, L.J. held that:

"Fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in

ignorance of the real facts of the case, and obtaining that decree by that contrivance."

24. This Court in Bhaurao Dagdu Paralkar Vs. State of Maharashtra & Ors. [2005 (7) SCC 605] held that:

"Suppression of a material document would also amount to a fraud on the court. Although, negligence is not fraud, it can be evidence of fraud."

22. In view of the discussions made above, this Court finds that the orders impugned dated 26.2.2014 and 29.5.2014, passed by the courts below, cannot be sustained and are hereby quashed. The executing court is directed to reconsider the objection under section 47 CPC, afresh, in light of the observations made above. For such purposes, the executing court will go into the allegations of fraud on merits, in accordance with law, and after affording opportunity to both the parties, the plea of fraud would be adjudicated on merits. Since the proceedings have dragged for the last 13 years, therefore, the objection on merits would be decided forthwith, by fixing short dates, in accordance with law, without granting any adjournment to either of the parties, except upon imposition of cost, which shall not be less than Rs.500/-.

23. Accordingly, the writ petition stands allowed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.20115

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

U/s 482/378/407 No. 5323 of 2013

Vikram Capoor ...Applicant

Versus

The State of U.P. & Anr. . ..Opp. Parties

Counsel for the Applicant:
Sri Shishir Pradhan

Counsel for the Opp. Parties:
Govt. Advocate

(A)Cr.P.C.-Section 482-Inherent power of High Court-when exercised?-even on alternative remedy of revision under section 397 Cr.P.C. ?explained.

Held: Para-21
It is well settled now that when Court finds that the proceedings are an abuse of process of Court and would not serve the ends of justice and the case falls within any of the category specified in BhajanLal's Case,1992 (Supp) 1 SCC335 the High Court may invoke its jurisdiction under section 482 Cr.P.C. The similar view has been taken by Apex Court in. Urmila Devi v Yudhvir Singh ,JT (2013)SC 262 held in para 41, though the order passed under section 204 Cr.P.C.of issuing process against an accused is not an interlocutory order and revisable under section 397 Cr.P.C but the order of Magistrate deciding to issue process or summons to an accused in exercise of his power under section 204 Cr.P.C , can always be subject matter of challenge under inherent jurisdiction of the High Court under section 482 Cr.P.C.

(B)Cr.P.C.-Section 482-inherent power-whether can be exercised even availing alternative remedy u/s 245 (2) challenging discharge-application?-held-'yes'

Held: Para-22
The power under section 245(2) Cr.P.C. is not the alternative remedy before superior court. It is the part of trial In other words it cannot be said that after passing of order under section 204 Cr.P.C. the remedy of trial is available so powers under section 482 Cr.P.C. cannot be invoked. Hence I am of the view that

merely during trial accused may apply for discharge shall not preclude him for invoking jurisdiction of this Court under Section 482 Cr.P.C. as held in Umesh Kumar v. State of A.P., (2013) 10 SCC 591, at page 604

(C)Practice & Procedure-summoning order-on complaint-while against similar allegation-said order quashed by High Court-SLP pending without interim order?-held-against judicial discipline-such resources not available-unless earlier summoning order set-a-side or varied by Apex Court.

Held: Para-25

It is not in dispute that High Court has quashed the proceedings of criminal complaint case no 13391 of 2010 pending in the Court of JM-VIII,Lucknow vide order dared 3.10.2013 in Cri. M.C. No.4535 of 2013 under section 482 Cr.P.C. It is also not in dispute that against that ordera Special Leave petition has been filed in which there is no interm order staying the operation of the order passed by the High court. In view of the above the order of issuing summons to the petitioner passed in Criminal Complaint No. 13391 of 2010 cannot be enforced by passing fresh order of summoning in a fresh complaint on the same facts by the complainant. If it is permitted it will against the judicial discipline. The Complainant is bound by the orders passed by the High Court unless set-a-side or varied by the Apex Court. It is well settled principle of law that the things which could not be done directly cannot be permitted to be done indirectly as held in Patel Motibhai Narainbhai & anr. v. Dinubhai Motibhai Patel,(1996) 2 SCC 585. In AIR 1967 SC 295 Barium Chemicals and another Vs. Company Law Board and others and 1999 (3) SCC 422 Babu Verghese and others Vs. Bar council of Kerala and others it has been observed by the Apex Court that ''things should be done in the manner provided in the statute are not at all". Therefore, I am of the firm view that such a recourse is not available to the complainant of this case.

Case Law discussed:

(2012) 9 SCC 460; 1992 (Supp) 1 SCC 335; (2013) 10 SCC 591; (2014) 2 SCC 246; (1996) 2 SCC 585; (2013) 3 SCC 330; (1996) 5 SCC 591; (2000) 9 SCC 506; (1992) Supp. (1) 335.

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

1. By means of the present petition under section 482 Code of Criminal Procedure Code (For short "Cr.P.C.') the petitioner Vikram Capoor has prayed for quashing of the proceedings of Criminal Complaint Case No. 209 of 2013, Ani Capoor Vs. Vikram Capoor pending in the court of Judicial Magistrate-II, Lucknow and also the order impugned dated 25th September, 2013, whereby the petitioner has been summoned to face trial under sections 355, 409 504 and 506 IPC.

2. Brief facts germane to the present case are that petitioner is a nephew of opposite party no. 2 Ani Capoor. A business in the name of M/s Capoor Hotel and Restaurant was running in the partner-ship of petitioner and opposite party no. 2. Both were partners of equal share i.e. 50% each. The partnership deed was executed in between them. During continuance of the partnership some dispute arose and opposite party no. 2 made applications to the Station Officer of police station Hazratganj, District Lucknow on 7.5.2007 and on 8.5.2007 and also to S.S.P. Lucknow on 9.5.2007 by sending the same by registered post alleging therein that petitioner with intention to cause pecuniary loss to the opposite party no. 2 and with mala fide intention prepared a forged acknowledgement dated 22.3.2007 along with receipts thereof by making forged signature of opposite party no. 2, by which a

letter (notice of proceedings) dated 21.3.2007 was said to be served upon opposite party no. 2. This forged acknowledgement was used in the arbitration proceedings pending in the court of District Judge, Lucknow by the petitioner with intention to deprive her from legal rights to contest. This all has been done by the petitioner to dislodge her from the partnership property with connivance of courier company.

3. Opposite party no. 2 moved an application under section 156 (3) Cr.P.C. with similar allegation on 11.5.2007 (Annexure no. 3 to this petition). which was registered as Criminal Misc. Case No. 447 of 2007. The learned Chief Judicial Magistrate, Lucknow rejected the same by means of order dated 27.5.2007 on the ground that application under section 340 Cr.P.C. was given before District Judge where forgery was committed. In this regard what proceeding has been done by the District Judge, has not been mentioned by the opposite party no. 2 nor any order of the District Judge has been filed by her.

4. Opposite party no. 2 moved another application under section 156 (3) Cr.P.C on 19.5.2007 (Annexure no. 5 to this petition) alleging therein that partnership deed was executed in between petitioner and opposite party no. 2 on 31.10.1995 and the same was signed by them. The petitioner with intent to cause pecuniary loss to opposite party no. 2 and with mala fide intention prepared forged documents on different dates by manipulating the bills of hotel and the amount under the bills paid by the customers was misappropriated by the petitioner. The bills have been removed from the computer. As such the petitioner has also committed criminal offence by causing pecuniary loss to Trade Tax Department. It was also alleged that in terms of partnership deed the income of the hotel has to be deposited in CC Account No. 253 of Capoor Hotel and Restaurant with Federal Bank Ltd. Vidhan Sabha, Lucknow but the same was not deposited with the aforesaid bank, which was actually deposited in the personal account of petitioner having Account No. 0294000100723466 in Punjab National Bank, Hazratganj, Lucknow. As such he committed breach of trust. He also prepared forged documents by making fictitious signature of opposite party no. 2 thereon so that the entire amount under partnership deed shall be deemed to be paid to her and false balance-sheet has been prepared and used as genuine by filing the same before trade tax authority. It was also alleged that on 8.5.2007 at about 9.00 p.m. the opposite party no. 2 made a complaint of all these things to the petitioner. The petitioner abused her in filthy language and put his license revolver on her chest and threatened her to go back otherwise she will be killed. In this regard she tried to lodge first information report, but the same was not lodged. Consequently she moved the application under section 156 (3) Cr.P.C on 19.5.2007, which has been registered as Criminal Misc. Case No. 472 of 2007. On the same date, the learned Magistrate called for report from concerned police station and asked as to why the offence has been registered so far. In pursuance thereof the FIR has been lodged against petitioner at case crime no. 409 of 2007 under section 420,406,467,468,471,504 and 506 IPC. P.S. Hazratganj, District Lucknow on 8.6.2007.

5. The opposite party no. 2 moved an application on 15.6.2007 to the DGP, Lucknow accompanied with affidavit

stating therein that the matter has been compromised in between the parties, hence she does not want to launch criminal proceedings initiated against petitioner in pursuance of FIR lodged on 8.6.2007 at case crime no. 409 of 2007 under section 420,406,467,468, 471,504 and 506 IPC P.S. Hazratgang, Lucknow and the same may be closed and final report may be submitted by the police. The police investigated the case and submitted final report in this case.

6. It is pertinent to mention here that when the dispute was going on, the compromise has been arrived at in between the parties and the Memorandum of Understanding (M.O.U.) was came into existence (Annexure no. 1 to the supplementary affidavit filed by the petitioner on 28.11.2014). This MOU was executed on 8.6.2007. In pursuance of this MOU, the litigation relating to civil and criminal pending in between the parties were compromised.

7. The opposite party no.2 has moved an application for dismissal of petition under section 156 (3) Cr.P.C. as not pressed on 15.6.2007/16.6.2007. The learned Magistrate vide order dated 16.6.2007 rejected the same.

8. On 15.9.2010 the opposite party no. 2 filed Complaint Case bearing no. 13391 of 2010 (Annexure no. 9 to this petition) containing the allegations relating to alleged forgery of acknowledgement. In this complaint, it was also alleged that signature of O.P.No2 on the acknowledgement used in arbitration proceeding pending in the court of District Judge, Lucknow was found forged. The opposite party no. 2 examined herself under section 200 Cr.P.C. and the learned Magistrate summoned the petitioner vide order dated 19.1.2011 and 30.7.2013.

9. Aggrieved by the aforesaid orders the petitioner filed a petition no. 4535 of 2013 under section 482 Cr.P.C. This Court vide order dated 3.10.2013 allowed the petition and quashed the summoning orders dated 19.1.2011 and 30.7.2013 passed by the Additional Chief Judicial Magistrate-VIII, Court No. 23, Lucknow along with proceedings initiated thereof. The opposite party no. 2 challenged the order dated 3.10.2013 before Hon'ble Supreme Court by filing SLP having no. 9693 of 2014. The Apex Court admitted the same and issued notice to the petitioner.

10. During pendency of the proceeding in Apex Court opposite party no. 2 filed another complaint on 28.2.2013 having complaint case no. 2090 of 2013 with the allegation similar to allegations made in complaint which was dismissed as withdrawn on 6.6.2007. In this complaint the O.P.No2 also levelled similar allegations in paras 7 8,9,10 and 11 which were made in complaint dated 19.5.2007. In this complaint it has also been stated that when terms of MOU dated 8.6.2007 were not complied with by the petitioner, she gave notice to the petitioner on 25.10.2012, which was neither replied nor terms of MOU were complied with by him. It was also stated therein that under great pressure exerted by her the petitioner inducted his son in her place in the partnership business to the extent of 50% share in the same. It was also stated that offences in which compromise had taken place in compliance of MOU were non compoundable under the provisions of Section 320 (9) Cr.P.C.

11. In support of allegation in complaint she examined herself under section 200 Cr.P.C. and examined Sanjai Capoor, the son of opposite party no. 2 and Awadhesh Tiwari, the Care Taker of Gauri Apartment, 57 Merabai Marg, Lucknow where Sanjai Capoor is residing, under section 202 Cr.P.C. Thereafter the learned Magistrate summon the petitioner to face trial under sections 355/409/504/506 IPC vide impugned order dated 25.9.2013. These proceedings were put under challenge in this petition.

12. By means of supplementary affidavit the petitioner has filed MOU dated 20.6.2007 and the fresh partnership deed/tripartite agreement dated 23.8.2011, by which Sanjay Capoor was inducted as partner holding share of 50% in place of Ani Capoor. This fresh partnership deed was made effective from 1.09.2011. It was signed by Vikram Capoor, Ani Capoor and Sanjay Capoor in the presence of witnesses.

13. I have heard Shri Anil Kumar Tiwari, Senior Advocate assisted by Shri Shishir Pradhan, learned counsel for the petitioner, and Shri Salil Kumar Kumar Srivastava, learned counsel for opposite party no. 2 as well as learned AGA and also perused the record.

14. It has been contended by the learned counsel for the petitioner that that opposite party no. 2 filed the complaint with mala fide intention after concealing the material fact. It was asserted that real dispute arose after execution of partnership deed under tripartite agreement with effect from 23.8.2011, whereby Sanjay Capoor has been inducted as partner to the extent of 50% share. The opposite party no. 2 has executed a registered gift deed, who was the part of tripartite agreement dated 23.8.2011. This gift deed was executed on 23.07.10 in favour of Akshat Bajaj, who is the grand son of opposite party no. 2. By this gift deed 12.5% share of the partnership business was gifted to Akshat Bajaj. Akshat Bajaj served a legal notice dated 20.4.201i. He also filed Regular Suit No. 540 of 2012 against M/s Capoor Hotel and Restaurant and others which is pending in the court of Civil Judge (Senior Division), Lucknow. The matter of 50% share of opposite party no 2 was in dispute in between the son and grand son of opposite party no. 2 namely Sanjay Capoor and Akshat Bajaj. The petitioner requested to settle their dispute so that the business may not be adversely effected. Thereafter Opposite party no. 2 filed a Regular Suit bearing no. 774 of 2012 seeking cancellation of gift deed dated 23.7.2011. When the dispute arose amongst sons , grand son of opposite party no. 2 and opposite party no. 2, this complaint has been filed to put pressure upon the petitioner with mala fide intention in counter blast to the proceedings initiated in civil court. It was further submitted that matter which has already been compromised cannot be reopened and the proceedings are abuse of process of court.

15. Counter affidavit has been filed wherein factual matrix has not been disputed. It has been stated that present petition is not maintainable because remedy of filing revision against summoning order before sessions judge is available to the petitioner. Moreover, alternative remedy under section 245 (2) Cr.P.C. is also available where he may claim by moving the application before trial court.

16. It is also submitted that SLP is pending before Hon'ble Supreme Court. It cannot be said that matter has been finally decided regarding quashment of proceedings and there is no impediment in entertaining the fresh proceedings in respect of offence which is non compoundable.

17. It was further submitted that documents which are not form part of the record of trial court cannot be looked into in this proceeding .Moreover the said documents are not of unimpeachable character. It is also submitted that actually the O.P.No. Wants to execute a will in favour of minor grand son Akshat Capoor, but the mother of Akshat Capoor fraudulently got executed gift deed instead of will deed. It is also also submitted that investigation report filed by police before trial court in pursuance of order passed by learned Magistrate under section 202 Cr.P.C. is only for assistance for the Court and that cannot be used for quashing of the proceedings. It was further submitted that document relating to forgery would be submitted at the stage of section 244 Cr.P.C. Therefore, the proceedings cannot be quashed.

18. In view of submissions at Bar, for deciding the present petition the following are the question for consideration:-

1.Whether this petition under section 482 is not maintainable in view of availability of remedy to file revision against the order of summoning?

2.Whether this petition under section 482 is not maintainable in view of availability of remedy to file application under section 245(2) Cr.P.C?

3.Whether during pendency of SLP before Apex Court challenging the order of quashing the complaint and relating proceedings by High Court vide its order dated 03.10.2013 the O.P.No.2 have any right to file fresh complaint on the same allegation which were contained in earlier complaint which has been quashed by High Court vide its order dated 03.10.2013?

4.Whether the documents of the petitioner attached with his petition and not find place in the record of learned Magistrate could be looked into at this Stage?

5.Whether after entering into compromise and acting upon the same by the parties , any party to compromise have any right to file fresh criminal complaint on the same allegation after about 5 years, taking plea that offences compromised were non compoundable?

6.Whether the present proceedings are an abuse of process of Court and are liable to be quashed?

7.Whether action of filing the present complaint by O.P.No.2 is mala fide and she is also guilty of concealment of material fact? If so its effect.

Question No.1

19. The Hon'ble Supreme Court in Raj Kapoor v. State, (1980) 1 SCC 43, considered the question involved here and held in para 10 at page 48 :

"10. The first question is as to whether the inherent power of the High Court under Section 482 stands repelled when the revisional power under Section 397 overlaps. The opening words of Section 482 contradict this contention because nothing of the Code, not even Section 397, can affect the amplitude of

the inherent power preserved in so many terms by the language of Section 482. Even so, a general principle pervades this branch of law when a specific provision is made: easy resort to inherent power is not right except under compelling circumstances. Not that there is absence of jurisdiction but that inherent power should not invade areas set apart for specific power under the same Code. In Madhu Limaye case,(1977) 4 SCC 551 this Court has exhaustively and, if I may say so with great respect, correctly discussed and delineated the law beyond mistake. While it is true that Section 482 is pervasive it should not subvert legal interdicts written into the same Code, such, for instance, in Section 397(2). Apparent conflict may arise in some situations between the two provisions and a happy solution

"would be to say that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then in accordance with one or the other principles enunciated above, the inherent power will come into play, there being no other provision in the Code for the redress of the grievance of the aggrieved party. But then, if the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the 1898 Code, the High Court will refuse to exercise its inherent power. But in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly. One such case would be the desirability of the quashing of a criminal proceeding initiated illegally, vexatiously or as being without jurisdiction".

In short, there is no total ban on the exercise of inherent power where abuse of the process of the court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more. The policy of the law is clear that interlocutory orders, pure and simple, should not be taken up to the High Court resulting in unnecessary litigation and delay. At the other extreme, final orders are clearly capable of being considered in exercise of inherent power, if glaring injustice stares the court in the face. In between is a tertium quid, as Untwalia, J. has pointed out as for example, where it is more than a purely interlocutory order and less than a final disposal. The present case falls under that category where the accused complain of harassment through the court's process. Can we state that in this third category the inherent power can be exercised? In the words of Untwalia, J.: (SCC p. 556, para 10)

"The answer is obvious that the bar will not operate to prevent the abuse of the process of the Court and/or to secure the ends of justice. The label of the petition filed by an aggrieved party is immaterial. The High Court can examine the matter in an appropriate case under its inherent powers. The present case undoubtedly falls for exercise of the power of the High Court in accordance with Section 482 of the 1973 Code, even assuming, although not accepting, that

invoking the revisional power of the High Court is impermissible."

I am, therefore clear in my mind that the inherent power is not rebuffed in the case situation before us. Counsel on both sides, sensitively responding to our allergy for legalistics, rightly agreed that the fanatical insistence on the formal filing of a copy of the order under cessation need not take up this court's time. Our conclusion concurs with the concession of counsel on both sides that merely because a copy of the order has not been produced, despite its presence in the records in the court, it is not possible for me to hold that the entire revisory power stands frustrated and the inherent power stultified."

20. In Amit Kapoor v. Ramesh Chander, (2012) 9 SCC 460, in para 21 at page 480 the Hon'ble Apex Court after relying upon the Raj Kapoor's case held as under;

"21.------The inherent powers under Section 482 of the Code are of a wide magnitude and are not as limited as the power under Section 397. Section 482 can be invoked where the order in question is neither an interlocutory order within the meaning of Section 397(2) nor a final order in the strict sense. Reference in this regard can be made to Raj Kapoor v. State,(1980) 1 SCC 43. In that very case, this Court has observed that inherent power under Section 482 may not be exercised if the bar under Sections 397(2) and 397(3) applies, except in extraordinary situations, to prevent abuse of the process of the Court. This itself shows the fine distinction between the powers exercisable by the Court under these two provisions. In that very case, the Court also considered as to whether the inherent powers of the High Court under Section 482 stand repelled when the revisional power under Section 397 overlaps. Rejecting the argument, the Court said that the opening words of Section 482 contradict this contention because nothing in the Code, not even Section 397, can affect the amplitude of the inherent powers preserved in so many terms by the language of Section 482. There is no total ban on the exercise of inherent powers where abuse of the process of the court or any other extraordinary situation invites the court's jurisdiction."

21. It is well settled now that when Court finds that the proceedings are an abuse of process of Court and would not serve the ends of justice and the case falls within any of the category specified in BhajanLal's Case,1992 (Supp) 1 SCC335 the High Court may invoke its jurisdiction under section 482 Cr.P.C. The similar view has been taken by Apex Court in. Urmila Devi v Yudhvir Singh ,JT (2013)SC 262 held in para 41, though the order passed under section 204 Cr.P.C.of issuing process against an accused is not an interlocutory order and revisable under section 397 Cr.P.C but the order of Magistrate deciding to issue process or summons to an accused in exercise of his power under section 204 Cr.P.C , can always be subject matter of challenge under inherent jurisdiction of the High Court under section 482 Cr.P.C.

Question No.2

22. The power under section 245(2) Cr.P.C. is not the alternative remedy before superior court. It is the part of trial In other words it cannot be said that after passing of order under section 204

Cr.P.C. the remedy of trial is available so powers under section 482 Cr.P.C. cannot be invoked. Hence I am of the view that merely during trial accused may apply for discharge shall not preclude him for invoking jurisdiction of this Court under Section 482 Cr.P.C. as held in Umesh Kumar v. State of A.P., (2013) 10 SCC 591, at page 604

"The law does not prohibit entertaining the petition under Section 482 CrPC for quashing the charge-sheet even before the charges are framed or before the application of discharge is filed or even during the pendency of such application before the court concerned. The High Court cannot reject the application merely on the ground that the accused can argue legal and factual issues at the time of the framing of the charge. However, the inherent power of the Court should not be exercised to stifle the legitimate prosecution but can be exercised to save the accused from undergoing the agony of a criminal trial."

23. In Devendra Kishanlal Dagalia v. Dwarkesh Diamonds (P) Ltd.,(2014) 2 SCC 246, the Apex Court held that Magistrate after issuing summons under section 204 cannot review its order under any provision in view of express bar contained in section 362 Cr.P.C the only remedy is to challenge the same under section 482 Cr.P.C or under Article 227 of Constitution of India . Para 10 at page 250 is extracted below :

"10. The aforesaid provisions make it clear that the Magistrate is required to issue summons for attendance of the accused only on examination of the complaint and on satisfaction that there is sufficient ground for taking cognizance of the offence and that he is competent to take such cognizance of offence. Once the decision is taken and summons is issued, in the absence of a power of review including inherent power to do so, remedy lies before the High Court under Section 482 CrPC or under Article 227 of the Constitution of India and not before the Magistrate.

24. Hence provision under section 245(2) Cr.P.C. is not a bar to invoke jurisdiction of High Court under Section 482 Cr.P.C

Question No.3

25. It is not in dispute that High Court has quashed the proceedings of criminal complaint case no 13391 of 2010 pending in the Court of JM-VIII,Lucknow vide order dared 3.10.2013 in Cri. M.C. No.4535 of 2013 under section 482 Cr.P.C. It is also not in dispute that against that ordera Special Leave petition has been filed in which there is no interm order staying the operation of the order passed by the High court. In view of the above the order of issuing summons to the petitioner passed in Criminal Complaint No. 13391 of 2010 cannot be enforced by passing fresh order of summoning in a fresh complaint on the same facts by the complainant. If it is permitted it will against the judicial discipline. The Complainant is bound by the orders passed by the High Court unless set-a-side or varied by the Apex Court. It is well settled principle of law that the things which could not be done directly cannot be permitted to be done indirectly as held in Patel Motibhai Narainbhai & anr. v. Dinubhai Motibhai Patel,(1996) 2 SCC 585. In AIR 1967 SC 295 Barium Chemicals and another Vs. Company Law Board and others and 1999 (3) SCC 422 Babu Verghese and others Vs. Bar council of Kerala and others it has been observed by the

Apex Court that "things should be done in the manner provided in the statute are not at all". Therefore, I am of the firm view that such a recourse is not available to the complainant of this case.

Question No.4

26. The question is not res intigra. In Rajiv Thapar v. Madan Lal Kapoor, (2013) 3 SCC 330, at page 347 in para 29 and 30 the Hob'ble Supreme Court delineated certain steps to determine the veracity of a prayer for quashment raised by the accused by invoking the powers of High Court under section 482 Cr.P.C. :

"29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 CrPC, if it chooses to quash the initiation of the prosecution against an accused at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to herein above, would have far-reaching consequences inasmuch as it would negate the prosecution's/ complainant's case without allowing the prosecution/ complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 CrPC the High Court has to be fully satisfied that the material produced by the accused is such that would lead to the conclusion that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 CrPC to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashment raised by an accused by invoking the power vested in the High Court under Section 482 CrPC:

30.1. Step one: whether the material relied upon by the accused is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

30.2. Step two: whether the material relied upon by the accused would rule out the assertions contained in the charges levelled against the accused i.e. the material is sufficient to reject and overrule the factual assertions contained in the complaint i.e. the material is such as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false?

30.3. Step three: whether the material relied upon by the accused has not been

refuted by the prosecution/complainant; and/or the material is such that it cannot be justifiably refuted by the prosecution/complainant?

30.4. Step four: whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

30.5.If the answer to all the steps is in the affirmative, the judicial conscience of the High Court should persuade it to quash such criminal proceedings in exercise of power vested in it under Section 482 CrPC. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as proceedings arising therefrom) specially when it is clear that the same would not conclude in the conviction of the accused.

27. Therefore if the documents filed by the petitioner pass the test as discussed above can be looked into for exercising the powers under section 482 Cr.P.C.

28. In this case the documents filed by the petitioners are noSo far as the genuineness of documents relied upon by the petitioner in support of their claim annexed with their pleading has not been disputed. The correctness of these documents has not been refuted by the complainant. Therefore this Court has to evaluate the material relied upon by the petitioner with a view whether the same is sound, reasonable, and indubitable i.e. the material is of sterling and impeccable quality?

Question no.5

29. This fact has not in dispute that all the civil and criminal matters has been ended in terms of compromise, i.e. MOU dated 20.7.2007. The parties had acted upon that MOU and changed their position in terms of MOU. It is true that this MOU also contain terms for withdrawal of criminal matters involving some of the offences which were non compoundable in view of section 320 Cr.P.C. but the same was not limited to alleged criminal actions of petitioner but also about the civil rights and dispute amongst the parties. The perusal of MOU reveals that in term no 10 the parties agreed to resolve future dispute s amicably and in the alternative by way of arbitration or they may again approach to Shri Murli Lunggani and Sri Raj Kanwal Chanana for their intervention. It is also not in dispute that this matter and dispute is in between the close relatives of a family in respect of business run since their ancestral. The Apex Court in Gian Singh v. State of Punjab, (2012) 10 SCC 303, at page 340 observed in respect of certain category of cases of compoundable offences in the following terms;-

"58. Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the

permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

30. The Apex Court in CBI v. Duncans Agro Industries Ltd., (1996) 5 SCC 591, at page 608 in para 29 observed that when parties compromise there civil dispute for which criminal proceedings are pending than the criminal proceedings may deemed to be compromised specially when criminal proceedings were not initiated for long time :

"29. In the facts of the case, it appears to us that there is enough justification for the High Court to hold that the case was basically a matter of civil dispute. The Banks had already filed suits for recovery of the dues of the Banks on account of credit facility and the said suits have been compromised on receiving the payments from the companies concerned. Even if an offence of cheating is prima facie constituted, such offence is a compoundable offence and compromise decrees passed in the suits instituted by the Banks, for all intents and purposes, amount to compounding of the offence of cheating. It is also to be noted that a long time has elapsed since the complaint was filed in 1987. It may also be indicated that although such FIRs were filed in 1987 and 1989, the Banks have not chosen to institute any case against the alleged erring officials despite allegations made against them in the FIRs. Considering that the investigations had not been completed till 1991 even though there was no impediment to complete the investigations and further investigations are still pending and also considering the fact that the claims of the Banks have been satisfied and the suits instituted by the Banks have been compromised on receiving payments, we do not think that the said complaints should be pursued any further. In our view, proceeding further with the complaints will not be expedient. In the special facts of the case, it appears to us that the decision of the High Court in quashing the complaints does not warrant any interference under Article 136 of the Constitution. We, therefore, dismiss these appeals."

31. In Provident Fund Inspector, Tirupati v. Madhusudana Chaudhury,(2000) 9 SCC 506, the Hon'ble Supreme Court at page 506 observed that withdrwal of Complaint without complying provision under section 257 Cr.P.C will not come in the

way in compromise in between the parties;

"------Admittedly on the basis of a complaint filed by the appellant and his statement being recorded, the Magistrate was fully satisfied as to the existence of a prima facie case and took cognizance and issued summons for the appearance of the accused persons. There cannot be any dispute that the complainant at any time before a final order is passed in a case can satisfy the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused and in such a case the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused against whom the complaint is so withdrawn. But there must be an existence of a request from the complainant indicating good grounds as to why the complainant wishes to withdraw and the Magistrate after applying his mind to the said request must be satisfied that in fact good grounds exist for withdrawal of the complaint."

32. In view of Gian Singh's case this case falls within the category of cases which could be compromised irrespective of the facts that they are non compoundable. It is true that intervention of Court is required either in the light of section 320 Cr.P.C. or under section 482 Cr.P.C in such cases. Here in this case in terms of MOU the police filed final report and court accepted the same by a judicial order, which has been allowed to become final by the O.P.No.2. The petitioner thereafter filed criminal complaint No. 13391 of 2010 on the basis of similar allegations as contained in earlier complaint which ended in final report on the basis of MOU. This complaint has been quashed by this Court on 3.10.2013.The conduct of the parties specially of the O.P.No.2 is important to be examined. Section 115 of Evidence Act provides that when a person has by his declaration,act or omission ,intentionally caused or permitted another person to believe a thing to be true and to act upon such belief , neither he nor his representatives shall be allowed , in any suit or proceedings between himself and such person or his representative , to deny the truth of that thing. It is also well settled that there shall be no estoppel against law. But while exercising the jurisdiction by the High Court under section 482 Cr.P.C., if the Court is satisfied on facts that any party has taking advantage of his own wrong under the garb of legal provision to cause substantial loss and injustice to other party this Court can pass the orders to otherwise secure the ends of justice and nothing in the Code of Criminal Procedure shall limit the inherent powers of this Court to make such order.

Question No.6 and 7

33. Both the question are related to fact of the case and are so interlinked that they cannot be dealt separately, so they are being decided jointly.

34. After examining the facts of the case It reveals that in terms of MOU the son of O.P.No2 was inducted in the partnership and the O.P.N.2 retired from the partnership business as is evident from deed of partnership dated 23.8.2011 in which the O.P.No.2 was also one of the signatory. In MOU it has been clearly mentioned in term No.5 that non of the other children of O.P.No.2, Smt.Ani Capoor would claim any right in the said business of partnership and She will not

ask or insist for making any other children of her as partner in the said firm.Further the other children of Smt. Ani Capoor namely Smt. Madhu Tondon (her daughter), Sanjib Capoor (her son), Smt Pooja (widow of late Anand Capoor) her daughter in law for herself and being guardian has given undertaking in this regard. The O.P. No.2 on 23.8.11 retired from partnership after induction of his son Sanjay Capoor as partner to the extant of 50 % share in the partnership which Smt. Ani Capoor was holding. The facts reveals that while entering into this agreement of partner-ship the O.P.No.2 already gifted her share to the extent of 12.5% in the aforesaid partnership Firm by a registered gift deed to her grand son Akshat Bajaj through her mother. This fact has been concealed by Ani Capoor at the time of her retirement from Firm from petitioner. A notice has been given on behalf of Akshat Bajaj to petitioner. Than the petitioner asked O.P.No.2, Sanjay Capoor and M/O Akshat Bajaj to settle the dispute which is in respect of the extent of share of O.P.No.2. Akshat Bajaj also filled civil suit 540 of 2012 for accounting and for injunction from restraining the the firm from running the business. The stand in this regard of O.P.No.2 as mentioned in para 50 of C.A. is that;

"50.--------it is submitted that 12.5% share of partnership has been transferred to Akshat Bajaj through his mother by registered deed while factually the respondent No.2 was subjected to cheating and forgery by misrepresentation of fact and got the gift deed registered in place of will deed for which the suit for cancellation of gift deed has been filed and subsequently the transferee had filed a suit for accounting in which the application U/S 10CPC for stay of proceeding was given which was refused on 16.1.2013 against which the revision preferred by the respendent No.2 was allowed by the Court of District Judge by way of civil Revision No.33/2013 and matter has been remanded to Additional Civil Judge , Court No.20, Lucknow and the suit for cancellation of gift deed filed by way of RegularSuit No.774/2012-Ani Capoor Vs. Akshat Bajaj is pending before the court concerned."

35. The O.P.No.2 also stated in the same para that a Criminal Complaint in this respect has also been filed against Priyanka Bajaj and Harshit Bajaj under section 420/323 IPC which has been subjected to challenge under section 482 in Cr.M.C. No.88/2013 where in interim relief has been granted by the High Court and the same is pending.

36. In this litigation the worst sufferer is the petitioner. If in the light of this fact the case is scanned it is crystal clear that this complaint did not contain any new incident but is based on earlier incident which kin terms of MOU has come to an end. The summoning order reveals that there is no material so far as forgery or forged documents are concerned. Nor during investigation any such document has been provided to I.O. The learned Magistrate categorically stated in its order there appears to be a dispute in between the complainant and accused relating to family business of partnership and no explanation has been given of notice dated 25.10.2012. The complainant has given evidence in respect of incident of dated of 8.5.07 in the form of witnesses under section 202 Cr.P.C. Therefore on the basis of allegation the offence of criminal breach of trust and on

8.5.07 show of criminal force against complainant and for hurling abuses prima facie made out under section 355,409,504and 506 against the accused/petitioner. The learned Magistrate has rejected the report of investigation ordered by him in exercise of powers under section 202 Cr.P.C. where in police submitted the report that no such offence is made out.

37. It is important to mention here that notice which alleged to have been given has been given is described in para 4 of complaint. In Para 4 it has been stated that Vikram Capoor is his nephew and he made false promise that we both brothers shall compromise and yo do not proceed with the cases. Because the complainant is old , weak, and widow and the accused is powerful and wants to garb the half share of my husband in the business she was compelled to give notice dated 25.10.2012 through registered post of this intention that you did not comply the terms of compromise so she will proceed her criminal cases against him. The accused did not reply the notice so the complaint is being filed.

38. It is important to note that in complaint there is no reference of partnership deed of dated 23.08.2011 by which she retired from partnership. She gave notice on 25.10.2012, that is after her retirement from partnership and after induction of Sanjay Capoor , her son, in her place to the extent of her share of 50%. After that she had no concern with the partnership business. No notice of grabbing the share has been given to accused petitioner by her son who is the existing partner in the firm. She also did not disclosed the fact of her retirement from firm nor mentioned any thing about the dispute raised by Akshat Bajaj. She is guilty of material concealment. It also shows that the ground for filing the complaint based on notice is wholly untrainable. It further shows that to screen her misdeed she wants to involve the petitioner in this mala fide prosecution. Thus the proceedings of this case in view of the aforesaid facts are nothing but an abuse of process of Court .

39. Moreover in absence of any document entrustment of money to the petitioner could not be established. Therefore in absence of any alleged forged document no case of misappropriation of money of partnership could be prima facie made out against the petitioner. Admittedly the dispute is of family business in which she has no concern now.

40. During the pendency of SLP filed by O.P.No.2 before Apex Court, O.P.No.2 cannot be permitted to file a fresh compliant on the same facts, specially when earlier compliant has been quashed by the High Court and the order of quashing compliant yet not set a side. In SLP. While filing fresh complaint the O.P.No.2 concealed material fact of dispute arising out of her retirement from firm and induction of his son as partner in his place on account of registered gift made in favour of Akshat Bajaj. The present complaint filed are based on the same facts which were contained in earlier complaint filed by O.P.No.2 and has been withdrawn after entering in to compromise in form of MOU in 2007. It is also important to note that MOU has been acted upon by the parties and the parties has changed there position in terms of MOU. On the basis of MOU all the civil proceedings on account of dispute relating to family business amongst the family members, arising out of the same cause of action giving rise to criminal

proceedings earlier filed, were already compromised between the parties in Civil Court on the basis of compromise decrees. The criminal proceedings in between the petitioner and O.P.No.2 earlier filed against each other were also came to an end by withdrawal of those proceedings.

41. The scope of exercise of power under Section 482 CrPC and the categories of cases where the High Court may exercise its power under it relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice were set out in some detail by the Apex Court in State of Haryana v. Bhajan Lal (1992 Supp (1) 335. The illustrative categories indicated by the Apex Court are as follows:

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

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3)Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

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

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

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

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

42. In view of the aforesaid discussion made the present criminal proceeding is manifestly attended with mala fide and maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge. In the opinion of this Court, the case in hand is an extraordinary case based on extraordinary fact and circumstances wherein to prevent abuse of the process of the Court , this Court must exercise it inherent power to quash the proceedings to secure the ends of justice.

43. Consequently, This petition is allowed. The Criminal complaint Case No. No. 209 of 2013, Ani Capoor Vs. Vikram Capoor pending in the court of Judicial Magistrate-II, Lucknow and also the order impugned dated 25th

September, 2013, whereby the petitioner has been summoned to face trial under sections 355, 409 504 and 506 IPC. are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.01.2015

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

Misc. Single No. 7677 of 2014

Ram Shlok Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Rakesh Pathak

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Art.-226-Transfer of prisoner from one jail to another-by administrative order held illegal-only the Magistrate can pass such order u/s 309 Cr.P.C.-after affording opportunity of hearing-order quashed.

Held: Para-11
Admittedly, in the case in hand, before passing the order impugned, opportunity of being heard before considering the request made by the jail authority has not been given to the present petitioner. Therefore, the order impugned cannot be allowed to sustain and is liable to be set aside.

Case Law discussed:
2012 Law Suit (SC) 741.

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

1. Heard Shri Rakesh Pathak, learned counsel for the petitioner and the learned AGA.

2. By means of the present petition, the petitioner, who is under trial prisoner has prayed for issuing a writ in the nature of certiorari quashing the impugned order dated 28.11.2014 passed by the Chief Judicial Magistrate, Pratapgarh, whereby permission has been granted to transfer the petitioner alongwith three under trial prisoners from District Jail, Pratapgarh to District Jail, Raebareli on the basis of allegations made in letter dated 24.11.2014 of Superintendent, District Jail, Pratapgarh, and further prayed for issuance of writ in the nature of mandamus commanding the opposite parties directing them that the petitioner may be kept in District Jail, Pratapgarh during his judicial custody in relation to case crime no. 264 of 214 under sections 147,148,149,307 and 302 IPC P.S. Aaspur Devsara, District Pratapgarh.

3. The letter dated 24.11.2014 of Superintendent, District Jail, Pratapgarh transpires that petitioner Ram Shlok Pandey and other under trial prisoners are detained in District Jail, Pratapgarh relating to case crime no. 264 of 2014 under sections 147,148,149,307 and 302 IPC P.S. Aaspur Devsara, District Pratapgarh. The present petitioner alongwith three other associates Ram Kailash Yadav, Brajesh Yadav and Kallu Dubey are most indisciplined and hard core criminal of the district. They create hurdle in administrative work. Some of the persons of rival group of them are also detained in District jail, Pratapgarh. There is only one circle in the jail which is used by all prisoners for taking out meal, water and treatment etc. Though the aforesaid prisoners are kept in separate Baracks for the purpose of their security, but there remains apprehension of some mis-happening when they come in circle. It has been brought to the notice of the jail authority that lives of the

aforesaid under trial prisoners are in danger from their rival groups who are also detained in jail. Therefore, if the aforesaid prisoners are allowed to remain in District Jail, Pratapgarh, any untoward incident or violence would occur, by which security, discipline and peace of jail may be disturbed. Hence a request has been made to the Chief Judicial Magistrate, Pratapgarh for transfer of the aforesaid prisoners from this Jail to another jail.

4. By means of impugned order the Chief Judicial Magistrate, after satisfying with the report submitted with regard to conduct and behaviour of the aforesaid prisoners and also the aforesaid letter permitted the Superintendent, District Jail, Pratapgarh to transfer the petitioner and his associates, who are under trial prisoners from District Jail, Pratapgarh to District Jail, Raebareli.

5. It has been contended by the learned counsel for the petitioner that under trial prisoners cannot be transferred from one jail to another jail except in accordance with order passed by the judicial authority under whose orders they are detained in judicial custody in particular jail. It is further contended that jail authority has no jurisdiction to transfer the under trial prisoners on administrative ground. It is further submitted that in case of transfer of the under trial prisoners before passing the order of transfer an opportunity of hearing should have been provided to the under trial prisoners and if no such hearing is provided to them, the order of transfer would be vitiated as held in State of Maharastra Vs. Mohd. Saeed Sohail Sheikh reported in 2012 Law Suit (SC) 741.

6. On the strength of the aforesaid authority, it has been submitted by the learned counsel for the petitioner that in this case before passing impugned order no opportunity of hearing has been provided to the petitioner. Hence the impugned order is violative of principles of natural justice and cannot be allowed to sustain.

7. Per contra, learned AGA submitted that there is no statutory provision to give any hearing before permitting transfer of accused to a particular judicial custody. He referred the provisions of sections 167 and 309 Cr.P.C. to this effect. It is further submitted that it is the choice of Magistrate or the court under whose orders, the under trial prisoner has been lodged in judicial custody. The under trial prisoner has no right to remain in particular judicial custody of his own choice. It is further contended that judgment cited hereinabove relates to a convicted person and shall not extend help to the petitioner.

8. It is not in dispute that under trial prisoners cannot be transferred from one jail to another jail under administrative order of jail authority. They could only be transferred under the order of judicial authority under whose order they are detained in particular judicial custody.

9. Now, the question remains for consideration before this Court whether judicial authority while passing the order transferring the under trial prisoners is under any obligation to give an opportunity of being heard to them before their transfer to another jail. This question has been dealt with elaborately in the case of Saeed Sohail Sheikh (Supra), relevant paragraphs 27 and 39 of which are reproduced herebelow:-

"27.The forensic debate at the Bar was all about the nature of the power exercisable by the court while permitting or refusing transfer. We have, however, no hesitation in holding that the power exercisable by the court while permitting or refusing transfer is 'judicial' and not 'ministerial' as contended by Mr. Naphade. Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected, no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an on-going trial.

That transfer of an under trial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations is settled by the decision of this Court in Sunil Batra v. Delhi Administration AIR 1980 SC1579, where this Court observed: "48. Inflictions may take many protean forms, apart from physical assaults.

Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied.

There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice. The string of guidelines in Batra set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior, and early judicial consideration so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose."

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.....

"36. Applying the above principles to the case at hand and keeping in view the fact that any order that the Court may make on a request for transfer of a prisoner is bound to affect him prejudicially, we cannot but hold that it is obligatory for the Court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially.

It follows that any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one. Inasmuch as the trial court appears to have treated the matter to be administrative and accordingly permitted the transfer without issuing notice to the under-trials or passing an appropriate order in the matter, it committed a mistake.

A communication received from the prison authorities was dealt with and disposed of at an administrative level by sending a communication in reply without due and proper consideration and without passing a considered judicial order which alone could justify a transfer in the case. Such being the position the High Court was right in declaring the transfer to be void and directing the re-transfer of the under trials to Bombay jail. It is common ground that the stay of the proceedings in three trials pending against the respondents has been vacated by this Court. Appearance of the under trials would, therefore, be required in connection with the

proceedings pending against them for which purpose they have already been transferred back to the Arthur Road Jail in Bombay. Nothing further, in that view, needs to be done by this Court in that regard at this stage."

10. Perusal of the aforesaid paragraphs cited hereinabove leaves no room to doubt that before passing the order impugned an opportunity of being heard should have been given to the petitioner who is an under trial prisoner. Since it has not been done , the order impugned would be vitiated.

11. Admittedly, in the case in hand, before passing the order impugned, opportunity of being heard before considering the request made by the jail authority has not been given to the present petitioner. Therefore, the order impugned cannot be allowed to sustain and is liable to be set aside.

12. The petitioner, if has not yet been transferred back to District Jail, Pratapgarh, he shall again be admitted to District Jail, Pratapgarh. The order to this effect if necessary be obtained. The Chief Judicial Magistrate, Pratapgarh to pass the order in this regard.

13. However, it is provided that if the jail authorities are still intending the transfer of the petitioner from District Jail, Pratapgarh for any valid reason, he may approach the competent judicial authority under whose order the petitioner is detained in judicial custody and in such situation the competent judicial authority will pass order after giving an opportunity of being heard to the petitioner, in accordance with law.

14. In view of what has been discussed above, the writ petition is allowed. The order impugned dated 28.11.2014 passed by the Chief Judicial Magistrate, Pratapgarh is hereby set aside.
