APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2015

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

Special Appeal Defective No. 71 of 2015

State of U.P. & Anr. ...Appellants
Versus
Vinay Yadav ...Respondent

Counsel for the Appellants:
Sri A.K.Roy, S.C.

Counsel for the Respondent:
Sri Ram Sagar Yadav

U.P. Recruitment & Department of Government Servant Dying in Harness Rules 1974-as amended by Six Amendment Rules 2001-2(a)-expression 'family'-includes unmarried brother also-on death of unmarried deceased government employee-Learned Single Judge rightly remanded for fresh consideration of other requirement-warrant no interference-appeal dismissed.

Held: Para-10
The learned Single Judge has not issued a mandamus for the appointment of the respondent but has remanded the proceeding back to the State after quashing and setting aside the order dated 10 April 2014 rejecting the claim for compassionate appointment. The matter has been remanded for fresh consideration in the light of the observations contained in the judgment. On remand, the State would have to consider whether the respondent fulfills all the other requirements of the Rules including those which are set out in Rule 2 (c) to the effect that the deceased should have been unmarried and that the person claiming employment should have been dependent of the deceased. We also clarify that the State would be at liberty to duly assess whether the claim for appointment is otherwise sustainable on the basis of the Rules as explained in the judgment of the Full Bench of this Court in Shiva Kuma Dubey vs. State of U.P. and others5. The law laid down by the Full Bench recently is on the basis of the position in law, as explained by the judgment of the Supreme Court.

Case Law discussed:
W.P. No. 45645 of 2007; Spl Appl No. 356 of 2012.

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

1. The special appeal arises from a judgement of the learned Single Judge dated 8 July 2014.

2. The brother of the respondent was selected in the Provincial Armed Constabulary1 as a constable on 5 July 2006. He was appointed in the 28th Battalion at PAC Etawah. On 8 November 2007, the Government cancelled the selection process and appointments of constables throughout the State on the ground that there were malpractices in the selection process. By orders dated 11 September 2007, 18 September 2007 and 30 September 2007, the appointments of over 18700 personnel were cancelled. A large batch of writ petitions was filed in this Court challenging the decision of the State Government. The leading writ petition in Pawan Kumar Singh vs. State of U.P. and others2 was allowed by a judgment and order dated 8 December 2008. The writ petitions were allowed and the orders passed by the Government canceling selection process and appointments were quashed. A special appeal3 filed by the

State was dismissed on 4 March 2009. The State Government moved the Supreme Court in a special leave petition. It is not in dispute that in pursuance of an order of the Supreme Court dated 25 May 2009, the State Government had issued a government order dated 26 May 2009 by which all the constables were allowed to rejoin on provisional basis. Eventually, the special leave petition was withdrawn. Consequently, the directions issued by this Court attained finality.

3. The brother of the respondent met with an accident and died on 26 February 2008. The claim of the respondent for compassionate appointment was rejected by an order dated 10 April 2013 on the ground that his brother had joined service on 2 September 2006 but the State Government had on 8 November 2007 cancelled all the recruitments and appointments throughout the State. On 12 September 2007, the services of the brother of the respondent were also terminated. Hence, it was submitted that the brother of the respondent who had died in the meantime on 26 February 2008 was deemed to be out of service. Even though a notice had been sent to him on 30 May 2009 in compliance of the order of the Supreme Court dated 25 May 2009 and the subsequent government order dated 26 May 2009, he had not reported in view of the admitted position that he had already died in an accident on 26 February 2008.

4. Before the learned Single Judge, the submission which was urged on behalf of the respondent was that as an unmarried brother of the deceased and a person who was dependent on the deceased, the respondent fell within the definition of the expression family under the Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules 19744. On the other hand, the submission which was urged in defence by the State was that on account of the death of the employee on 26 February 2008, he had never joined service in compliance of the direction of the Supreme Court dated 25 May 2009 and the implementing order of the State Government dated 26 May 2009. Since he would be deemed to be out of service, in consequence of his death in the meantime, the respondent would not be entitled to seek compassionate appointment.

5. The learned Single Judge rejected this contention noting that the orders passed by the State canceling the entire selection process across the State had been set aside by this Court in a batch of matters. After the special appeal of the State had failed and the Government carried the matter in a special leave petition to the Supreme Court, the State, in fact, complied with the direction for allowing all such persons provisionally to join service and eventually withdrew the special leave petition. The learned Single Judge held that all the government orders as well as individual termination orders were quashed by this Court in a batch of matters while upholding the recruitment which was made for over 18700 constables. Hence, it was held that the respondent could not be denied the benefit of compassionate appointment since the plain consequence of the setting aside of the orders of termination and the cancellation of the selection process was that all the constables who were similarly placed, were reinstated in service.

6. The learned Judge noted that save and except for this submission which was

urged in paragraph 10 of the counter, no other submission had been raised. Moreover, it was found that it was not disputed that as per the definition of the expression "family", an unmarried brother, dependent on a deceased government servant, was entitled to compassionate appointment. Moreover, the learned Single Judge held that while rejecting the claim, the State had not taken the plea that the respondent was not covered by the definition of the expression "family" in the Rules.

7. In support of the appeal, the learned Standing Counsel has urged only one submission. The submission is that the definition of the expression "family" in Rule 2 (c) was amended on 22 December 2011 so as to bring within its purview an unmarried brother.

8. In the present case, it was submitted that when the brother of the respondent died on 26 February 2008, the definition did not include an unmarried brother. Hence, it was submitted that when the right to apply accrued to the respondent, he was not entitled to compassionate appointment.

9. At the outset, we may note that this point has neither been raised in the counter nor was it urged before the learned Single Judge. However, in the interest of justice and since a pure question of law has been raised, we deemed it appropriate to allow the learned Standing Counsel to address the Court on the issue so as to bring finality to the matter. There is a basic fallacy in the submission of the learned Standing Counsel. The Dying in Harness Rules were amended by the (Sixth Amendment) Rules of 2001 which were notified on 12 October 2001. By the amendment, the definition of the expression "family" was enlarged to include an unmarried brother, unmarried sister and a widowed mother provided (i) the deceased government employee was unmarried; and (ii) the heirs as described were dependent on the deceased. There is hence an error in the submission of State that it was for the first time in 2011 that the Rules were amended to bring in unmarried brother within the purview of the expression "family". The amendment of 2011 has further enlarged the definition of the expression "family" which is not relevant for the present purpose. Since the amended definition covered an unmarried brother right from 2001, there is no merit in the submission.

10. The learned Single Judge has not issued a mandamus for the appointment of the respondent but has remanded the proceeding back to the State after quashing and setting aside the order dated 10 April 2014 rejecting the claim for compassionate appointment. The matter has been remanded for fresh consideration in the light of the observations contained in the judgment. On remand, the State would have to consider whether the respondent fulfills all the other requirements of the Rules including those which are set out in Rule 2 (c) to the effect that the deceased should have been unmarried and that the person claiming employment should have been dependent of the deceased. We also clarify that the State would be at liberty to duly assess whether the claim for appointment is otherwise sustainable on the basis of the Rules as explained in the judgment of the Full Bench of this Court in Shiva Kuma Dubey vs. State of U.P. and others5. The law laid down by the Full Bench recently is on the basis of the position in law, as

explained by the judgment of the Supreme Court.

11. For these reasons and subject to the above, we see no reason to interfere with the order of the learned Single Judge. The special appeal is dismissed.

12. Since in the meantime, the respondent has instituted a contempt application for non compliance of the impugned order under appeal, we deem it appropriate in the interest of justice to extend the time for compliance by a further period of two months from today.

13. The special appeal is, accordingly, disposed of. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2015

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

Special Appeal Defective No. 101 of 2015

Bankey Bihari Chauhan ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri G.C. Pant, Sri Nitin Pant

Counsel for the Respondents:
C.S.C., Sri Ajit Kumar Singh

Uttar Pradesh State Transport Corporation Employee (other than officers) Service Regulation 1981-Regulation-39, 63-Gratuity payment to employees of corporation-provision of Payment of Gratuity Act 1972-Rule 4(6)-deduction of amount of loss from gratuity-held-illegal without following procedure-action of corporation ultra virus-appeal allowed.

Held: Para-8
In any event, it is clear that even Regulation 63 contains no such provision of recovery from gratuity. In these circumstances, we are of the view that the action for recovery from gratuity was contrary to law and in the teeth of the express provision of the Act. The learned Single Judge, with great respect, was not justified in dismissing the petition on the ground that the appellant had not challenged the order of penalty or the appellate order. For the purposes of the present proceedings, it is not necessary for the Court to enquire into the grievance of the appellant that he was not served with the appellate order. Moreover, we may clarify that the learned counsel for the appellant has only confined himself to the payment of gratuity. Even if the order of penalty has attained finality, as is urged on behalf of the employer, any recovery or adjustment of the amount of gratuity has to be made by following the statutory provisions contained in the Act. Since the conditions set out in Section 4 (6) of the Act for forfeiture of the gratuity have not been fulfilled, the action of the employer was ultra vires.

Case Law discussed:
(2007) 1 SCC 663; (2013) 12 SCC 210.

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

1. This special appeal has arisen from a judgment of the learned Single Judge dated 9 December 2014 dismissing a writ petition filed by the appellant.

2. The appellant was appointed as a Bus Conductor in the Uttar Pradesh State Road Transport Corporation1 on 20 March 1978. His services are governed by

the Uttar Pradesh State Road Transport Corporation Employees (Other than Officers) Service Regulations, 19812. Disciplinary proceedings were initiated against the appellant by the issuance of a charge sheet on 6 July 2002. The appellant submitted a reply to the charge sheet. His reply was not found satisfactory and a notice to show cause was issued to him on 15 December 2005, proposing to punish him for the loss stated to have been incurred by the Corporation in the amount of Rs 2,99,848/-. After considering the reply of the appellant and the report of the Inquiry Officer, the competent authority found the appellant to be negligent in the performance of his duties, thereby causing a financial loss in the amount of Rs 219,846/- and an order was passed on 27 June 2006 for the recovery of the aforesaid amount by deducting Rs 500/- per month from his salary until his retirement. The appellant filed a writ petition which was dismissed on 24 July 2006 with liberty to file an appeal. According to the respondents, the appeal was dismissed by the appellate authority on 9 April 2009. On the other hand, according to the appellant, the order of the appellate authority was never served on him. The appellant moved the prescribed authority under the Payment of Wages Act, 1936. The Commissioner, by an order dated 22 June 2009 allowed the application and set aside the deduction of Rs 500/- with a direction, consequently, to refund an amount of Rs 22,000/- to the appellant. That amount was admittedly refunded. The Corporation filed an appeal which was rejected by the appellate authority on 27 October 2010. A writ petition was filed by the Corporation in which, on 8 April 2011, the operation of the orders dated 22 June 2009 and 27 October 2010 was stayed. The stay order dated 8 April 2011 is stated to have been extended on 4 July 2011.

3. The cause of action for the appellant for filing the writ petition was the initiation of recovery proceedings by the Corporation represented in these proceedings by the second and third respondents. On 1 September 2014, an order was passed by the Regional Manager of the Corporation sanctioning the total gratuity amount of Rs 2,50,945/- and adjusting it towards the balance amount of Rs 2,89,250/- which was to be recovered. The entire amount of gratuity has thus been adjusted towards the recovery. Challenging the recovery action, the appellant moved writ proceedings which have been dismissed by the learned Single Judge by the impugned order dated 9 December 2014. What has weighed with the learned Single Judge is that the appellant did not challenge the order of punishment that was originally passed or the order passed in the departmental appeal and has now challenged only a consequential decision to recover the amount from the gratuity due and payable.

4. Regulation 39 of the Regulations provides as follows:

"39. Pension and other retirement benefit.- (1) (i) Subject to the provisions of clause (ii) of this sub-regulation, an employee of the Corporation shall not be entitled to pension, but he shall be entitled to the retirement benefits mentioned in sub-regulation (2).

(ii) A person, who was the employee of the State Government in the erstwhile U.P. Government Roadways and has opted for the service of the Corporation,

shall be entitled to pension and other retirement benefits in terms of the G.O. No. 3414/302-170-N-72, dated July 5, 1972.

(2) Without prejudice to the provisions of sub-regulation (1) an employee (including an employee who was in the service of the State Government in the erstwhile U.P. Government Roadways Department), shall be entitled to the following retirement benefits:

(i) Employees Provident Fund or the General Provident Fund, as the case may be;

(ii) Gratuity in accordance with the Payment of Gratuity Act, 1972 or the relevant Government Rules, as may be applicable;

(iii) amount due under Group Insurance Scheme, 1972;

(iv) one free family pass in a year for journey within the State;

(v) a free family pass for his return to his home from the place of posting at the time of retirement in case he does not accept railway fare;

(vi) any other benefit that may be allowed by the Corporation from time to time."

5. Hence, under Regulation 39 (2) (ii), an employee of the Corporation is entitled to gratuity in accordance with the Payment of Gratuity Act, 19723 or the relevant rules of the Government as may be applicable.

6. Section 4 (6) of the Act provides for the circumstances in which the gratuity of an employee, whose services have been terminated, can be forfeited. Section 4 (6) is in the following terms:

"4. Payment of gratuity. - (1) ... ...

(6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited, -

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

7. In the decision of the Supreme Court in Jaswant Singh Gill Vs Bharat Coking Coal Limited4, it has been held that termination of services for any of the causes enumerated in sub-section (6) of Section 4 of the Act is imperative before the gratuity can be forfeited. The same principle has been followed in a more recent decision of the Supreme Court in State of Jharkhand Vs Jitendra Kumar Srivastava5.

8. In the present case, it is not in dispute that the services of the appellant were never terminated. The appellant continued to be in service and retired on attaining the age of superannuation. In the circumstances, the basic pre-condition for the forfeiture of gratuity under Section 4 (6) of the Act was not fulfilled. We may also note that Regulation 63 of the Regulations provides for penalties and clause (4) thereof provides for the

recovery from pay or deposit at the credit of an employee of the whole or part of a pecuniary loss caused to the Corporation by negligence or breach of an order. The Regulations must necessarily be harmonized with the provisions of the Act and cannot override the express statutory provision. In any event, it is clear that even Regulation 63 contains no such provision of recovery from gratuity. In these circumstances, we are of the view that the action for recovery from gratuity was contrary to law and in the teeth of the express provision of the Act. The learned Single Judge, with great respect, was not justified in dismissing the petition on the ground that the appellant had not challenged the order of penalty or the appellate order. For the purposes of the present proceedings, it is not necessary for the Court to enquire into the grievance of the appellant that he was not served with the appellate order. Moreover, we may clarify that the learned counsel for the appellant has only confined himself to the payment of gratuity. Even if the order of penalty has attained finality, as is urged on behalf of the employer, any recovery or adjustment of the amount of gratuity has to be made by following the statutory provisions contained in the Act. Since the conditions set out in Section 4 (6) of the Act for forfeiture of the gratuity have not been fulfilled, the action of the employer was ultra vires.

9. We, accordingly, allow the special appeal and set aside the impugned judgment and order of the learned Single Judge dated 9 December 2014. In consequence, we allow the writ petition filed by the appellant and set aside the impugned directions of the Corporation contained in the orders dated 1 September 2014 and 10 January 2014 in regard to the recovery from the amount of gratuity. The gratuity which is admissible to the appellant shall be paid to him within a period of two months from the receipt of a certified copy of this order together with interest computed at the rate as applicable under sub-section (3A) of Section 7 of the Act with effect from the date on which the gratuity became payable to the appellant.

10. The special appeal is, accordingly, disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2015

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Civil Misc. Writ Petition No. 182 of 2011

Saraya Distillery A Unit of Saraya Indus.Saradar Nagar Gorakhpur..Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Avnish Kumar Srivastava, Sri Tarun Veer Singh Khehar

Counsel for the Respondents:
C.S.C., A.S.G.I. 2011/237, Sri C.B. Tripathi, Sri Siddharth Saran

Constitution of India, Art.-226-Writ of mandamus-seeking direction to private respondent-the purchaser company to issue for 'C'-held-the agreement between petitioner and private company-sales tax department not bound-only course to file civil suit on invoke arbitration clause-no mandamus can be issued-petition dismissed.

Held: Para-8
In the instant case we find that there is an agreement between the petitioner

and the private respondents for supply of goods on certain terms and conditions. The Sales Tax Department is not party to this agreement nor is privy with any assurances that might have been exchanged inter se between the petitioner and the respondents. Form-C is obtained by the purchasing dealer from his assessing authority upon due verification and genuineness being shown and if for any reason Form-C is not forwarded by the purchasing dealer to the selling dealer then the only recourse available is to file a suit for recovery against the Sales Tax Department from purchasing dealer or arbitration clause under the agreement. We are, accordingly, of the opinion that no mandamus could be issued to the private respondents for issuance of Form-C.

Case Law discussed:
(2003) RD-TN 209; (2013) 61 VST 370 (Gau); Writ Tax No. 1648 of 2009; AIR 2005 SC 958.

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

1. The petitioner is a company incorporated under the Companies Act and is engaged in the manufacture and sale of extra neutral alcohol/rectified spirit and other products. The petitioner has entered into an agreement with various parties, i.e., respondent nos. 4 to 20 for supply of the products manufactured by it on terms and conditions specified in the agreement. It is alleged that in the agreement it was also indicated that the supply of the product shall be made by the petitioner on concessional rate of tax and that the respondent companies would supply Form -C to the petitioner company to avail the benefit of concessional sales made by them. Some of the private respondent companies are public sector undertakings but majority of them are private companies.

2. Based on the agreement entered by the petitioner with various parties it is alleged that the goods were supplied on concessional rate of tax but the respondents failed to issue Form-C. Due to the non-supply of Form-C by the private respondents, the petitioner could not submit Form-C to the tax department. Accordingly, the Assessing Officer passed assessment order levying the general rate of tax applicable on the sale made by the petitioner. The petitioner, being aggrieved by the assessment orders passed under U.P. Trade Tax Act, 1948 as well as under Central Sales Tax Act,1956 for the assessment years 2004-05, 2005-06 and 2006-07, has filed the present writ petition for quashing of the assessment orders as well as for a writ of mandamus commanding the private respondents to supply Form-C to the petitioner to enable the petitioner to avail concessional rate of tax under the Central Sales Tax Act.

3. We have heard Sri Tarun Veer Singh Khehar, learned counsel along with Sri Avnish Kumar Singh, learned counsel for the petitioner and Sri C.B.Tripathi, learned special counsel for the State.

4. The contention of the learned counsel for the petitioner that he had supplied the goods to the private respondents, some of whom are public sector undertaking, at concessional rate of tax under the agreement and consequently, the petitioner was entitled to receive Form-C from them in order to avail the concessional rate of tax in the assessment proceedings. The petitioner contended that a public duty is cast upon the respondents to issue Form-C and since the same has not been issued, the writ Court has the jurisdiction to issue a mandamus commanding the respondent

companies to supply Form-C to the petitioner. In support of his contention the learned counsel has placed reliance upon a decision of the Madras High Court in Tvl. City Tower Hotels (P) Ltd. Vs. The Commercial Tax Officer, decided on 13.03.2003 (2003) RD-TN 209. This decision is not helpful nor applicable in the instant case. In the said decision the tax authorities were not issuing Form-C to the petitioner on the ground that the petitioner would misuse Form-C and in that scenario writ Court issued a mandamus directing the authorities to issue Form-C. The learned Counsel for the petitioner further relied upon a decision of the Gauhati High Court in OMIL-JSC-JV Vs. Union of India and others, (2013) 61 VST 370 (Gau), where direction was issued to the respondent company to issue Form-C.

5. Having heard the learned counsel for the parties, we are of the view that the petitioner is not entitled to any relief. In so far as the assessment orders are concerned, the petitioner has a remedy of filing an appeal before the Ist Appellate Authority under the Act. Consequently, on the ground of alternative remedy, no relief could be granted to the petitioner.

6. In so far as, a writ of mandamus is concerned, no mandamus could be issued to the private respondents to supply Form-C. In M/s U.B.Engineering Ltd. Vs. State of U.P. and others, decided on 27.08.2014, the Court held as under:

"Under the contract, the petitioner was entitled to receive Form-C from the purchaser, namely, from the Managing Director of PVVNL. The said respondent was obliged to issue Form-C to the petitioner to enable the petitioner avail concessional rate of tax in his assessment proceedings. Since the petitioner did not receive Form-C from PVVNL the petitioner became liable to pay tax at a higher rate. We are of the opinion that the petitioner is entitled to recover the differential rate of tax etc. from PVVNL as per the contract. However, the writ jurisdiction is not the appropriate proceedings for recovery of the tax. We find that there is a contract between the petitioner and PVVNL in which there is a clause relating to arbitration for settlement of a dispute. We, are accordingly, of the opinion that no mandamus could be issued to PVVNL-respondent no.5 for issuance of Form-C.

7. In Commissioner of Sales Tax, Delhi and others Vs. Shri Krishna Engg. Co. and Ors. AIR 2005 SC 958, the Supreme Court held that if requisite ST-1 form was not being issued the only legal recourse is for the selling dealer to file a suit for recovery of the sales tax from the purchasing dealer. The Supreme Court held as under:

"Considering the full effect of the provisions, we are fortified in our conclusion that exemption from including the total turnover of the selling dealer is possible only where the requisite ST-1 form is produced. The embargo on charging tax under the Act is only in those instances where the purchasing dealer contemporaneously offers ST-1 Form to the selling dealer. The Sales Tax Department neither privy to nor is it concerned with any assurances that might have been exchanged inter se there parties. As observed by the High Court quite frequently ST-1 Forms are obtained from Sales Tax Department by the purchasing dealer, but for sundry reasons

are not forwarded to the selling dealer. The only legal recourse is for the selling dealer to file a suit for the recovery of the sales tax from the purchasing dealer. There is no reason to deviate from this position. It should be recalled that, for the benefit of the assessee, the Rules permit the filing of exemption Forms till the time of assessment, this is probably the reason why dealers postpone their obtainment. There is no reason for the consequences of the dealers acts of omission or commission to visit the Department. The Act and the Rules do not prohibit the simultaneous furnishing of ST-1 Forms. They, in fact, envisage it."

8. In the instant case we find that there is an agreement between the petitioner and the private respondents for supply of goods on certain terms and conditions. The Sales Tax Department is not party to this agreement nor is privy with any assurances that might have been exchanged inter se between the petitioner and the respondents. Form-C is obtained by the purchasing dealer from his assessing authority upon due verification and genuineness being shown and if for any reason Form-C is not forwarded by the purchasing dealer to the selling dealer then the only recourse available is to file a suit for recovery against the Sales Tax Department from purchasing dealer or arbitration clause under the agreement. We are, accordingly, of the opinion that no mandamus could be issued to the private respondents for issuance of Form-C.

9. In the light of the aforesaid, the writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2015

BEFORE

THE HON'BLE ARUN TANDON, J.
THE HON'BLE HARSH KUMAR, J.

Writ-C No. 2002 of 2015

Vineet Sachdeva ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri T.P. Singh, Sri Siddharth Nandan

Counsel for the Respondents:
C.S.C., Sri Suresh Singh

Constitution of India, Art.-226-Cancellation of application from zone of consideration of allotment-on ground petitioner by applying two categories i.e. 'D' & 'E' itself-brought himself beyond zone of consideration-as per clause (ii) 10 of brochure 'Terms and conditions of Residential plots scheme, 2009 (c) a person could apply only one category out of five-held-wrong-result of misinterpretation-otherwise from clause iii of para 10 would be meaningless-petitioner very fairly surrendered his allotments of category 'E'-hence cancellation of application illegal.

Held: Para-13 & 14

13. We are of the considered opinion that there is substance in the submissions made by the counsel for the petitioner. From a simple reading of Clause 10 (A) (ii) or 10(d)(ii) of the Brochure, we find that a person was entitled to make more than one application under the scheme, i.e. one application each in respect of one plot of each category. Meaning thereby that a person was entitled to submit as many as five applications at a time one each for a plot in each of the five different categories. But he would be entitled for allotment of one plot in any of the categories under the scheme.

14. In fact under clause 10(A) (iii) or 10 (d) (iii) lead to such interpretation, inasmuch as if clause (ii) permitted making of one application by a person only that there would have been no need to make a provision under clause (iii)

disqualifying a person from allotment of more than one plot in the scheme. The petitioner was therefore correct and did not commit any error/wrong, in submitting two applications, one for plot falling under category 'D' and the other for the plot falling under category 'E'. We may record that the petitioner was more than fair in surrendering the allotment of plot offered to him falling under the category 'E', as under clause 10 (A) (iii) a person could be allotted only one plot under the entire scheme. The petitioner has decided to retain the allotment made in his favour in respect of plot falling under category 'D' and surrendered plot allotted under category 'E'. There is no justification to deprive him from the plots allotted in his favour in category 'D'.

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

1. Heard Sri T.P. Singh, learned Senior Counsel assisted by Sri Siddharth Nandan, learned Advocate for the petitioner and Sri Suresh Singh, learned counsel for the respondents.

2. The writ has been filed for quashing of the impugned orders dated 12.11.2014 and 02.11.2012 contained in Annexure Nos.1 and 8 respectively.

3. The controversy raised by means of present writ petition revolves around interpretation to be placed upon Clause 10 (ii) and (iii) of "Terms and Conditions of the Residential Plot Scheme 2009 (1) of YEIDA.

4. The copy of the brochure titled "Terms and Conditions of the Residential Plot Schemes 2009(1) of YEIDA" in English and Hindi has been filed as Annexure-2 to the writ petition. Clause 10A in English at page 30 and Clause 10 d in Hindi at page 37 of the writ petition reads as under :'

"10. ELIGIBILITY TO APPLY:

A. General Category:

(i) The applicant must be competent to contract and shall have attained the age of majority.

(ii) All Indians/Non-Resident Indians who are neither in any way prohibited by the Government of India nor by U.P. Government under any specific rules to purchase any immovable property in U.P., shall be eligible to apply. Persons eligible as above can apply under any category only for one plot.

(iii) No person shall be eligible to get allotment for more than one plot in this scheme."

"10. आवेदन हेतु पात्रताः

(क) सामान्य श्रेणीः

(प) आवेदक वयस्क होनाा चाहिए तथा अनुबंध करने हेतु सक्षम होना चाहिए।

(पप) समस्त भारतीय/प्रवासीय भारतीय नागरिक जो भारत सरकार अथवा उत्तर प्रदेश सरकार के किसी नियम के अन्तर्गत उत्तर प्रदेश में अचल सम्पत्ति क्रय करने हेतु किसी भी प्रकार से प्रतिबंधित नही है, आवेदन हेतु पात्र होगें। उपरोक्तानुसार पात्र व्यक्ति किसी भी श्रेणी के अंतर्गत एक ही भूखण्ड हेतु आवेदन कर सकता है।

(पपप) कोई भी व्यक्ति एक से अधिक भूखण्ड आवंटन हेतु पात्र नहीं होगा।"

5. The relevant facts in short leading to this petition are as follows:-

Yamuna Expressway Development Authority published an advertisement for settlement of Residential Plot Scheme-2009 wherein prospective candidates were called upon to apply for allotment of plots falling within the territorial jurisdiction of the said development authority. These plots were categorized in five categories

i.e. A, B, C, D, and E. The petitioner before this Court submitted two applications for plots one each falling under the categories 'D' and 'E'. After draw of lots, the petitioner was found to have been selected for allotment of two plots one falling in categories 'D' and the other in category "E'. The petitioner on being made aware that he has been selected for two plots, himself surrendered the allotment, which was made in respect of plot falling under category 'E', as this allotment was subsequent in point of time, meaning thereby he expressed his willingness for keeping the plot first allotted, falling under the category 'D'. This according to the petitioner was done in conformity with clause 10 (iii) as quoted above.

6. However, under the order impugned dated 2.11.2012 the authority has proceeded to cancel the allotment made in respect of plot falling under category 'D' also.

7. Feeling aggrieved, the petitioner approached this Court by means of Writ Petition No.9577 of 2013, which was disposed of requiring the petitioner to approach the State Government under section 12 of U.P. Industrial Area Development Act, 1976 read with section 41 (3) of the Urban Planning and Development Act, 1973.

8. The State Government under the order impugned dated 12.11.2014, has maintained the decision of the Development Authority. Both, the State as well as Development Authority have recorded a finding that in view of clause 10 (ii) the applicant could have submitted only one application in respect of one plot only in any of the five categories. Since the petitioner had submitted two applications, he has rightly been held disqualified from the zone of consideration for allotment.

9. Sri T.P. Singh, learned Senior Counsel assisted by Sri Siddharth Nandan, learned counsel for the petitioner points out that on simple reading of Clause 10 (ii), it is apparent that the applicant was entitled to make applications in respect of one plot falling in each of the five categories and it is on this reading of the clause that the petitioner had submitted two applications, one for plot falling under category 'D' and the other falling under category 'E'. The petitioner was intimated about his selection in respect of plot falling under category 'D' prior in point of time. In view of provisions of Clause 10 (iii) quoted above, on being informed of his selection for the second plot falling in category 'E', he immediately surrendered the same.

10. Counsel for the petitioner submits that the impugned orders passed by respondents are based on misreading of the said clause 10 (ii) and, being bad in law are liable to be quashed.

11. Sri Suresh Singh, learned counsel for the respondents, on the contrary supports the order of the development authority as well as State Government, and submits that development authority has restricted the making of more than one application by any person for one plot only in respect of any of the five categories. This is what he interprets from the reading of the clause 10(क)(ii). It is the case of respondents that the words " उपरोक्तानुसार पात्र व्यक्ति किसी भी श्रेणी के अन्तर्गत एक ही भू–खण्ड हेतु आवेदन कर सकता है." makes it clear that in respect of all the categories, only one application could have been made for allotment of one plot.

12. Heard counsel for the parties and examined the records.

13. We are of the considered opinion that there is substance in the submissions made by the counsel for the petitioner. From a simple reading of Clause 10 (A) (ii) or 10(क)(ii) of the Brochure, we find that a person was entitled to make more than one application under the scheme, i.e. one application each in respect of one plot of each category. Meaning thereby that a person was entitled to submit as many as five applications at a time one each for a plot in each of the five different categories. But he would be entitled for allotment of one plot in any of the categories under the scheme.

14. In fact under clause 10(A) (iii) or 10 (क) (iii) lead to such interpretation, inasmuch as if clause (ii) permitted making of one application by a person only that there would have been no need to make a provision under clause (iii) disqualifying a person from allotment of more than one plot in the scheme. The petitioner was therefore correct and did not commit any error/wrong, in submitting two applications, one for plot falling under category 'D' and the other for the plot falling under category 'E'. We may record that the petitioner was more than fair in surrendering the allotment of plot offered to him falling under the category 'E', as under clause 10 (A) (iii) a person could be allotted only one plot under the entire scheme. The petitioner has decided to retain the allotment made in his favour in respect of plot falling under category 'D' and surrendered plot allotted under category 'E'. There is no justification to deprive him from the plots allotted in his favour in category 'D'.

15. For the said reasons, the order passed by the Development authority and that passed by the State Government are held to be bad.

16. In view of discussions made above, the allotment of the plot in favour of the petitioner falling under the category 'D' is fully justified under the scheme and is restored subject to the fulfillment of conditions of allotment by the petitioner, in accordance with the allotment order.

17. We may clarify that if any person has been awarded two plots under the same scheme, may be in different categories, the development authority would be justified in canceling the allotment of one of the two plots, which was offered later in point of time irrespective of the fact that such allottee, has transferred the second plot in favour, to some third person.

18. On simple reading of clause 10 (iii), it is clear that a person upon allotment of a particular plot within the scheme in any of the five categories, stands disqualified for allotment of any other plots, subsequently in same or any other category. The Development authority will be justified in proceeding for cancellation of later plot in accordance with law.

19. The writ petition is allowed subject to the observation made.

20. We further require the development authority to notify the revised schedule in the matter of payment of installment etc. to the petitioner within two weeks of the receipt of the certified copy of this order.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.02.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE OM PRAKASH-VII, J.

Criminal Appeal No. 2895 of 1986

Mahtab ...Appellant
Versus
State ...Opp. Party

Counsel for the Appellant:
Sri V.S. Rathore, Sri Gyaneshwar Bhatt, Sri A.K. Shukla, Sri A.K. Shrivastava

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

Criminal Appeal-against conviction of life imprisonment under section 302 IPC-challenged on ground-right to defend to accused not properly given-opportunity to explain real cause of death properly given under section 313 Cr.P.C.-deceased being wife of appellant who was found present-no omission on part of Trail Court found-can not be said to be prejudiced the right of accused to defend himself-Trail Court rightly held that the appellant committed murder of his wife-presumptions not disputed-by accused-appeal dismissed.

Held: Para-40
On close analysis of the evidence and the questions framed by the trial Court in the statement under section 313 Cr.P.C., it clearly indicates that all the incriminating inculpatory evidence have been placed before the accused and opportunity to explain the real cause of death has also been given to the accused which has not been explained by the accused truthfully. There is no omission on part of the trial Court. Therefore, in the facts and circumstances of the case, it cannot be said that right of the accused to defend himself for the reason mentioned above has been prejudiced. Trial Court has followed correct legal procedure. Sufficient opportunity has been offered through the questions put to accused to explain the real cause of murder as the deceased is done to death in his house. Ligature mark clearly goes to show that deceased died due to strangulation. Since the dead body of the deceased was found in the house of the deceased and deceased is the wife of accused, who was present in the house, medical evidence clearly establishes that deceased has been murdered, therefore, all the circumstances laid by the prosecution before the Court for raising presumption under section 114 of the Indian Evidence Act taking recourse of the provisions of section 106 of the Indian Evidence Act have arisen. Trial Court has rightly held that it was the accused who has committed the murder of his wife and this presumption has not been rebutted by the accused by adducing any evidence. Thus, point no.4 & 6 are answered as above.

Case Law discussed:
(2015) 1 Supreme Court Cases 496; 1969 AIR 422.

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

1. This criminal appeal has been preferred by the appellant Mahtab son of Raghu Lal resident of Khargapur, P.S. Bisalpur, District Pilibhit against the judgment and order dated 10.09.1986 passed by Sessions Judge, Pilibhit in Sessions Trial No.125 of 1986 (State Vs. Mahtab) under Section 302 IPC, P.S. Bisalpur whereby the trial Court has convicted and sentenced the accused-appellant Mahtab under Section 302 IPC for life imprisonment.

2. The prosecution case in nutshell is that on 31.1.1986, informant Raghu Lal

(P.W.1), moved an application before the concerned police stating therein that he is the resident of village Khargapur, P.S. Bisalpur. In the intervening night of 30/31.1.1986, when the informant's son had gone to attend the cultural programe at Pradhan's place, his daughter-in-law, who was suffering from fits, had latched the door of the room from inside and had slept. When his son came back at about 4:00 a.m. and tried to open the door, but the door did not open, then his son broke the latch of the door with the help of Karchuli and saw that his wife was lying dead on the Galicha. Request was made to take legal action.

3. This information is scribed by one Ram Singh son of Shiv Lal and is Ex.ka-2 and it was entered in the general diary at Rapat No.26, which is Ex.Ka-3. The carbon copy of the G.D. entry, which is Ex.Ka-4, is also on record whereby case was converted as Crime No.36 of 1986 under Section 302 IPC on the basis of postmortem report. Police has prepared inquest report (Ex.Ka-5) and also the Form No.13 (Ex-Ka-6), Photo Lash (Ex.ka-7), letter to R.I. (Ex.Ka-8), letters to C.M.O. (Ex.Ka-9 & 11). The dead body was kept in a sealed cover and sample seal was also prepared, which is Ex.Ka-10. Postmortem on the dead body of the deceased was done on 1.2.1986 at 2:30 p.m., which is Ex.Ka-13. Investigating officer has also inspected the spot and prepared site plan, which is Ex.Ka-14. Police recorded the statement of the witnesses and also collected the evidence and submitted the charge-sheet under Section 302 IPC against the accused-appellant, which is Ex.Ka.-12.

4. The postmortem on the body of the deceased was conducted on 1.2.1986 at 2:30 p.m. and time of death is mentioned as one and a half day old. Rigor mortis passed off in upper limits and present in lower limits.

5. Upon postmortem, the following ante-mortem injuries were found :

(i)Contusion at upper lid 2.5 cm. x 1.5 cm. in right side.

(ii)Contusion at right lower lid 2.75 cm. x 1.5 cm. in size.

(iii)Lacerated wound on eye ball right side. It is 3 cm. x 2 cm. x bone deep in size.

(iv)Ligature mark at middle of neck all around. It is 1.5 cm. x all around in length. It is transverse in position (continuous) low down in the neck below thyroid, base of groove is soft and reddish, ecchymosis and the edges of ligature mark is present. Subcutaneous tissues are ecchymosed under the mark.

6. The following postmortem injuries were also found:

(i) Ant bite abrasion on back of left little finger at junction of middle and distal phalanx. It is 1 cm. x .5 cm. in size.

(ii) Ant bite abrasion at left ring finger at joint of distal phalanx on back, .5 cm. x .5 cm.

7. In the opinion of the doctor, Smt. Raj Beti had died due to asphyxia which was the result of strangulation. According to the doctor, Smt. Raj Beti could die on the night of 30/31.1.86 at any time.

8. After taking cognizance, case was committed to the Court of Sessions. The trial Court framed charge under Section 302 IPC against the appellant, which is as follows :

"I, P.K. Dixit, Sessions Judge, Pilibhit hereby charge you, Mahtab, as follows :-

9. That you on the night intervening 30/31.1.86 in village Khargapur, within police station Bisalpur, did commit the murder by intentionally, or knowingly causing the death of your wife, Smt. Raj Beti, and thereby committed an offence punishable under Section 302 I.P.C. and within my cognizance.

And I hereby direct that you be tried by this court on the said charge."

9. Since accused has denied the charge framed against him, therefore, in order to prove the case, the prosecution examined P.W.1 Raghu Lal, the father of the accused-appellant Mahtab, P.W.2 Indrajeet Mukhia, P.W.3 Laxmi Narain, P.W.4 Dr. M.L. Sharma, who has conducted the postmortem, P.W.5 Constable Hem Raj, who has proved the G.D. Entreis and also the inquest report, photo lash, challan lash, letter to R.I. and C.M.O. Sample seal. This witness has also proved the charge-sheet and the endorsement made on the postmortem report. After completing the prosecution evidence, Court recored the statement of the accused-appellant under Section 313 Cr.P.C.

10. Accused in the statement under Section 313 Cr.P.C. has stated that he has not committed the present offence by strangulating his wife in the intervening night of 30/31.1.1986. He had not gone to the house of Indrajeet Mukhiya on the next day of the offence and has not made any extra judicial confession to him. He had also not made any extra judicial confession to anyone at the time of preparing the inquest report and postmortem. He has specifically stated that Indrajeet Mukhiya had told him to serve as labour, but he denied. Witness Laxmi Narain has also told him the same fact, but he was not agree to do work as labour, therefore, due to this enmity, they have made a false statement.

11. Accused has not adduced any oral or documentary evidence in support of his defence.

12. After hearing the parties and going through the record, the learned trial Court vide impugned judgment and order convicted and sentenced the appellant for the offence under Section 302 IPC for life imprisonment. Hence this Appeal.

13. P.W.1 Raghu Lal, who is the father of the accused-appellant, has stated that he had informed orally to the local police regarding death of the deceased. The deceased committed suicide. No one has committed her murder. Accused Mahtab was present in the village at the time of death of the deceased. There was no issue to the deceased. Hori Lal, his nephew, used to come at his residence. Accused Mahtab suspects that Hori Lal had illicit relations with the deceased and the child in the womb was of Hori Lal. In the cross-examination, this witness has accepted that when deceased died, he was outside the house and accused Mahtab had gone to attend Thirthone. Deceased was suffering from fits.

14. P.W.2 Indrajeet Mukhiya has stated that he knows the accused. Information to the police regarding death of the deceased had been given by the father of the accused. Police had come. Inquest report had been prepared and the dead body was kept in a sealed cover. He had seen the dead body of the deceased and he was also one of

the witnesses of the inquest report. He has seen the injuries on the eyes of the deceased and blood was also present on the dead body. This witness has proved his signature on the inquest report. He has specifically stated that on the second day of the incident, accused had come to meet him and had stated that "Mehtab ne mujhse kaha ki usne anpi biwi ke danda mara jo uski aankh mein lag gaya jisse wah mar gaye hai. Mahtab ne kaha ki uski biwi ka sambandh Hori se tha." As per this witness, accused has committed the murder of his wife in a fit of rage. This witness has also specifically stated that he does not know whether the deceased was pregnant or not. He has been cross-examined by the defence.

15. P.W.3 Laxmi Narain has stated that he knows the accused Mahtab. Deceased was the wife of accused Mahtab, whose inquest report was prepared before him. He was also one of the witnesses of the inquest report. This witness has proved his signature on the inquest report. It has also been stated that on 1.2.1986, in the evening, accused Mahtab had come to meet him. One Siya Ram was also sitting there. Accused Mahtab has told to this witness that "Truth has been surfaced from the postmortem report that he has committed murder of his wife". Accused has also told to this witness that Hori used to come to his house. He asked from his wife that why he comes to this place. He also restrained his wife. This witness has also stated that accused has told that when he asked from his wife that why does Hori Lal come then his wife did not say anything and on this, accused gave 2-3 danda blows to his wife. She received injuries on her eye and fell down on the Galicha. Accused has also told to this witness that he has strangulated the deceased and has done her to death. The rope used to commit the offence was burnt by him on the chulha. Accused Mahtab intends his help, but this witness expressed inability to extend any help. This witness has been cross-examined at length by the defence.

16. P.W.4 Dr. M.L. Sharma, posted as Medical Officer at District Hospital, Pilibhit on the date of performing the postmortem on the dead body of the deceased, has stated that on 1.2.1986 at about 2:30 p.m, he has conducted the postmortem on the dead body of the deceased, which had been brought by Constables Arun Singh and Ajay Kumar Pandey in a sealed cover from Police Station Bisalpur. They have also identified the dead body of the deceased. As per this witness, he has found antemortem as well as postmortem injuries on the body of the deceased, which has already been mentioned hereinabove. In the opinion of this witness, deceased died due to asphyxia, which was occasioned due to strangulation and injury no.4 is the result of strangulation. Venus was found congested. This witness has proved the postmortem report and has stated that he has prepared this report after performing the postmortem, which has also been certified by Dr. M.P. Singh, who was present at the time of postmortem. This witness has opined that death of the deceased might have taken place in the intervening night of 30/31.1.1986 at any time. Postmortem injuries were the result of ant eating. It has further been opined that the postmortem injuries found on the body of the deceased may only occur when the dead body of the deceased was lying uncared. Defence has put only one question in the cross-examination as to the nature of

the injuries no.1, 2 & 3 and this witness stated that injuries no.1 & 2 were simple, but injury no.3 was grievous in nature. Trial court has also asked question as to whether death was suicidal or homicidal, then this witness has stated that deceased was done to death. It was not a case of suicide.

17. P.W.5 Constable Hem Raj has stated that on 31.1.1986, he was posted as head moharir at P.S. Bisalpur. On that day at about 15:30 hours, one Raghu Lal putting his thumb impression submitted a written report scribed by one Ram Singh, the same was entered in the G.D. and was annexed with the G.D. by this witness. This witness has proved the G.D. prepared by him comparing it with the original G.D. This witness has also stated that Sub-Inspector Vivek Gautam proceeded to the spot for preparing the inquest report and other police papers. When this witness received postmortem report on 2.2.1986 at 12:30 p.m., the case was converted into the offence under Section 302 IPC vide G.D. Rapat No.22 dated 2.2.1986. Ex.Ka-4, the true copy of the G.D. was also proved by this witness comparing it with the original G.D. The papers prepared by S.I. Vivek Gautam and Badan Singh Tibbetia have also been proved by this witness. He has stated that they were posted with him and he has seen them writing and signing and also he is aware about the writing and signature of them. As per this witness, inquest report, challan lash, photo lash, report of R.I., Report of C.M.O., Sample Seal etc. have been prepared by the Sub-Inspector Vivek Gautam in his writing, which are Ex.Ka.-5 to Ex.Ka.-11 on record. The investigating officer Badan Singh Tibbetia, after completing the investigation, has submitted charge-sheet, which had also been prepared by him in his writing. Since this witness is aware of the writing and signature of Sri Badan Singh Tibbetia, therefore, he has also proved the charge-sheet Ex.Ka.-2. Endorsement made on the postmortem report by the C.O. K.S. Sharma have also been proved by this witness, which has been exhibited as Ex.Ka.13. This witness has not been cross-examined by the defence.

18. Before proceeding to record the arguments advanced by the learned counsel for the parties, we think it proper to reproduce the endorsement made by Circle Officer on the postmortem report, which has been exhibited as Ex.Ka.-13.

" I have seen the ligature mark around the neck of the dead body of Smt. Raj Beti wife of Mahtab resident of Khargapur, P.S. Bisalpur. I agree with the report of Medical Officer".

19. We have heard Sri A.K. Srivastava and Sri A.K. Shukla, learned counsel for the appellant as well as Sri Pradeep Pandey, learned A.G.A. for the State and also perused the entire record carefully.

20. It is the submission of the learned counsel for the appellant that deceased was suffering from a disease i.e. fits and due to this reason, in the intervening night of 30/31.1.1986, she received injuries and resultantly she died. It has also been argued that accused has not made any extra judicial confession to any person. The prosecution case regarding extra judicial confession is false. Medical evidence does not support the prosecution case. All the incriminating inculpatory evidence came in the prosecution evidence have not been put before the accused in the statement under section 313 Cr.P.C. Therefore, prejudice has been caused and opportunity has not been given to the accused to explain those incriminating inculpatory evidence. Referring the contents of the first information report, it was also

submitted that door was closed from inside of the room, which had been opened breaking the latch by the accused himself. Therefore, all the circumstances clearly show that deceased has committed suicide and it is not a case of murder. P.W.2 and P.W.3, as has been indicated in the statement under Section 313 Cr.P.C., have falsely implicated the accused in this case. Accused has never made any extra judicial confession before P.W.1 and P.W.2. Apart to this, extra judicial confession is a very weak piece of evidence. Until and unless there is any supporting / corroborating evidence of the extra judicial confession, no sanctity can be attached to it and conviction cannot be based on such confession, which has been retracted by the accused. First information report has been lodged by the father of the deceased himself. If accused had committed the murder of the deceased, why he will send his father to inform the police. It was also argued that accused, who was present there, not only opened the door of the room where the deceased has committed suicide, but was also present during preparation of inquest report and performing of the postmortem. Mere finding of ligature mark around the neck, it cannot be presumed that deceased was done to death and she has not committed suicide. Motive is also not proved by the prosecution.

21. Reliance has been placed on the law laid down in the following cases :

(1) Nar Singh Vs. State of Haryana, (2015) 1 Supreme Court Cases 496.

(2)Decision of this Court dated 11.3.2014 passed in Criminal Appeal No.700 of 1983, Jan Mohd. Vs. State of U.P.

22. It was also submitted by the learned counsel for the appellant that the appellant, if found guilty, may be extended the benefit of imprisonment already undergone as the offence is not covered under section 302 IPC.

23. Per contra, learned A.G.A. submitted that deceased died in the house of the accused. Death is not natural death. Medical evidence discloses that deceased was done to death. Trial Court finding that it is not a suicidal death is correct. Although, first information report has been lodged by the father of the accused belatedly, but the real cause of the death of the deceased has been suppressed. Accused has made extra judicial confession to P.W.1 Raghu Lal and P.W.2 Indrajeet Mukhiya and such extra judicial confession has been made by the accused voluntarily, which has been rightly relied on by the trial Court. It was also submitted that if the extra judicial confession is voluntarily made by the accused and inspire confidence, then conviction can be based on such extra judicial confession. It was further submitted that motive shown by the accused in the statement under section 313 Cr.P.C. is not believable as no evidence in that respect has been adduced by the accused. Answer made in the statement under section 313 Cr.P.C. cannot take place a piece of evidence until and unless it is supported by some corroborative evidence or it is in the line of the prosecution case. Medical evidence clearly indicates that deceased died due to strangulation. Ligature mark found around the neck of the deceased clearly goes to show that it is not a case of suicide. Burden to explain the reason of the death of the deceased lies upon the accused, which has not been explained satisfactorily by the accused. At this stage, learned A.G.A. referred the

provisions of Section 106 and 114 of the Indian Evidence Act as also the scope of provision of Section 313 Cr.P.C and submitted that all the circumstances clearly indicate that accused and accused only has committed the death of the deceased. Presumption made by the trial Court is in accordance with law, which has not been rebutted by the accused from his evidence. Since all the incriminating inculpatory evidence have been put to the accused in the statement under section 313 Cr.P.C., therefore, no prejudice has been caused to the accused in his defence. The trial Court has rightly held the guilt of the accused.

24. Learned A.G.A. has placed reliance on the following case laws :

(1)Nishi Kant Jha Vs. State of Bihar, 1969 AIR 422.

(2)Sahadevan and Another Vs. State of Tamil Nadu, (2012) 6 Supreme Court Cases 403.

25. We have considered the submission raised by the learned counsel for the parties and also gone through the record carefully.

26. In the present matter, as is clear from the prosecution case, the first information report is lodged by the father of the accused, who is said to be present in the village at the time of incident. Offence is said to have been committed in the intervening night of 30/31.1.1986. Information has been given on 31.1.1986 by the father of the accused only mentioning therein that when his son (the accused) returned back at about 4:00 a.m. and tried to open the door, which had been closed by the deceased from inside, it was not opened by the deceased, then he broke the door and found the dead body of the deceased lying on the Galicha.

27. Trial Court on the point of lodging of the first information report has opined that information has been given by the informant after deliberation with the accused. It is also pertinent to mention here that in the present case, no question arises regarding delay in lodging the first information report. It is also undisputed fact that dead body of the deceased was lying inside the house of the accused in a room. This fact is also supported with the inquest report. Nothing has been found by the Investigating Officer on the spot to show that accused opened the door breaking the latch.

28. Thus, main points for consideration in the case, as has been argued by the learned counsel for the parties, are that :-

(1)Whether the death of the deceased is suicidal or homicidal ?

(2)What are the scope and effect of extra judicial confession said to have been made by the accused to the witnesses ?

(3)Whether the finding arrived at by the trial Court regarding medical evidence is in accordance with law ?

(4)Whether any prejudice has been occasioned to the accused by not placing all the incriminating inculpatory evidence before him?

(5)Whether enmity stated by the appellant is sufficient to falsify the accused in the present matter ?

(6)Whether circumstances have been established by the prosecution to reach on an irresistible conclusion that accused and accused only has committed the present offence of murder ?

(7)Whether accused has explained satisfactorily the reason or cause of death of the deceased ?

29. First of all, we are proceeding to decide as to whether the death of the deceased is homicidal or suicidal. Since this point is relating to the medical evidence, there is no direct evidence of the case, the dead body of the deceased was found inside the house of the accused, therefore, postmortem report prepared in this case is the most important piece of evidence. P.W. 4 Dr. M.L. Sharma, who has conducted the postmortem and has prepared the postmortem report, has found two types of injuries on the person of the deceased. Antemortem injuries are in the form of contusion, lacerated wound and ligature mark. One contusion is in the right side of the upper lid. Second contusion is in right lower lid. Lacerated wound is on the eye ball right side in the size of 3 cm. x 2 cm. x bone deep. Ligature mark at middle of neck all around into the size of 1.5 cm. x all around in length.

30. Information was given by P.W.1 Raghu Lal initially does not contain any injury in it. The case has been converted into the offence under section 302 IPC after receiving the postmortem report on the basis of ligature mark.

31. P.W.4 Dr. M.L. Sharma has clearly stated that death of the deceased was not a suicidal death, but she had been murdered. This statement by P.W.4 Dr. M.L. Sharma is only an opinion, therefore, we have compared this opinion with the injuries found on the body of the deceased. Finding of ligature mark all around the neck clearly indicates that some other person has tighten the neck by using rope or the like article of material, then and then only death of the deceased took place. P.W.4 has also opined that death of the deceased was the result of asphyxia due to strangulation. The opinion expressed by Dr. Sharma is based on the basis of injuries found on the body of the deceased. Trial Court has taken into consideration the opinion of P.W.4 and has rightly concluded that deceased has been murdered, thus the points no.1 & 3 are answered as above.

32. Now the Court proceed to decide as to whether the extra judicial confession, said to have been made by the accused to the witnesses, is reliable and inspire confidence. Trial Court has placed reliance on the extra judicial confession made by the accused to P.W.2 Indrajeet Mukhiya and P.W.3 Laxmi Narain. One argument has been raised on behalf of the appellant that the accused has not made any extra judicial confession to the above-named witnesses and they have deposed before the Court this fact due to enmity and also on the advise of the police.

33. On close scrutiny of the evidence regarding enmity, it is evident that accused has stated that he was told by these two witnesses to serve as labour with them, but he denied, therefore, they have made false statement before the Court. The enmity shown by the accused person is not of such nature, which may be taken for false implication of the accused. This is a case in which the deceased is done to death, therefore the enmity shown by the accused for his false implication has rightly not been found sufficient by the trial Court.

34. As regards the acceptance of extra judicial confession made by the

accused person is concerned, Hon'ble Supreme Court in the case of Nishi Kant Jha (supra) has propounded the theory of exculpatory and inclupatory part before relying on such extra judicial confession.

35. Hon'ble Supreme Court in its latest pronouncement in the case of Sahadevan (supra) at paragraph no.16 has propounded the principal to rely upon an extra judicial confession alleged to have been made by the accused, which are quoted as under.

"16. Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

(i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.

(ii) It should be made voluntarily and should be truthful.

(iii) It should inspire confidence.

(iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.

(v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.

(vi) Such statement essentially has to be proved like any other fact and in accordance with law."

36. In the instant case, accused had gone to the house of the witness Indrajeet Mukhiya and has disclosed the fact voluntarily. Defence has also not been able to show that such confession made by the accused have come out due to any pressure or for any other reason. Similarly, accused has also confessed the guilt to the witness Laxmi Narain during postmortem saying that he has committed murder of his wife. By that time he was also not under any pressure. It might be possible that the extra judicial confession has been made by the accused in remorse. Witnesses have not been found inimical at any score by the trial Court and the extra judicial confession, said to have been made, has been made voluntarily and the circumstance also goes to show that it does not suffer from any material discrepancies and inherent improbabilities and is truthful. At this stage, it is also pertinent to mention here that the theory narrated in the first information report and the plea taken by the accused in the statement under Section 313 Cr.P.C. have not been found true by the trial Court. On close analysis of the entire evidence, we are also of the view that the plea taken by the accused in the statement under Section 313 Cr.P.C. and suggestions made to the witnesses regarding enmity or the narration made in the first information report are not true as no evidence regarding breaking of latch was found by the investigating officer. Deceased died due to asphyxia as a result of strangulation. The ligature marks all around the neck have also been found,

therefore, in the facts and circumstances of the case and taking into consideration the nature of the extra judicial confession made by the accused before the witnesses, the trial Court's view regarding placing of reliance on the extra judicial confession is not interferable. Merely, on the basis that during course of trial, accused has retracted from the said confession, it cannot be held that the said extra judicial confession has not been made by him. Thus the point nos. 2 and 4 are answered as such that extra judicial confession made by the accused has been made voluntarily and the enmity shown is not believable in the matter. Extra judicial confession is supported by other circumstances and also corroborated by the medical evidence and it does not suffer from any material discrepancies and inherent improbabilities.

37. Now we proceed to discuss the point no.4 regarding placing / putting of all incriminating inculpatory evidence before the accused in the statement under section 313 Cr.P.C. and its scope.

38. Trial Court after completing the prosecution evidence has framed seven questions in the statement under section 313 Cr.P.C. Trial Court has clearly placed the evidence before the accused to explain that in the postmortem report, antemortem injuries have been found on the dead body of the deceased and it is also found that deceased was done to death by strangulation in the intervening night of 30/31.1.1986. Accused has denied this fact. The extra judicial confession said to have been made by the accused to the witnesses namely Indrajeet Mukhiya and Laxmi Narain have also been placed before the accused. Accused has also been given opportunity to explain the cause of death of the deceased. No explanation has been given by the accused although he has denied the incriminating inculpatory evidence placed before him.

39. Hon'ble Supreme Court in the case of Nar Singh (supra) discussing the scope of Section 313 Cr.P.C. in the following paragraphs has held as under :

"11. The object of Section 313 (1)(b) Cr.P.C. is to bring the substance of accusation to the accused to enable the accused to explain each and every circumstance appearing in the evidence against him. The provisions of this section are mandatory and cast a duty on the court to afford an opportunity to the accused to explain each and every circumstance and incriminating evidence against him. The examination of accused under Section 313 (1)(b) Cr.P.C. is not a mere formality. Section 313 Cr.P.C. prescribes a procedural safeguard for an accused, giving him an opportunity to explain the facts and circumstances appearing against him in the evidence and this opportunity is valuable from the standpoint of the accused. The real importance of Section 313 Cr.P.C. lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point.

16. Undoubtedly, the importance of a statement under Section 313 Cr.P.C., insofar as the accused is concerned, can hardly be minimised. The statutory provision is based on the rules of natural justice for an accused, who must be made aware of the circumstances being put against him so that he can give a proper explanation to meet that case. If an

objection as to Section 313 Cr.P.C. statement is taken at the earliest stage, the Court can make good the defect and record additional statement of the accused as that would be in the interest of all. When objections as to defective Section 313 Cr.P.C. statement is raised in the appellate court, then difficulty arises for the prosecution as well as the accused. When the trial court is required to act in accordance with the mandatory provisions of Section 313 Cr.P.C., failure on the part of the trial court to comply with the mandate of the law, in our view, cannot automatically enure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. Insofar as non-compliance of mandatory provisions of Section 313 Cr.P.C., it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal.

17. So far as Section 313 Cr.P.C. is concerned, undoubtedly, the attention of the accused must specifically be brought to inculpable pieces of evidence to give him an opportunity to offer an explanation, if he chooses to do so. A three-Judge Bench of this Court in Wasim Khan v. The State of Uttar Pradesh, AIR 1956 SC 400; and Bhoor Singh & Anr. v. State of Punjab, AIR 1974 SC 1256 held that every error or omission in compliance of the provisions of Section 342 of the old Cr.P.C. does not necessarily vitiate trial. The accused must show that some prejudice has been caused or was likely to have been caused to him.

18. Observing that omission to put any material circumstance to the accused does not ipso facto vitiate the trial and that the accused must show prejudice and that miscarriage of justice had been sustained by him, this Court in Santosh Kumar Singh v State through CBI, (2010) 9 SCC 747 (Para 92), has held as under: "... the facts of each case have to be examined but the broad principle is that all incriminating material circumstances must be put to an accused while recording his statement under Section 313 of the Code, but if any material circumstance has been left out that would not ipso facto result in the exclusion of that evidence from consideration unless it could further be shown by the accused that prejudice and miscarriage of justice had been sustained by him..."

19. In Paramjeet Singh alias Pamma v State of Uttarakhand (supra), this Court has held as under:- "Thus, it is evident from the above that the provisions of Section 313 Cr.P.C. make it obligatory for the court to question the accused on the evidence and circumstances against him so as to offer the accused an opportunity to explain the same. But, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead, he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of any inadvertent omission on the part of the court to question the accused on an incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the court."

20. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of Section 313 Cr.P.C. has materially prejudiced him or is likely

to cause prejudice to him. Merely because of defective questioning under Section 313 Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under Section 313 Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused.

21. We may refer to few judgments of this Court where this Court has held that omission to put the question under Section 313 Cr.P.C. has caused prejudice to the accused vitiating the conviction. In State of Punjab v Hari Singh & Ors. (2009) 4 SCC 200, question regarding conscious possession of narcotics was not put to the accused when he was examined under Section 313 Cr.P.C. Finding that question relating to conscious possession of contraband was not put to the accused, this Court held that the effect of such omission vitally affected the prosecution case and this Court affirmed the acquittal. In Kuldip Singh & Ors. v State of Delhi (2003) 12 SCC 528, this Court held that when important incriminating circumstance was not put to the accused during his examination under Section 313 Cr.P.C., prosecution cannot place reliance on the said piece of evidence.

22. We may also refer to other set of decisions where in the facts and circumstances of the case, this Court held that no prejudice or miscarriage of justice has been occasioned to the accused. In Santosh Kumar Singh v State thr. CBI (supra), it was held that on the core issues pertaining to the helmet and the ligature marks on the neck which were put to the doctor, the defence counsel had raised comprehensive arguments before the trial court and also before the High Court and the defence was, therefore, alive to the circumstances against the appellant and that no prejudice or miscarriage of justice had been occasioned. In Alister Anthony Pareira v. State of Maharashtra (2012) 2 SCC 648, in the facts and circumstances, it was held that by not putting to the appellant expressly the chemical analyser;s report and the evidence of the doctor, no prejudice can be said to have been caused to the appellant and he had full opportunity to say what he wanted to say with regard to the prosecution evidence and that the High Court rightly rejected the contention of the appellant-accused in that regard.

23. When such objection as to omission to put the question under Section 313 Cr.P.C. is raised by the accused in the appellate court and prejudice is also shown to have been caused to the accused, then what are the courses available to the appellate court? The appellate court may examine the convict or call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him under Section 313 Cr.P.C. and the said answer can be taken into consideration.

24. In Shivaji Sahabrao Bobade & Anr. vs. State of Maharashtra (1973) 2 SCC 793, this Court considered the fallout of the omission to put a question to the accused on vital circumstance appearing against him and this Court has held that the appellate court can question the counsel for the accused as regards the circumstance omitted to be put to the accused and in para 16 it was held as under:- " ... It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed.

However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration.

It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction.

In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused...."

40. On close analysis of the evidence and the questions framed by the trial Court in the statement under section 313 Cr.P.C., it clearly indicates that all the incriminating inculpatory evidence have been placed before the accused and opportunity to explain the real cause of death has also been given to the accused which has not been explained by the accused truthfully. There is no omission on part of the trial Court. Therefore, in the facts and circumstances of the case, it cannot be said that right of the accused to defend himself for the reason mentioned above has been prejudiced. Trial Court has followed correct legal procedure. Sufficient opportunity has been offered through the questions put to accused to explain the real cause of murder as the deceased is done to death in his house. Ligature mark clearly goes to show that deceased died due to strangulation. Since the dead body of the deceased was found in the house of the deceased and deceased is the wife of accused, who was present in the house, medical evidence clearly establishes that deceased has been murdered, therefore, all the circumstances laid by the prosecution before the Court for raising presumption under section 114 of the Indian Evidence Act taking recourse of the provisions of section 106 of the Indian Evidence Act have arisen. Trial Court has rightly held that it was the accused who has committed the murder of his wife and this presumption has not been rebutted by the accused by adducing

any evidence. Thus, point no.4 & 6 are answered as above.

41. Learned counsel for the appellant has also argued that charge against the accused only covered under section 304 Part-1 IPC, therefore, converting the offence said to be proved under section 302 IPC into the offence under section 304 IPC, accused be enlarged on already undergone by the appellant in jail. To decide this fact, we have also taken into consideration the facts and circumstances and the evidence available on record. Accused has been charged under Section 302 IPC. There is clear medical evidence that she was done to death. Accused has not given any explanation as to how deceased died. Accused has also not taken any plea in the trial Court that due to motive assigned in the first information report about illicit relationship of the deceased with one Hori Lal, he was deprived of power of self-control, therefore, he has committed the present offence. Since there is no such type of plea and facts and circumstances of the case also does not warrant to hold any presumption in favour of the accused, therefore, arguments advanced by the learned counsel for the appellant is not acceptable. We are of the considered view that the present case clearly covered under section 302 IPC, but not under any exception of the Section 300 IPC. Thus, on the basis of foregoing discussions, we are of the view that trial Court has rightly held guilty to the appellant under Section 302 IPC and sentenced him for life imprisonment, which is the minimum sentence.

42. So far as the inconsistency and contradiction are concerned, there is no such type of inconsistency or contradiction which affects the prosecution case or creates doubt on the material point. There is no infirmity, perversity or illegality in the finding arrived at by the trial Court and no interference is required by this Court.

43. Thus, in view of the above, we do not find any substance in the contentions raised by learned counsel for the appellant. The Appeal is devoid of merit and is liable to be dismissed and is, accordingly dismissed. Impugned judgment and order dated 10.9.1986 passed by the trial Court is hereby confirmed. Since the accused-appellant is in jail, let a copy of this judgment and order be sent immediately to the concerned Court to take necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2015

BEFORE
THE HON'BLE TARUN AGARWALA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Civil Misc. Writ Petition No. 4024 of 2015

A.N.K. Restobars Pvt. Ltd. & Anr.
...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Pankaj Agarwal

Counsel for the Respondents:
C.S.C., Sri Satish Chaturvedi.

The Securitisation and Reconstruction of Financial Assets and enforcement of Security Interest Act, 2002-Section 13 (3-A)-provision of giving notice and disposal of objection-before taking recourse of Section 14-held-mandatory-in absence of such action-taking possession-wholly illegal quashed-petition allowed.

Held: Para-6

In the instant case, we find that the objection of the petitioner has not been decided by the respondent-bank, since no order has been brought before the Court, nor any such order has been communicated to the borrower, namely, the petitioner. In the absence of deciding any objection, we are of the opinion that the respondent could not file an application under Section-14 and take an order for possession from the Collector without deciding the objection under Section-13(3-A). Consequently, the order of the Additional District Magistrate dated 28.11.2014 is wholly illegal and is quashed. The writ petition is allowed. It is open to the respondent-bank to proceed from the stage of deciding the objection of the petitioner under Section-13(3-A) of the Act and proceed accordingly.

Case Law discussed:

(2013) 9 SCC 620

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

1. We have heard Sri Pankaj Agarwal, learned counsel for the petitioners and Sri Satish Chaturvedi, learned counsel appearing for the State Bank Of India, Meerut-respondent no.4.

2. The petitioner is a borrower and had taken certain cash credit facility from the respondent-bank. Since the petitioner could not repay the loan, proceedings under The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as the 'Act') was initiated by the respondent-bank. A notice dated 11.05.2013 under Section-13(2) of the Act was issued to the petitioner in pursuance of which the petitioner filed his objection dated 05.07.2013. Without deciding the objection, it transpires that the respondent-bank filed an application under Section-14 of the Act before the District Magistrate which was allowed by an order dated 28.11.2014 permitting the respondent-bank to take physical possession of the property in question. The petitioner, being aggrieved by the action of the respondent and the order of the Additional District Magistrate (Finance & Revenue) has filed the present writ petition contending that no measures for taking possession of the property could be taken unless objection of the petitioner was decided by the respondent-bank under Section-13(3-A) of the Act which, in the instant case, has not been done.

3. This Court while entertaining the writ petition had directed the learned counsel for the respondent-bank to seek necessary instructions as to whether any objection was filed and whether any order on such objection was passed by the respondent-bank.

4. Sri Satish Chaturvedi, learned counsel for the respondent-bank had obtained necessary instructions and submitted that objection was received by the respondent-bank and that it transpires from the order of the District Magistrate that objection was decided but the same is not on the record and there is nothing further to indicate that such reply of the bank was communicated to the petitioner. Learned counsel has further place reliance upon paragraph-26 of the judgment of the Supreme Court in Standard Chartered Bank Vs. V. Nobel Kumar and others (2013) 9 SCC 620 to support his contention that possession can be taken without even deciding the objection of the petitioner under Section-13(3-A) of the Act.

5. Having heard the learned counsel for the parties, we are of the opinion that the writ petition could be decided at the admission stage itself on the basis of the instructions received by the learned counsel for the respondent-bank. We find that the Supreme Court's judgment in Standard Chartered Bank (supra) is not at all applicable in the instant case. The scheme of the Act and the procedure provided under Section-13 of the Act for the enforcement of the security interest requires that where the borrower is under a liability to a secured creditor and makes a default in repayment of the secured debt, in which case, the secured creditor is required to issue a notice in writing to the borrower to discharge in full his liabilities to the secured creditor within a stipulated period. On receipt of the said notice, the borrower is entitled to raise objections which, in our opinion, is required to be decided by the bank under Section-13(1-A) of the Act. This provision, in our opinion is mandatory and it is obligatory to the bank to decide the objections. Once such objection is decided and the liability is not discharged then it becomes open to the respondent-bank to proceed under Section-13(4) by taking possession or taking over the management of the business of the borrower. Section-14 is an additional procedure for taking possession which the Supreme Court has held in Standard Chartered Bank's case.

6. In the instant case, we find that the objection of the petitioner has not been decided by the respondent-bank, since no order has been brought before the Court, nor any such order has been communicated to the borrower, namely, the petitioner. In the absence of deciding any objection, we are of the opinion that the respondent could not file an application under Section-14 and take an order for possession from the Collector without deciding the objection under Section-13(3-A). Consequently, the order of the Additional District Magistrate dated 28.11.2014 is wholly illegal and is quashed. The writ petition is allowed. It is open to the respondent-bank to proceed from the stage of deciding the objection of the petitioner under Section-13(3-A) of the Act and proceed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2015

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE SHASHI KANT, J.

Civil Misc. Writ Petition No. 5206 of 2015

Bajji ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri C.B. Dubey, Sri S.B. Dubey

Counsel for the Respondents:
C.S.C., Sri Ramendra Pratap Singh

Constitution of India-Art.226-Notification under Land Acquisition-challenged-after 2 decades-no plausible explanation-delay having important note in acquisition proceeding-can not be interfered under writ jurisdiction.

Held: Para-20 & 21

20. The acquisition proceedings have been challenged by the petitioner after about two decades. The submissions as made and the aspects or suggested by learned counsel for the petitioner hardly gives any reasonable and satisfactory explanation for gross and inordinate delay in filing the petition.

21. in challenge to land acquisition proceedings, delay plays an important role. Petitioner cannot be allowed to sit on the fence and wait for completion of the land acquisition proceedings and thereafter approach the Court.

Case Law discussed:
[2011 (11) ADJ 1]; (1998) 6 SCC 1; (2009) 10 SCC 689; (2010) 11 SCC 242; (2011) 5 SCC 607; (2008) 4 SCC 695; (1975) 4 SCC 285; (1996) 11 SCC 501; (1996) 6 SCC 445; (2000) 2 SCC 48; (2008) 4 SCC 695.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for respondent nos. 1 to 3 and Shri Ramendra Pratap Singh appearing for respondent no. 4.

2. By means of this petition, petitioner has prayed for following reliefs:

"1. issue a writ, order or direction in the nature of certiorari quashing the impugned Notification No. 181/ Bhau-18-11-74 Bha. 93 Lucknow, dated 05.05.1993, under section 4 of Land Acquisition Act and impugned Notification No. 2747 Bhau/18-11-74 Bha. 93, dated 25.05.1993, under section 6 of the Land Acquisition Act 1894, in respect of petitioner's land comprising of the Plot No. 114, area 0-1-5, Plot No. 166, area 1-8-0, Plot No. 167 area 1-8-0, plot No. 168 area 1-1-0, Plot No. 169 area 0-13-0 mentioned in the extract of khatauni of revenue village Brahmpur Gajraula, Pargana and Tehsil Dadari District Gautam Budh Nagar (Annexure no. 1 and 2 to the writ petition).

2. issue a writ, order or direction in the nature of mandamus directing the respondents concerned to give additional compensation at the rate of 64% and or avail of allotment of developed abadi land to the extend of 10% subject to a maximum in the light of directions issued by this Hon'ble Court in the case of Gajraj Singh and others Versus State of U.P. and others reported in 2011 (11) ADJ 1 till the disposal of the present writ petition, so that justice may be done.

3. issue any suitable order or direction which this Hon'ble Court may deem fit and proper under the facts and circumstances of the case., so that justice may be done.

4. award the cost of the writ petition."

3. Shri Ramendra Pratap Singh, learned counsel for the respondents has raised a preliminary objection regarding the maintainability of the writ petition. He submits that the writ petition has been filed after more than 22 years from the date of declaration issued under Section 6 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) and it is highly bared by laches. He submits that even the Full Bench judgment in Gajraj Singh & Ors Vs. State of U.P. & Ors [2011 (11) ADJ 1], was delivered on 21/10/2011, and more than 3 years have elapsed from the judgment of the Full Bench in Gajraj's case (supra), which decided the bunch of writ petitions including the writ petition relating to Village Habibpur. In the entire writ petition, the petitioners, in any paragraph, have not given any explanation for delay and laches in approaching this Court.

4. However, placing reliance on the Full Bench judgment of this Court in the case of Gajraj (supra), it has been urged by learned counsel for the petitioner that relief prayed is liable to be granted in view of the said judgment.

5. Full Bench in the case of Gajraj (supra) has not entertained the petitions barred by delay and laches in a general manner without examining specific cases. It may be relevant to quote following from the report.

"We, however, cannot loose sight of the fact that the above grounds taken are not applicable to those writ petitioners, where the acquisition was finalised decades ago and allotment of private builders and colonisers which were complained of were not applicable in the aforesaid cases. We, now proceed to refer to cases in which there are inordinate delay and the aforesaid ground pleaded are not applicable to them. These petitions with inordinate delay relate to Noida. There are two writ petitions of Village Nithari namely; Writ Petition No.45933/2011, Ravindra Sharma & Anr Vs. State of U.P. & ors, 47545/2011, Babu Ram & Ors Vs. State of U.P. & Ors. These two writ petitions have been filed in the year 2011, where as the notification under Section 4 was issued on 01/6/1976 and declaration under Section 6 was issued on 16/9/1976. The possession was taken by the respondents on 28/10/1976 and the award was also declared on 15/7/1978. The writ petitions have been filed after more than 2 decades. There are no grounds in the writ petitions to entertain such highly barred writ petitions in exercise of writ jurisdiction. Both these writ petitions deserve to be dismissed on the ground of laches alone."

6. Thereafter, the Full Bench after analysing the individual cases, dismissed the petitions, which were filed with inordinate delay and laches. Thus, the Full Bench decision in the case of Gajraj (supra) does not lay down an absolute proposition that despite laches and delay, the petitions are to be entertained.

7. The same view has been taken by the Hon'ble Apex Court in catena of decisions. Reference may be made to the following pronouncements.

8. Om Prakash & Anr. Vs. State of U.P. & Ors. (1998) 6 SCC 1, wherein it has been observed in paragraph 30 as under.

"30. It is also to be kept in view that the impugned notification under Section 6 of the Act was issued for the purpose of planned development of District Ghaziabad through NOIDA and by the said notification, 496 acres of land spread over hundreds of plot numbers have ben acquired. Out of 494.26 acres of land under acquisition, only the present appellants owning about 50 acres, making a grievance about acquisition of their lands have gone to the court. Thus, almost 9/10th of the acquired lands have stood validly acquired under the land acquisition proceedings and only dispute centers round 1/10th of these acquired lands owned by the present appellants. It is a comprehensive project for the further planned development in the district. We are informed by learned senior counsel Shri Mohta for NOIDA, that a lot of construction work has ben done on the undisputed land under acquisition and pipelines and other infrastructure have been put up. That the disputed lands belonging to the appellants may have stray complex of lands sought to be acquired. That if notification under Section 4(1) read with Section 17 (4) is set aside qua these pockets of lands then the entire development activity in the complex will come to a grinding halt and that would not be in the interest of anyone.

.....

That we cannot permit upsetting the entire apple cart of acquisition of 500 acres only at the behest of 1/10th of land owners whose lands are sought to be acquired. We may also keep in view the further alien fact that all the appellants have filed reference for additional compensation under Section 18 of the Act. Shri Shanti Bhushan, learned senior counsel, was right when he contended that the appellants could not have taken the risk of getting their reference applications time barred during the pendency of these proceedings. Therefore, without prejudice to their contentions in the present proceedings they have filed such references. Be that as it may., that shows that an award is also made and reference are pending. Under these circumstances for enabling the appellants to have their say regarding release of their lands on the ground that they are having abadi and that the State Policy helps them in this connection the appellants can be permitted to have their grievances voiced before the State authorities under Section 48 rather than under Section 5-A of the Act at such a late stage. Consequently, despite our finding in favour of the appellants on Point No. 1, we do not think that this is a fit case to set aside the acquisition proceedings on the plea of the appellants about non-compliance with Section 5-A at this late stage. it is also obvious that if on this point the notifications are quashed for non-compliance of Section 5-A, that would open a pandora's box and those occupants who are uptill now sitting on the fence may also get a hint to file further proceedings on the ground of discriminatory treatment by the State authorities. All these complications are required to be avoided and hence while considering the question of exercise of our discretionary jurisdiction under Article 136 of the Constitution of India, we do not think that this is a fit case for interference in the present proceedings with the impugned notifications. Point No. 3, therefore, is answered in the affirmative against the appellants and in favour of the respondents."

9. In the case of Tika Ram & Ors. Vs. State of U.P. & Ors., (2009) 10 SCC 689, the Court was faced with a situation where invocation of Section 5A of the Act, 1894 was held not to be justified. The Court thereafter proceeded to consider as to whether the notification deserves to be quashed or not. Following was laid down in paragraph 116:-

"116. In a reported decision in Kishan Das & Ors. v. State of UP & Ors. this Court has taken a view that where the acquisition has been completed by taking the possession of the land under acquisition and the constructions have been made and completed, the question of urgency and the exercise of power under Section 17(4) would not arise. We must notice that acquisitions in this case are of 1984-1985 and two decades have passed thereafter. The whole township has come up, the houses and the lands have been allotted, sold and re-sold, awards have been passed and overwhelming majority of land owners have also accepted the compensation, this includes even some of the appellants. In such circumstances we do not think that the High Court was in any way wrong in not interfering with the exercise of power under Section 17 (4) of the Act. At any rate, after the considered findings on the factual questions recorded by the High Court, we would not go into that question."

10. In the case of Anand Singh & Anr. Vs. State of U.P. & Ors., (2010) 11 SCC 242, appeal was filed against the

judgment of the High Court dismissing the writ petitions filed by land holders. One of the submission made before the High Court and the Apex Court was that the State Government wrongly exercised its power under Section 17(4) in dispensing with the inquiry. The Apex Court after considering all relevant cases came to the conclusion that the dispensation of inquiry under Section 5A was unsustainable. The Apex Court after taking the view that notification in so far as the dispensation of inquiry under Section 5A, was unsustainable, proceeded to consider as to whether acquisition proceedings were liable to be declared invalid and illegal. The Apex Court noticing the submission of the Gorakhpur Development Authority, which had invested huge amount in the development, did not grant relief to the petitioners for quashing the acquisition/notification. Following was laid down in paragraphs 55 and 56 which are reproduced hereunder:-

"55.In the facts and circumstances of the present case, therefore, the Government has completely failed to justify the dispensation of an enquiry under Section 5A by invoking Section 17(4). For this reason, the impugned notifications to the extent they state that Section 5A shall not apply suffer from legal infirmity. The question, then, arises whether at this distance of time, the acquisition proceedings must be declared invalid and illegal.

56. In the written submissions of the GDA, it is stated that subsequent to the declaration made under Section 6 of the Act in the month of December, 2004, award has been made and out of the 400 land owners more than 370 have already received compensation. It is also stated that out of the total cost of Rs. 8,85,14,000/- for development of the acquired land, an amount of Rs. 5,28,00,000/- has already been spent by the GDA and more than 60% of work has been completed. It, thus, seems that barring the appellants and few others all other tenure holders/land owners have accepted the `takings' of their land. It is too late in the day to undo what has already been done. We are of the opinion, therefore, that in the peculiar facts and circumstances of the case, the appellants are not entitled to any relief although dispensation of enquiry under Section 5A was not justified."

11. Reference may also be made to the judgment of the Hon'ble Apex Court rendered in the case of Shankara Cooperative Housing Society Ltd. Vs. M. Prabhakar & Ors., (2011) 5 SCC 607 laying down principles for granting or refusing relief on the ground of delay and laches.

In paragraphs 54 and 68 of the reports, it was held as under.

"54. The relevant considerations, in determining whether delay or laches should be put against a person who approaches the writ court under Article 226 of the Constitution is now well settled. They are:

(1)There is no inviolable rule of law that whenever there is a delay, the court must necessarily refuse to entertain the petition; it is a rule of practice based on sound and proper exercise of discretion, and each case must be dealt with on its own facts.

(2)The principle on which the court refuses relief on the ground of laches or delay is that the rights accrued to others

by the delay in filing the petition should not be disturbed, unless there is a reasonable explanation for the delay, because court should not harm innocent parties if their rights had emerged by the delay on the part of the petitioners.

(3)The satisfactory way of explaining delay in making an application under Article 226 is for the petitioner to show that he had been seeking relief elsewhere in a manner provided by law. If he runs after a remedy not provided in the Statute or the statutory rules, it is not desirable for the High Court to condone the delay. It is immaterial what the petitioner chooses to believe in regard to the remedy.

(4)No hard and fast rule, can be laid down in this regard. Every case shall have to be decided on its own facts.

(5)That representations would not be adequate explanation to take care of the delay.

68. The other factor the High Court should have taken into consideration that during the period of delay, interest has accrued in favour of the third party and the condonatoin of unexplained delay would affect the rights of third parties. We are also of the view that reliance placed by Shri Ranjit Kumar on certain observations made by this Court would not assist him in the facts and circumstances of this case. While concluding on this issue, it would be useful to refer the observations made by the Court in the case of Municipal Council, Ahmednagar Vs. Shah Hyder Beig, wherein it is stated that:

delay defeats equity and that the discretionary relief of condonation can be had, provided one has not given by his conduct, given a go by to his rights'."

12. The Apex Court in Swaika Properties (P) Ltd. & Anr. Vs. State of Rajasthan & Ors. reported in (2008) 4 SCC 695, has held that writ petition challenging the land acquisition proceedings with delay and laches be not entertained. The Apex Court in Aflatoon & Ors. Vs. Lt. Governor of Delhi & Ors., (1975) 4 SCC 285, has laid down following in paragraph 11 of the reports:

"11. There was apparently no reason why the writ petitioners should have waited till 1972 to come to this Court for challenging the validity of the notification issued in 1959 on the ground that the particulars of the public purpose were not specified. A valid notification under Section 4 is a sine qua non for initiation of proceedings for acquisition of property. To have sat on the fence and allowed the Government to complete the acquisition proceedings on the basis that the notification under Section 4 and the declaration under Section 6 were valid and then to attack the notification on grounds which were available to them at the time when the notification was published would be putting a premium on dilatory tactics. The writ petitions are liable to be dismissed on the ground of laches and delay on the part of the petitioners (see Tilokchand Motichand v. H.B. Munshi and Rabindranath Bose v. Union of India)."

13. Coming to the facts of the case in hand, notification under Section 4 of the Act was published in official gazette on 05.05.1993 and declaration under Section 6 of the Act on 25.06.1993. Total area of land acquired was 136 bigha, 8 biswa, 19 biswansi. The purpose of

acquisition was planned industrial development in district Ghaziabad through Greater Noida Industrial Development Authority. Enquiry under Section 5-A was dispensed invoking provisions of Section 17 (4) of the Act. Award was made and published on 16.12.1996. Possession of the land acquired has admittedly been taken.

14. In identical circumstance, the Hon'ble Apex Court in the case of Municipal Corpn. Of Greater Bombay Vs. Industrial Development Investment Co. (P) Ltd., (1996) 11 SCC 501, upheld the judgment of the High Court dismissing the writ petition filed by land holders on the ground of delay and laches. Hon'ble Mr. Justice K. Ramaswamy speaking for the Bench, observed as under.

"29. It is thus well-settled law that when there is inordinate delay in filing the writ petition and when all steps taken in the acquisition proceedings have become final, the Court should be loath to quash the notifications. The High Court has, no doubt, discretionary powers under Article 226 of the Constitution to quash the notification under Section 4(1) and declaration under Section 6. But it should be exercised taking all relevant factors into pragmatic consideration. When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

15. In the concurring judgment, Hon'ble S.B. Majmudar, J. held as under :

"35 ..... Such a belated writ petition, therefore, was rightly rejected by the learned Single Judge on the ground of gross delay and laches. The respondent-writ petitioners can be said to have waived their objections to the acquisition on the ground of extinction of public purpose by their own inaction, lethargy and indolent conduct. The Division Bench of the High Court had taken the view that because of their inaction no vested rights of third parties are created. That finding is obviously incorrect for the simple reason that because of the indolent conduct of the writ petitioners land got acquired, award was passed, compensation was handed over to various claimants including the landlord. Reference applications came to be filed for larger compensation by claimants including writ petitioners themselves. The acquired land got vested in the State Government and the Municipal Corporation free from all encumbrances as enjoined by Section 16 of the Land Acquisition Act. Thus right to get more compensation got vested in diverse claimants by passing of the award, as well as vested right was created in favour of the Bombay Municipal Corporation by virtue of the vesting of the land in the State Government for being handed over to the Corporation. All these events could not be wished away by observing that no third party rights were created by them. The writ petition came to be filed after all these events had taken place. Such a writ petition was clearly stillborn due to gross delay and laches."

16. Similarly, in the case of State of Rajasthan & Ors. Vs. D.R. Laxmi & Ors.,(1996) 6 SCC 445, it was held :

"9. ... When the award was passed and possession was taken, the Court should not have exercised its power to quash the award which is a material factor to be taken into consideration before exercising the power under Article 226. The fact that no third party rights were created in the case, is hardly a ground for interference. The Division Bench of the High Court was not right in interfering with the discretion exercised by the learned Single Judge dismissing the writ petition on the ground of laches."

17. To the similar effect is the judgment of Hon'ble Apex Court in Municipal Council, Ahmednagar & Anr. Vs. Shah Hyder Beig & Ors., (2000) 2 SCC 48, it was held as under:

"In any event, after the award is passed no writ petition can be filed challenging the acquisition notice or against any proceeding thereunder. This has been the consistent view taken by Hon'ble Apex Court and in one of the recent cases (C. Padma Vs. Dy. Secy. to the Govt. of T.N., (1997) 2 SCC 627)".

18. In a more recent decision in the case of Swaika Properties (P) Ltd. & Anr. Vs. State of Rajasthan & Ors. reported in (2008) 4 SCC 695, while dismissing the challenge to land acquisition proceedings made after possession was taken and award was made in Hon'ble Apex Court held as under.

"In the present case also, the writ petition having been filed after taking over the possession and the award having become final, the same deserves to be dismissed on the ground of delay and laches. Accordingly, the order of the learned Single Judge and that of the Division Bench are affirmed to the extent of dismissal of the writ petition and the special appeal without going into the merits thereof. This appeal also deserves to be dismissed without going into the merits of the case and is dismissed as such. No costs."

19. Dispute in the present case is confined only to Plot Nos. 114, area 0-1-5, Plot No. 166, area 1-8-0, Plot No. 167, area 1-8-0, plot No. 168 area 1-1-0 and Plot No. 169 area 0-13-0 belonging to the petitioner. Thus, the dispute is confined only in respect of a very small fraction of total land under acquisition. It is not disputed or denied that after acquisition, land was transferred by the Greater NOIDA to certain private builders and a lot of development work has been undertaken bringing about a substantial change in the nature of the land.

20. The acquisition proceedings have been challenged by the petitioner after about two decades. The submissions as made and the aspects or suggested by learned counsel for the petitioner hardly gives any reasonable and satisfactory explanation for gross and inordinate delay in filing the petition.

21. In challenge to land acquisition proceedings, delay plays an important role. Petitioner cannot be allowed to sit on the fence and wait for completion of the land acquisition proceedings and thereafter approach the Court.

22. In view of the facts and discussions made above, the writ petition is liable to be

dismissed on the ground of delay and laches and the same, accordingly, stands dismissed.

23. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2015

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

Civil Misc. Writ Petition No. 7241 of 2011

Vaibhav Jain ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.N.Saxena, Sri Pramod Narayan Shahi, Sri Amit Saxena

Counsel for the Respondents:
C.S.C., Sri C.B. Yadav, Addl. Advocate General, Sri Shashank Shekhar Singh, Addl. Chief Standing Counsel.

Constitution of India, Art.-226-Election of Committee of Management-as per by laws-7 of the institution-3 years apart from one month-question the term of newly management when start ?-either from date of declaration of result or the date of taking actual charge-held-if any legal impediment or dispute-the relevant date would be the date on which taken charge-if newly elected person fails to take charge-the period shall start from the date of declaration of result of election.

Held: Para-13
Clause 7 of the amended scheme of administration provides for a term of three years for the committee of management. A further period of grace of one month is provided. If the new committee of management does not take over charge on the expiry of a period of three years and one month, the term of the earlier committee would ipso facto come to an end. Thereupon, the Joint Director of Education is authorised to appoint a Prabandh Sanchalak. The Prabandh Sanchalak, in turn, is duty bound to conduct elections as expeditiously as possible, so that the newly elected committee of management can be handed over charge. The actual handing over of charge is what merits emphasis. In the event of a dispute, a provision has been made for its resolution by the Deputy Director of Education. A newly elected committee of management may be unable to take charge in a given case despite the election which has been conducted by the Prabandh Sanchalak for a reason not bearing on its own default. In such a case, the term of office of the committee of management would commence with effect from the date on which it has taken over charge. However, where despite the absence of any hurdle, the newly elected committee of management fails to take over charge due to its own default, its term of office of three years would commence with effect from the date of declaration of the result of the election and would not be postponed to the date on which it takes over charge. The judgment of the Division Bench in Vaibhav Jain (supra) lays down a principle contrary to what has been explained above in the earlier judgments of the Division Benches in Jangali Baba and in Ratan Singh Solanki. The decision in Vaibhav Jain (supra) would not be construed as laying down the correct principle of law.

Case Law discussed:
Spl. Appeal No. 1283 of 2008; (1991) 2 UPLBEC 1183; 2010 (1) ADJ 262.

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

1. This reference to the Full Bench has been occasioned by a referring order dated 9 February 2011.

2. Jain Kanya Pathshala Inter College, Muzaffarnagar is a recognized and aided institution governed by the provisions of the U.P. Intermediate Education Act, 19211. Clause 7 of the scheme of administration as originally framed provided for the following term for members of the committee of management:

"7. Term of members:- The term of office bearers and members other than ex-officio members shall be three years form the date they are chosen provided that the term of every office bearer shall be deemed to have continued till his successor is chosen."

3. The scheme of administration was subsequently amended on 14 December 1983. As amended, the scheme of administration substituted original clause 7 for the following:

"7. प्रबन्ध समिति का कार्यकालः

वर्तमान प्राविधान निरस्त किया जाता है। पूर्व प्राविधान के स्थान पर निम्नांकित प्राविधान रहेगा।

पदाधिकारी एवं समिति के सदस्यों का कार्यकाल तीन वर्ष का होगा। कार्यअवधि समाप्त हो जाने पर अगले एक साल तक ही अपरिहार्य कारणों से पदाधिकारी बने रह सकेंगे। यदि तीन वर्ष पश्चात एक मास के अन्दर नवचयनित समिति कार्यभार ग्रहण नहीं करती है तो तीन वर्ष एक मास पश्चात कालातीत समिति कार्यकाल स्वतः समाप्त समझा जायेगा और मण्डलीय उप शिक्षा निदेशक द्वारा प्रबन्ध संचालक नियुक्त.....जिसे प्रबन्धाधिकरण के पूर्व अधिकार होगें। यह प्रबन्ध संचालक नवचयनित समिति को (चुनाव न होने की स्थिति में चुनाव कराकर) शीघ्रातीशीघ्र कार्यरत करायेगा। यदि एक से अधिक प्रबन्ध समिति अधिकार का दावा करे तो प्रकरण उप शिक्षा निदेशक को प्रस्तुत किया जायेगा जिसका निर्णय अन्तिम होगा।"

4. The Prabhandh Sanchalak, who was managing the institution, got the elections conducted, in the circumstances disclosed in the petition and the results were declared on 28 October 2007. Objections were raised and ultimately, the Regional Level Committee approved the election on 9 April 2008 after which, the committee of management represented by the fourth respondent started functioning. A writ petition was filed seeking a mandamus to the Joint Director of Education to appoint an authorized controller under the amended scheme of administration with a direction to hold the elections for a new committee of management. The case of the petitioner was that under amended clause-7 of the scheme of administration, the term of the committee of management is three years together with a grace period of one month after which, if no committee of management is elected, the Joint Director of Education is authorized to appoint an authorized controller to hold elections. Accordingly, it was urged that the period of three years would commence from 28 October 2007 when the results were declared and after the expiry of the term of the committee of management, an authorized controller ought to be appointed for conducting the elections.

5. Reliance was placed by the petitioner on a judgment of a Division Bench of this Court in Vaibhav Jain v. State of U.P.2 in which, the submission that the term of the committee of management would commence from the date of assumption of charge of office was negated. This Court in a judgment of a Division Bench in a special appeal held that the term of the committee of management would start from the date of its election even if the elected body has started functioning much after the declaration of the results of the elections. The judgment of the Division Bench dated 4 January 2011 is extracted hereinbelow:

"This appeal has been filed against the judgment and order dated 26th August, 2008 by which the writ petition has been dismissed. The dispute before the Hon'ble Single Judge was with respect to the validity of the election held on 28.10.2007 of which Sri Praveen Kumar Jain was elected as Manager. It is submitted that the term of Committee of Management is three years. Although it is contended by learned counsel for the appellant that the term shall start running from the date of assuming the charge of office of the Manager but the law is settled in this regard that the term of Committee will start from the date of its election even if the elected body has started its functioning much after the declaration of the result of election of Committee of Management.

In view of that, no useful purpose will be served in deciding the case on merit.

The special appeal is dismissed."

6. When reliance was placed on the aforesaid decision, the learned Single Judge was of the view that the Division Bench had failed to notice an earlier decision in Committee of Management, Jangali Baba Intermediate College Garwar District Ballia v. Deputy Director of Education, Vth Region, Varanasi3. Hence, the reference.

7. The issue which falls for determination before this Court is as follows:

Whether the judgment of the Division Bench in Vaibhav Jain v. State of U.P. (Special Appeal No.1283 of 2008, decided on 4 January 2011) lays down the correct position in law when it holds that the term of the Committee of Management will start from the date of its election even if the elected body has started functioning much after the declaration of the results of the election.

8. In the earlier decision of the Division Bench in Jangali Baba (supra), the Court noted that the period prescribed for the committee of management under the scheme of administration was three years. The term of a validly elected committee of management would automatically come to an end after one month thereafter. The Division Bench held as follows:

"However, we feel after perusing the Scheme of Administration, the various provisions of the Act and the Rules that its period would start running either from the date of election validly held where the period of earlier Committee of Management has already come to an end prior to this date and there being no dispute or from the date the elected Committee of Management takes over the charge of the Management."

9. The Division Bench was of the view that if, for some reason, after the election the newly elected committee of management is not permitted to take charge from the earlier committee or from the Prabandh Sanchalak, the period of three years of the newly elected committee of management would commence after it has taken over charge and commences functioning.

10. This decision of the Division Bench in Jangali Baba was followed by another Division Bench of this Court in Ratan Kumar Solanki v. State of U.P.4 After noting the law on the subject, the Division Bench held as follows:

"40. The above discussion makes it clear that the term of Committee of

Management would commence when the Committee of Management starts functioning as a result of the election. If a Committee of Management which is already existing and the same Officer Bearers have come to be elected in the new election, if the election has been held after expiry of the term of the earlier Committee of Management, the newly elected Committee of Management can start function from the date its result is declared but where Office Bearers are different, for newly elected Committee of Management the same can be said to have taken over charge after the term of the earlier Committee is over and newly elected Committee is allowed to function. However where the newly elected Committee of Management is not able to function not on account of any lapse on its part, but for the reasons beyond its control, namely, some order issued by the educational authorities restraining it from functioning or an order by the Court or similar other circumstances, the term of the Committee of Management would commence after it takes over charge and starts function. We make it clear that there may be a case where despite a new election having taken place, the term of the earlier Committee of Management is over, and, in the absence of any prohibitive order by any competent authority, Committee of Management newly elected does not take any step on its own to take over charge of the management of the College, in that case we are clearly of the view that the lapse on the part of the newly elected Committee of Management would not give it any advantage to defer or postpone the commencement of the period inasmuch it cannot be allowed to take advantage of its own wrong but where despite efforts etc., the rival Committee or the Authorised Controller, as the case may be, has not permitted the newly elected Committee of Management to function, in that case the dictum as laid down above that the term would commence from the date of taking over the charge would apply."

11. The judgment of the Division Bench in Vaibhav Jain (supra) has evidently not taken note of the earlier judgments of the Division Bench in Jangali Baba (supra) and in Ratan Kumr Solanki (supra).The judgment of the Division Bench in Vaibhav Jain proceeded on the assumption that it is a 'settled principle of law' that the term of the committee of management will commence from the date of election even if the elected body has started functioning much after the declaration of result. In fact the settled position in law was as reflected in the decisions in Jangali Baba and Ratan Singh Solanki. Hence a clear distinction exists between a case where the elected committee of management has been unable to take charge due to a circumstance outside its control like an order of restraint of a competent authority or court and a case where the elected committee has been in default in taking charge in spite of the absence of any legal hurdle. In the former case, the term would commence when the committee takes charge to start functioning. In the latter case the elected committee will not have that benefit since the failure to take charge has been due to its own default, without a restraint or legal prohibition.

12. The judgment of the Division Bench in Ratan Kumar Solanki (supra) has been followed by a judgment of a learned Single Judge comprised of one of us (Hon'ble Dilip Gupta, J) in Dr. Mahendra Pratap Singh v. State of U.P.5

13. Clause 7 of the amended scheme of administration provides for a term of three years for the committee of management. A further period of grace of one month is provided. If the new committee of management does not take over charge on the expiry of a period of three years and one month, the term of the earlier committee would ipso facto come to an end. Thereupon, the Joint Director of Education is authorised to appoint a Prabandh Sanchalak. The Prabandh Sanchalak, in turn, is duty bound to conduct elections as expeditiously as possible, so that the newly elected committee of management can be handed over charge. The actual handing over of charge is what merits emphasis. In the event of a dispute, a provision has been made for its resolution by the Deputy Director of Education. A newly elected committee of management may be unable to take charge in a given case despite the election which has been conducted by the Prabandh Sanchalak for a reason not bearing on its own default. In such a case, the term of office of the committee of management would commence with effect from the date on which it has taken over charge. However, where despite the absence of any hurdle, the newly elected committee of management fails to take over charge due to its own default, its term of office of three years would commence with effect from the date of declaration of the result of the election and would not be postponed to the date on which it takes over charge. The judgment of the Division Bench in Vaibhav Jain (supra) lays down a principle contrary to what has been explained above in the earlier judgments of the Division Benches in Jangali Baba and in Ratan Singh Solanki. The decision in Vaibhav Jain (supra) would not be construed as laying down the correct principle of law.

14. We, accordingly, answer the reference in the aforesaid terms. The writ petition shall now be placed before the regular court for disposal in the light of the reference, as answered.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2015

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Writ C No. 17647 of 1995

Chetan Das ...Petitioner
Versus
D.C .S.C., U.P., LKO & Ors. ...Respondents

Counsel for the Petitioner:
Sri S.N. Singh, Sri A.K. Rai, Sri C.K. Parikh, Sri R.N. Singh

Counsel for the Respondents:
C.S.C., Sri A.C. Tripathi, Sri Satish Mandhyan, Sri Tarun Tiwari

(A) Displaced Persons (Compensation & Rehabilitation) Act 1954-Section 24 read with Displaced persons claims & other Laws Repeal Act, 2005 and General Clauses Act 1897-Section 6(e)-Revision Proceedings-order validity challenged under writ petition-whether maintainable even on repeal of old Act 1954?-held-'Yes'-in view of Section 6 (e) of General Clauses Act-such proceeding shall continue.

Held: Para-17
The General Clauses Act is a part of every Central Act, and has to be read, as such, in the Act, unless, it is specifically excluded. In view of the authoritative pronouncement of law on the question by the Apex Court, as reiterated by Full Bench of this Court, I am of the considered opinion that the proceedings of the present writ petition would not abate on account of repeal of Act of 1954, and the writ petition would be

maintainable, and will have to be decided on merits.

(B)Displaced Persons (Compensation & Rehabilitation) Act 1954-Section 20 read with Rules-76-A, 76-B, 90(8)(12) and (15)-Rights in property-whether creates only after-declaration of highest ----and deposit of amount or issuance of sale certificate?-held-only after issuance of sale certificate-not earlier.

Held:Para-26
The revisional court, therefore, was not justified in holding the sale certificate dated 14.6.1968 to be illegal, and thus directing it to be cancelled for the sole reason that Tota Mal alone had participated in the bid, and three other persons were not participants to the bid. The reason assigned for cancellation of the sale certificate dated 14.6.1968, therefore, is not liable to be sustained. Question no.2, therefore, is answered by holding that right in the property was not created merely at the stage of making of bid by Tota Mal, and it was only after payment of the bid amount and issuance of sale certificate that right in the property got crystallized.

(C)Displaced Person Act 1954-Section 24-Revision-against sale certificate-whether maintainable?-held-'No'-reason disclosed.

Held:Para-29
In view of the discussions made above, this Court finds that the sale certificate dated 14.6.1968, did not qualify to be an order passed by the authorities, which could be subjected to challenge in a revision under Section 24 of the Act, and the question is answered accordingly.

(D)Limitation Act-Article 29(2)-Applicability in Revision-in view of Section 29 (2)-outer limit of 3 years-provided under Article 137-revision filed after 20 years-held-barred by time.

Held: Para-31
The term 'at any time' therefore cannot be given an unguided and arbitrary scope. Examining the issue from a different perspective also, this Court finds that as the provisions of the Indian Limitation Act have not been excluded, therefore, by virtue of Section 29(2) of the Limitation Act, the outer limit of three years stipulated in Article 137 of the Limitation Act will have to be read.

Case Law discussed:
[1968 (4) DLT 78]; [AIR 2000 SC 811]; [1955 AIR SC 84]; [(1969) 2 SCC 412)]; [(2002) 3 SCC 481]; [(2002) 7 SCC 1]; [2013 (10) ADJ 612]; [2006 SCC Online P&H 334]; [AIR 2000 SC 811]; [(2002) 7 SCC 1]; [2013 (10) ADJ 612]; [AIR 1958 SC 289]; [AIR 1965 SC 1994]; [(1986) 4 SCC 667]; [(1994) 5 SCC 471]; [AIR 1962 Raj 112]; [(1964) 7 SCR 103]; [(2011) 5 SCC 607]; [1968 (4) DLT 78]; [(1997) 6 SCC 71].

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

1. The present writ petition is directed against the order dated 10th January, 1995, passed by Deputy Chief Settlement Commissioner, U.P.-cum-Member, Board of Revenue, U.P. at Lucknow, as well as its subsequent order dated 6th April, 1995, rejecting the restoration application of the petitioner.

2. The order impugned dated 10.1.1995 has been passed, allowing revision filed under Section 24 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, whereby sale certificate dated 14.6.1968, issued in favour of four persons, including the petitioner, has been cancelled, and a direction has been issued to issue a fresh sale certificate in favour of deceased Tota Mal, for the reason that he alone was the auction purchaser. The order dated 10.1.1995 is reproduced:-

"Heard the learned counsel for both the parties and perused the record of the case.

The sale certificate dated 14.6.1968 incorporating the names of the alleged co-purchasers Sri Amrumal S/o Sri Manumal, Sri Khem Chand S/o Sri Amru Mal and Sri Kakkoo Mal S/o Sri Amru Mal is cancelled as the bidsheet shows that they were not the purchasers. Revision is allowed. The managing officer, Varanasi is directed to issue and the certificate of sale in favour of the revisionist, who are the heirs of the deceased Tota Mal, who was the auction-purchaser."

3. A restoration application was filed by the petitioner alleging that the order dated 10.1.1995 was passed upon a revision, which itself was highly belated, as it was filed after 23 years, and without there being any order for condonation of delay, the same was allowed ex-parte, by a cryptic order, without hearing the petitioner. Various other grounds were pressed for restoration of the proceedings.

4. While rejecting the restoration application, learned Member of the Board of Revenue took note of the fact that a previous restoration application was filed by one Kakoo Mal on 18.1.1995, which was rejected by the following orders on 18.1.1995:-

"Heard the learned counsel at length. The plea is that Kakoo Mal S/o Amru Mal defendant no.4 in the revision did not have notice of the hearing and the proceedings may be restored.

The revision had been decided on 10.1.95 setting aside the sale certificate issued by the managing officer, Varanasi on 14.6.1966 incorporating the names of the defendants as co-purchasers of the evacuee property. The ground for this decision is that the revisionist was the sole successful auction bidder.

Subsequently, it seems that the defendants, who were related to the revisionist had applied to the managing officer, Varanasi that they have no objection if their claim are adjusted against once purchase money to be paid by the revisionist. They also stated that they had no objection, if the sale certificate is issued in favour of the revisionist. It is also noticed that the wrong sale certificate was issued 1st years after the auction. Under the circumstances the defendants have no legal right of getting their names to be recorded in the sale certificate as co-purchasers. If there is any civil claim, they can enforce the same through the civil process. The revisionist the sale purchaser in the auction of the evacuee property and the Displaced Persons Act, 1954 cannot be invoked by quoting the facts unrelated to the auction.

I, therefore, do not consider that there is any sufficient ground to reopen the case which has already been decided on merits. The earlier sale certificate issued by the managing officer was a patent act a illegality and the defendants cannot be allowed to base their claim of the same."

5. Learned Member of the Board of Revenue took note of the fact that claims of 22 displaced persons had been adjusted towards payment of bid amount, but all such persons had agreed that sale certificate be issued in the name of Tota Mal. Learned Member also took note of the fact that Tota Mal himself had moved an application that three more persons be admitted as co-purchaser, with each one having 1/4th share, including 1/4th share for himself, which was allowed, resulting

in issuance of the sale certificate dated 14.6.1968, in favour of four persons. The revisional authority was of the view that inclusion of these additional three names was illegal, and consequently, it rejected the restoration application. Following paras of the subsequent order dated 6.4.1995, which is under challenge, are reproduced:-

"5. Subsequently, the situation got further compounded when Tota Mal move the managing officer requesting that the sale certificate may be issued incorporating the name of three more persons besides himself. There three persons Amru Mal, Khem Chand and Kakoo Mal are shown as holding 1/4th share each alongwith Tota Mal in the sale certificate. It is, therefore, clear that against the compensation claim of twenty two persons which was utilized in paying for the auction money, only three were admitted as co-purchasers. The share of these co-purchasers also does not tally with their compensation claims utilized in the purchase. It is obvious that some settlement of money was made behind the scene between the parties. The action of the auction-purchaser Totamal in requesting that these three persons may be admitted as co-purchasers with a share of 1/4th each in the property, is clearly unauthorized under rule 76(a) & (b) of the Displaced Persons (C&R) Act, 1954 and the rules.

5. The managing officer was, therefore, acting illegally in admitting these three persons as co-purchasers in the sale certificate.

6. Therefore, there is no ground or justification for altering the verdict of the orders dated 10.1.95 and 18.1.95. However, as the sale certificate was issued in the June, 1968, the amended sale certificate is to issue on the same date is the name of Tota Mal, who was alive on date and not in the name of revisionists, who are the heirs of the deceased Tota Mal. To that extent the earlier order dated 10.1.95 stands amended. The opposite parties are free to seek civil remedy of their interest and can hope to regularise, what appears to be a sale, through the assertion that they may be associated as co-purchasers in sale certificate."

It is these two orders, which are under challenge in the present writ petition.

6. Facts, in brief, giving rise to filing of the present writ petition are that the Central Government had built 05 residential flats and 25 shops, upon a parcel of land, bearing Municipal No. B-47/203, situate at Ramapura, Godaulia, Varanasi, for rehabilitation of displaced persons. It was decided to auction the property amongst the displaced persons, under the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as the 'Act'). An auction was conducted on 31.1.1961, in which the highest bid of Tota Mal amounting to Rs.94,000/- was accepted. An initial amount of 10% i.e. Rs. 9,400/- was deposited with a sum of Rs.392.49 paise, in cash, and adjustment of claim of Rs.9,007.51 paise of Tota Mal, as displaced person. It appears that the competent authority, thereafter, directed Tota Mal to deposit balance amount, so that the sale itself could be confirmed. It is alleged by the petitioner that Tota Mal was not having sufficient fund to deposit

the amount, and he associated Amru Mal, another displaced person, who was related to Tota Mal, and his two sons. A letter was thereafter sent by Tota Mal on 20.4.1962 to the Regional Settlement Commissioner stating that pursuant to bid, sale certificate be issued in favour of Tota Mal himself, alongwith three sons of Amru Mal namely Khem Chand, Kakoo Mal and Chetan Das, with each one of them having 1/4th share. Certain proceedings continued in respect of the auction, which appears to have been cancelled, but thereafter the auction stood restored in appeal, and ultimately, required sum of Rs. 94,000/- was deposited by adjusting claim of other displaced persons, under the Act. A sale certificate was issued for the entire property on 14.6.1968 in favour of aforesaid four persons. Though sale certificate was issued in 1968, but no objection was raised against it by Tota Mal, who remained alive till 1980. Upon his demise, an original suit was filed by Smt. Gyani Devi widow of Tota Mal, as an indigent person, before the Civil Court at Varanasi, which was initially registered as Case No.33 of 1983, and was subsequently renumbered as Original Suit No.386 of 1989. In the said suit, a declaration has been sought that the suit property, which consisted of building No. B-47/203, consisting of 05 flats and 25 shops, situated at Mohalla Ramapura, Godaulia, Varanasi, be declared to be exclusive property of Tota Mal, and the plaintiffs be held entitled to receive rent etc. from tenants. Relief of cancellation of will dated 12.10.1979, allegedly executed by Tota Mal in favour of petitioner Chetan Das was also sought, alongwith relief of possession and damages. This suit is pending before Civil Court, Varanasi.

7. An application by the plaintiffs to appoint a receiver in the suit was rejected by the trial court on 14.11.1985, which was affirmed by this Court on 20.12.1985, in FAFO No. 929 of 1985. An application for injunction in the suit was also filed, which was refused. The trial court took note of subsequent developments, including the orders in revision filed under the Act, and an order was passed restraining the plaintiffs and defendant IInd Set, from interfering with the rights of defendants Ist Set (petitioner and others in the present writ petition), and a direction to maintain status quo was issued. This order of trial court was challenged before this Court in FAFO No. 905 of 1995, which was summarily rejected, under Order 41 Rule 11 CPC, by observing that suit itself be decided within six months, on merits, without being influenced by any observations made by trial court regarding rights of the parties.

8. During pendency of the suit, a belated revision, under Section 24 of the Act, No. 09 of 1990-1991 was filed against the sale certificate dated 14.6.1968 by Smt. Gyani Devi W/o Late Tota Mal and his other heirs, without impleading the petitioner. This revision remained pending since April, 1991, and was ultimately allowed on 10th January, 1995. There are no orders available on record to demonstrate that any notices were issued to the petitioner, or any order was passed by the revisional authority condoning delay in filing of revision. The order itself, on face of the record, appears to have been passed without hearing and adjudicating version of its beneficiary, including the petitioner. It is in this context and background that challenge has been made to the orders impugned.

9. I have heard Sri C.K. Parikh, learned counsel appearing for the petitioner, Learned Standing Counsel appearing for the respondent nos.1 & 2, and Sri B.D. Mandhyan, Learned Senior Counsel, assisted by Sri Anuj Mandhyan, appearing for the respondent nos.3 to 14.

10. Sri C.K. Parikh, appearing for the petitioner, has challenged the orders impugned essentially on the ground that the same are without jurisdiction, inasmuch as no revision under Section 24 of the Act was maintainable against a sale certificate; that the revision itself was entertained after 23 years, without issuing notices on the delay condonation application, and without affording an opportunity of hearing in the matter to the petitioner, the restoration application of petitioner has also been erroneously rejected; that the revision itself could not have been instituted or entertained and allowed during pendency of suit for declaration that the property in question exclusively belong to Tota Mal, and his heirs alone were entitled to have right in respect of the suit property, rendering suit itself meaningless; that act of sale crystallizes at the stage of execution of sale certificate, and not at the stage of conduct of bid, and the mere fact that Tota Mal was the highest bidder does not lead to an inference that he becomes the owner, ignoring subsequent developments; and that the revision after 23 years could not be allowed in the manner, as has been done.

11. Sri B.D. Mandhyan, Learned Senior Counsel appearing for the respondents, on the other hand, submits that the writ petition itself is not maintainable, as the Act itself has been repealed by The Displaced Persons Claims and Other Laws Repeal Act, 2005, Sri Mandhyan submits that once the Act itself has been repealed, the proceedings of writ are liable to abate and all orders passed therein have become final, and the writ petition itself is liable to be dismissed. He further submits that it is undisputed that only Tota Mal had participated in the auction proceedings, and bidsheet etc. have also been highlighted to contend that Tota Mal had participated in the bid in his individual capacity, and thereafter, it was not open to associate anyone else in sale certificate. He further submits that Tota Mal was a simple person, who was ignorant of the local language, and since Amru Mal was his relative, as such, a power of attorney in his favour was executed, and taking advantage of the power of attorney, fraudulent manipulations were done, without his consent and knowledge, by Amru Mal, to include name of his sons. It is then submitted that highest bid of Tota Mal, which had been accepted, was since in his individual capacity, therefore, revisional authority has rightly passed orders, which requires no interference. Sri Mandhyan also submits that no limitation is prescribed in filing of a revision under Section 24 of the Act by virtue of law laid down by Delhi High Court in M.C. Rahbar Vs. Union of India [1968 (4) DLT 78], therefore, no question arose for delay condonation in revision. It is submitted that revision had remained pending for 05 years, and was duly contested by all concerned, who had knowledge of it. He further submits that the petitioner had not contributed even a single naya paisa for purchase of the property, and the sale certificate dated 14.6.1968 was manipulated. Sri Mandhyan also submits that order in revision was passed after hearing the parties, and the same,

therefore, requires no interference in the present writ petition.

12. On the basis of submissions advanced by learned counsel for the parties, following questions arise for consideration before this Court in the present writ petition:-

(i) Whether the writ petition survives after the repeal of the Act of 1954, by virtue of the Displaced Persons Claims and Other Laws Repeal Act, 2005 ?

(ii) Whether right in property gets crystallized with acceptance of bid or such a right comes into existence only with deposit of bid amount and issuance of sale certificate ?

(iii) Whether a revision under Section 24 of the Act of 1954 lies against a sale certificate ?

(iv) Whether any limitation is prescribed for filing of revision under Section 24 of the Act of 1954 ?

(v) Whether the order impugned has been passed in accordance with law ?

Question No.(i)-

13. Sri B.D. Mandhyan, at the very outset, has invited the attention of the Court to the Displaced Persons Claims and Other Laws Repeal Act, 2005, which has received the assent of the President on 5th September, 2005, and has been published in Gazette on 6th September, 2005, whereby The Displaced Persons (Compensation and Rehabilitation) Act 44 of 1954 has been repealed. According to Sri Mandhyan, once the Act itself has been repealed, the orders passed thereunder are no longer open to challenge in the present writ proceedings, which is liable to abate. For said purposes, Sri Mandhyan has relied upon a Constitution Bench Judgment in Kolhapur Canesugar Works Ltd. Vs. Union of India [AIR 2000 SC 811].

14. On the other hand, Sri Parikh has placed reliance upon the language of Sections 6 and 24 of The General Clauses Act, 1897 to contend that as the Central Act itself has been repealed, in the instant matter, therefore, by virtue of Section 6(e), the proceedings of the writ petition have been specifically saved. Reliance has been placed upon judgments in State of Punjab Vs. Mohar Singh Pratap Singh [1955 AIR SC 84], Rayala Corpn. (P) Ltd. Vs. Director of Enforcement [(1969) 2 SCC 412)], State of Punjab Vs. Harnek Singh [(2002) 3 SCC 481], General Finance Co. Vs. C.I.T. [(2002) 7 SCC 1], Full Bench Judgment of this Court in Indrapal Singh Vs. State of U.P. And 2 others [2013 (10) ADJ 612], and Doaba Nirmal Mandal (Regd.) Vs. Financial Commissioner Revenue [2006 SCC Online P&H 334].

15. Before proceeding to deal with the submissions advanced in this regard, it would be appropriate to notice the language of Section 6(e) of The General Clauses Act, 1897, which reads as under:-

"6(e). Where this Act, or any 1 [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture

or punishment may be imposed as if the repealing Act or Regulation had not been passed."

16. In the facts of the present case, by virtue of Repeal Act, 2005, the provisions of the Act of 1954 itself have been repealed. Since the Act of 1954 was a Central Act, which itself has been repealed, therefore, the provisions of Section 6(e) would come into play, and therefore, the present writ petition being a legal proceeding in respect of a right created under the repealed Act would be clearly saved from the affect of repeal. The Constitution Bench judgment relied upon by Sri Mandhyan does not help his cause, inasmuch as the said judgment of the Apex Court dealt with Section 6 of the General Clauses Act arising out of repeal of a Rule framed under a Central Act, which was not repealed. The aforesaid view has been reiterated by the Supreme Court in the Constitution Bench judgment in Kolhapur Canesugar Works Ltd. Vs. Union of India [AIR 2000 SC 811]. Relevant portion of paras 32 and 33 of the judgment are reproduced:-

"32. .....The decision of the Constitution Bench is directly on the question of applicability of Section 6 of the General Clauses Act in a case where a rule is deleted or omitted by a notification and the question was answered in the negative. The Constitution Bench said that "Section 6 only applies to repeals and not to omissions, and applies when the repeal is of a Central Act or Regulation and not of a Rule" (page 656 of the Supreme Court Report).

33. The Full Bench appears to have lost sight of the position that all the relevant terms i.e. 'Central Act', 'Enactment' 'Regulation', and 'Rule' are defined in Sub-section 3(7), 3(19), 3(5), 3(50) and 3(51) respectively of the General Clauses Act. When the term Central Act or Regulation or Rule is used in that Act reference has to be made to the definition of that term in the statute. It is not possible nor permissible to give a meaning to any of the terms different from the definition. It is manifest that each term has a distinct and separate, meaning attributed to it for the purpose of the Act. Therefore, when the question to be considered is whether a particular provision of the Act applies in a case then the clear and unambiguous language of that provision has to be given its true meaning and import. The Full Bench has equated a 'rule' with 'statute'. In our considered view this is impermissible in view of the specific provisions in the Act. When the legislature by clear and unambiguous language has extended the provision of section 6 to cases of repeal of a 'Central Act' or 'Regulation', it is not possible to apply the provision to a case of repeal of a 'Rule'. The position will not be different even if the rule has been framed by virtue of the power vested under an enactment; it remains a 'rule' and takes its colour from the definition of the term in the Act (General Clauses Act). At the cost of repetition we may say that the omissions in the judgment in M/s. Rayala Corporation (supra) pointed out in paragraph 17 of the judgment of the Full Bench have no substance as they are not relevant for determination of the question raised for the reasons stated herein."

17. The aforesaid proposition has been followed in State of Punjab Vs. Harnek Singh [(2002) 3 SCC 481], and General Finance Co. Vs. C.I.T. [(2002) 7 SCC 1]. The same view has been expressed by Full Bench of this Court in

Indrapal Singh Vs. State of U.P. And 2 others [2013 (10) ADJ 612], wherein after referring to the aforesaid decisions of the Apex Court, it has been observed that The General Clauses Act is a part of every Central Act, and has to be read, as such, in the Act, unless, it is specifically excluded. In view of the authoritative pronouncement of law on the question by the Apex Court, as reiterated by Full Bench of this Court, I am of the considered opinion that the proceedings of the present writ petition would not abate on account of repeal of Act of 1954, and the writ petition would be maintainable, and will have to be decided on merits. The objection raised by Sri Mandhyan, in this regard, consequently fails. The first question is decided, accordingly.

Question No.(ii)-

18. The revisional authority for the purposes of passing the order impugned has solely relied upon the fact that it was Tota Mal, who had individually participated in the auction bid, and it was his individual bid of Rs.94,000/-, which was accepted. The revisional authority took note of the fact that name of other three persons namely Amru Mal and his two sons Khem Chand and Kakoo Mal were not shown as purchasers in the auction proceedings. The revisional authority proceeded on the premise that Tota Mal was the bidder, whose name bid was accepted, who became owner, and a subsequent addition of name in the sale certificate was impermissible.

19. -Sri Parikh has invited the attention of the Court to the provisions of Section 20 of the Act read with Rules 76-A, 76-B, and 90 (8), (12), (15) of the Rules. The aforesaid provisions are reproduced:-

"S.20 Power to transfer property out of the compensation pool.-(1) Subject to any rules that may be made under this Act, the managing officer or managing corporation may transfer any property out of the compensation pool-

(a) by sale of such property to a displaced person or any association of displaced persons, whether incorporated or not, or to any other person, whether the property is sold by public auction or otherwise;

(b) by lease of any such property to a displaced person or an association of displaced persons, whether incorporated or not, or to any other person;

(c) by allotment of any such property to a displaced person or an association of displaced persons whether incorporated or not, or to any other person, on such valuation as the Settlement Commissioner may determine;

(d) in the case of a share of an evacuee in a company, by transfer of such share to a displaced person 1 or any association of displaced persons, whether incorporated or not, or to any other person], notwithstanding anything to the contrary contained in the Indian Companies Act, 19132 (7 of 1913 .) or in the memorandum or articles of association of such company;

(e) in such other manner as may be prescribed.

(2) Every managing officer or managing corporation selling any immovable property by public auction under sub- section (1) shall be deemed to be a Revenue Officer within the meaning of sub- section (4) of section 89 of the Indian Registration Act, 1908 (16 of 1908).

(3) Where the ownership of any property has passed to the buyer before the payment of the whole of the purchase money, the amount of the purchase money or any part thereof remaining unpaid and any interest on such amount or part shall, notwithstanding anything to the contrary contained in any other law, be a first charge upon the property in the hands of the buyer or any transferee from such buyer and may, on a certificate issued by the Chief Settlement Commissioner, be recovered in the same manner as an arrear of land revenue.

4. [(1A) 3 For the purpose of transferring any property out of the compensation pool under sub- section (1), it shall be lawful for the managing officer or the managing corporation to transfer the same to a displaced person jointly with any other person or an association of displaced persons or otherwise.]

76-A. Adjustment of payment of price of properties or of public dues by association of claims--Notwithstanding anything contained in these rules the Central Government may, by general or special order made in this behalf allow, subject to such terms and conditions as may be specified in such order.

(i) payment of price of properties forming part of the compensation pool or any part of such price; or

(ii) payment of any public dues, by adjustment against the net compensation payable in respect of the verified claim of any displaced person.

76-B. Deed of transfer to be made out--Where any person in occupation of a property forming part of the compensation pool has associated with himself any other displaced person having a verified claim whose net compensation is to be adjusted against the purchase price in pursuance of rule 76-A, the transfer shall be made out jointly in the name of all such persons specifying the extent of interest of each in the property:

Provided that where every such displaced person who has so associated himself sends an intimation in writing to the Settlement Commissioner that the deed of transfer may be made out in the name of person in occupation , or the deed of transfer may be made in the name of such persons.

90. Procedure for sale of property by public auction--

(8). The person declared to be the highest bidder for the property at the public auction shall pay in cash or by a cheque drawn on a scheduled bank and endorsed "good for payment upto six months" or in such other forms as may be required by the Settlement Commissioner, immediately on the fall of hammer a deposit not exceeding 20 per cent of the amount of his bid to the officer conducting the sale and in default of such deposit the property may be resold.

(12). The balance of the purchase money may, subject to the other provisions of these rules be adjusted against the compensation payable to the auction purchaser in respect of any verified claim held by him. In any such case the auction purchaser shall be required to furnish within seven days of the receipt of intimation about the approval of bid, particulars of the compensation filed by him:

Provided that the Settlement Commissioner or any officer appointed by him in this behalf may, for reasons to be recorded in writing, extend the aforesaid period of seven days by such further period not exceeding fifteen days as the Settlement Commissioner or such other officer may deem fit:

Provided further that the period extended under the preceding provisio may further be extended (without any limit of time) by the Chief Settlement Commissioner.

(15). When the purchase price has been realised in full from the auction purchaser, the Managing Officer shall issue to him a sale certificate in the form specified in Appendix XXXII or XXXIII, as the case may be. A certified copy of the sale certificate shall be sent by him to the Registering Officer within the local limits of whose jurisdiction the whole or any part of the property to which the certificate relates is situated. If the auction purchaser is a displaced person and has associated with himself any other displaced person having a verified claim whose net compensation is to be adjusted in whole or in part against the purchase price, the sale certificate shall be made out jointly in the name of all such persons and shall specify the extent of interest of each in the property."

20. Relying upon the aforesaid provisions, Sri Parikh submits that the Act as well as the Rules clearly admit inclusion of other displaced persons for securing purchase of the property by the bidder, and such persons are entitled to be joined as purchasers. Sri Parikh, therefore, submits that mere fact that Tota Mal had individually taken part in the bid would not lead to an inference that he alone became the owner of the property pursuant to the bid and that inclusion of other names was unauthorized. It is submitted that right in the property is created only when the entire bid money is paid and a sale certificate is issued. The submission is that mere making of highest bid does not entitled the bidder to secure a sale certificate, and it is only pursuant to payment of its price, in cash or by adjustment of claim, that such right in the property is created with issuance of sale certificate.

21. Act of 1954 was a special Act enacted to secure payment of compensation and rehabilitation grant to displaced persons. The term displaced person was defined in Section 2(b) of the Act. Considering the adversities, which were being faced by these displaced persons, the legislature treated such displaced persons as a separate class in themselves, and provisions for allotment and sale of properties to them was separately provided. Section 20 clearly made reference to sale of property to a displaced person or any association of displaced persons. Sub-section 4 of Section 20 clearly made it lawful for managing officer to transfer the property to a displaced person, or to a set of displaced persons jointly, with any other person or an association of displaced persons or otherwise. Provision in Rules were also introduced, accordingly. Transfer of property, therefore, was made legal to an individual displaced person or jointly to a group of displaced persons of the same genus.

22. Hon'ble Supreme Court in Bombay Salt & Chemical Industries Vs. L.J. Johnson [AIR 1958 SC 289], while dealing with the provisions of the Act of 1954 observed as under in Para 10:-

"10. It is clear from the rules and the conditions of sale set out above that the declaration that a person was the highest bidder at the auction does not amount to a complete sale and transfer of the property to him. The fact that the bid has to be approved by the Settlement Commissioner shows that till such approval which the

Commissioner is not bound to give, the auction-purchaser has no. right at all. It would further appear that even the approval of the bid by the Settlement Commissioner does not amount to a transfer of property for the purchaser has yet to pay the balance of the purchase money and the rules provide that if he fails to do that he shall not have any claim to the property. The correct position is that on the approval of the bid by the Settlement Commissioner, a binding contract for the sale of the property to the auction-purchaser comes into existence. Then the provision as to the sale certificate would indicate that only upon the issue of it a transfer of the property takes place. Condition of sale No. 7 in this case, furthermore, expressly stipulated that upon the payment of the purchase price in full the ownership would be transferred and a sale certificate issued. It is for the appellants to show that the property had been transferred. They have not stated that the sale certificate was issued, nor that the balance of the purchase money had been paid. In those circumstances, it must be held that there has as yet been no. transfer of the salt pans to respondents Nos. 4 and 5. The appellants cannot therefore claim the benefit of S. 29 and ask that they should not be evicted. Mr. Purshottam Trikamdas contended that the sale certificate will in any event be granted and that once it is granted, as the form of this certificate shows, the transfer will relate back to the date of the auction. It is enough to say in answer to this contention that assuming it to be right, a point which is by no. means obvious and which we do not decide, till it is granted no. transfer with effect from any date whatsoever takes place and none has yet been granted."

23. Again in Bishan Paul Vs. Mothu Ram [AIR 1965 SC 1994], following observations were made in paras 9 to 11, which are reproduced:-

"9. The passing of title thus presupposes the payment of price in full and the question is at what stage this takes place. Obviously, there are several distinct stages in the sale of property. These are: (a) the fall of the hammer and the declaration of the highest bid; (b) the approval of the highest bid by the Settlement Commissioner or officer appointed by him; (c) payment of the full price after approval of the highest bid; (d) grant of certificate; and (e) registration of the certificate.

10. The first and last in this series, namely, the fall of the hammer and the registration of the certificate are not critical dates for this purpose and they have not been suggested as the starting point of title. It is also clear that till payment of full price title is in abeyance for the rules themselves say that if the price is not paid the auction purchaser has no claim to the property. Under Section 65 of the Code of Civil Procedure, title is deemed to commence from the date of auction and not when the sale becomes absolute. Sale becomes absolute under the Code after the period of thirty days, during which sale may be asked to be set aside, has passed. When that time has passed and no application to set aside the sale has been made the sale becomes absolute (Order 21, R. 92) and a certificate then issues (Order 21, R. 94). Under the corresponding section of the Code of 1882 (Section 316) the certificate was required to bear the date of the confirmation of sale and title vested from the date. The amendment of the Code in

1908 now antedates title, by a fiction, to the date of the auction.

11. This fiction cannot apply here for the simple reason that no such provision is made in the rules. It is, therefore, contended for the appellant that the approval of the bid does not confer title because the balance of the price has still to be paid and the property must continue to be evacuee property till the certificate issues. This line of reasoning was accepted in Manoharlal v. Rent Control and Eviction Officer, Bareilly, , Motandas v. Gopaldas, , Pamandas v. Mst. Lachhmi Bai, , Deptylal v. Collector of Nilgiris, , and in two un-reported cases of Punjab High Court--Ranjit Singh v. Anup Singh, (C. R. No. 524 of 1959 (Punj)), and Hiralal Khanna v. Gurcharan (C. R. No. 461 of 1960 (Punj.)) referred to in Jaimal Singh v. Smt. Gini Devi, 66 Pun LR 99: (AIR 1964 Punj 99). The last mentioned case has dissented from, the earlier view of that Court and has approved of Harkishan Lal v. Bansilal, 64 Pun LR 55, Harbans Singh v. Sohan Singh, 64 Pun LR 834, and Mohar Singh v. Moolchand, 65 Pun LR 253. In the former group of rulings support is derived from a decision of this Court in, whereas the latter group distinguishes that case holding that no such point was decided in it."

24. In Surinder Singh Vs. Central Government [(1986) 4 SCC 667], after considering the judgment in Bombay Salt & Chemical Industries (supra), the Apex Court held as under in Para 14:-

"14. Learned counsel for the appellant urged that the respondents being the highest bidders at the subsequent auction sale had no right in the property and as such they were not entitled to any opportunity of hearing before the Central Govt. He placed reliance on a decision of this Court in Bombay Salt and Chemical v. Johnson & Ors. MANU/SC/0140/1957: AIR 1958 SC 289. We have considered the said decision, where in this Court has 960 taken the view that the highest bidder at an auction sale does not get any right or interest in the property till the auction sale is approved, confirmed and the sale deed is executed in his favour. The respondents even though they were the highest bidders at the subsequent auction sale do not have any right or interest in the 'property' in dispute. The question is however not whether they have any 'right or interest' in the property but whether they would be prejudicially affected. They would certainly be affected, adversely if the appellant get relief in proceedings under sec. 33 of the Act in respect of the said property. Respondents have been in possession of the property since long and further more on the basis of their highest bid made at the subsequent sale they have sufficient interest in the matter to contest the appellant's petition made under sec. 33 of the Act. We are therefore in agreement with the High Court that respondents should have been afforded opportunity of hearing before any order on the appellant's petition was passed. Since no such opportunity was afforded, the High Court was justified in quashing the orders of Sri Rajni Kant. We accordingly uphold the High Court's order to that extent."

25. Again in Dr. Bhargava & Co. Vs. Shyam Sunder Seth [(1994) 5 SCC 471], the provisions of Sub-rule (15) of Rule 90 of the Displaced Persons (Compensation and Rehabilitation), Rules, 1955 was considered by the Apex

Court. Para 6 of the said judgment is reproduced:-

"6. It is obvious from the rule reproduced above that the title in the property cannot pass to the auction-purchaser unless the purchase price has been realised in full. Till the time the full price of the evacuee property sold at auction is realised from the highest bidder, the question of transferring the property to him or his perfecting the title in the said property does not arise..."

26. From the aforesaid propositions, it is clear that the mere fact that Tota Mal had participated in the bid individually would not lead to the conclusion that the property in question, which was purchased after accepting contributions from other displaced persons, could only be in the name of Tota Mal. Factors such as association of other persons in paying the amount of Rs.94,000/-, by adjusting their claims under the Act, as well as letter of Tota Mal dated 20.4.1962 etc. could not be ignored. Since a suit for declaration is already pending before the civil court, wherein all such issues are required to be examined, therefore, this Court would refrain from making any further observations on the claim of the parties, on merits, as this might adversely effect the determination of cause by the civil court, at the first instance. However, the order passed by the revisional authority directing the cancellation of sale certificate dated 14.6.1968, merely for the reason that Tota Mal alone had participated in the bid and the other three persons were not parties to the bid, cannot be sustained. The revisional court, therefore, was not justified in holding the sale certificate dated 14.6.1968 to be illegal, and thus directing it to be cancelled for the sole reason that Tota Mal alone had participated in the bid, and three other persons were not participants to the bid. The reason assigned for cancellation of the sale certificate dated 14.6.1968, therefore, is not liable to be sustained. Question no.2, therefore, is answered by holding that right in the property was not created merely at the stage of making of bid by Tota Mal, and it was only after payment of the bid amount and issuance of sale certificate that right in the property got crystallized.

Question No.(iii)-

27. Sri Parikh has contended that what was challenged before the revisional court under Section 24 was a sale certificate and not an order, and therefore, the revision itself was not maintainable. Section 24 of The Displaced Persons (Compensation and Rehabilitation) Act, 1954 reads as under:-

"S.24. Power of revision of the Chief Settlement Commissioner.-

(1) The Chief Settlement Commissioner may at any time call for the record of any proceeding under this Act in which a Settlement Officer, an Assistant Settlement Officer an Assistant Settlement Commissioner, a managing officer or a managing corporation has passed an order for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit.

(2) Without prejudice to the generality of the foregoing power under sub- section (1), if the Chief Settlement Commissioner is satisfied that any order for payment of compensation to a displaced person or any lease or

allotment granted to such a person has been obtained by him by means of fraud, false representation or concealment of any material fact, then notwithstanding anything contained in this Act, the Chief Settlement Commissioner may pass an order directing that no compensation shall be paid to such a person or reducing the amount of compensation to be paid to him, or as the case may be, cancelling the lease or allotment granted to him; and if it is found that a displaced person has been paid compensation which is not payable to him, or which is in excess of the amount payable to him, such amount or excess, as the case may be, may, on a certificate issued by the Chief Settlement Commissioner, be recovered in the same manner as an arrear of land revenue.

(3) No order which prejudicially affects any person shall be passed under this section without giving him a reasonable opportunity of being heard.

(4) Any person aggrieved by any order made under sub- section (2), may, within thirty days of the date of the order, make an application for the revision of the order in such form and manner as may be prescribed to the Central Government and the Central Government may pass such order thereon as it thinks fit."

28. The issue framed is no longer res integra, inasmuch as a Full Bench of Rajasthan High Court in Partumal Vs. Managing Officer [AIR 1962 Raj 112] had occasion to deal with the scope of revision contemplated under Section 24 of the Act. Paras 23, 24, 25 and 27 of the said judgment are reproduced:-

"23. Section 24(1) no doubt confers very wide powers of revision on the Chief Settlement Commissioner. However, Clause 2 of the said section affords some indication on the point. By clause 2, the Chief Settlement Commissioner ts authorised to cancel leases of immovable property and the order of cancellation of leases is subject to revision by the Central Government on an application filed in that behalf within 30 days by an aggrieved party. It stands to reason that if the Chief Settlement Commissioner had been given powers of cancellation of sales under Sub-clause (i) of Section 24, the law would have provided at least similar machinery for revision of such orders. Sale of immovable property stands much higher than a lease among the modes of transfer of immovable property and it cannot be conceived that when a safeguard of revision by the Central Government was provided against cancellation of a lease under an order of the Chief Settlement Commissioner, no such safeguard would have been considered necessary in the matter of cancellation of sales by him.

24. We can thus safely infer that Section 24(1) did not authorise cancellation of sales after they are completed. No doubt, allotments can be set aside under Section 24 of the Act, but after such allotments ripen into sales, they cannot be cancelled. We, therefore, hold that the Chief Settlement Commissioner or the Settlement Commissioner exercising his power had no authority to cancel sale of property and the order dated 10th January 1961, passed by him was without jurisdiction and invalid. Mr. Raj Narayan for the State has cited the decisions in AIR 1959 Punj 370 and AIR 1961 Punj 387. Ram Rattan Kapur's case, AIR 1961 Punj 387 was decided on the authority of Bara Singh's decision, AIR 1959 Punj 370. In Bara Singh's case, AIR 1959 Punj 370 it has been held that an

execution of a deed of conveyance amounts to drawing up of a formal document only and the same would become invalid no sooner the order of allotment is set aside by the appellate or revisional authority. The observations of the learned Judges are as follows:

"In any case where a managing officer wrongly omits to cancel an allotment in circumstances where he should have cancelled it, the Chief Settlement Commissioner can, in exercise of his power of revision, correct the error, and, similarly, where a managing officer wrongly transfers proprietary rights to a claimant in respect of any property, the Chief Settlement Commissioner can reverse the order and annul the transfer..... the sanad or its grant being founded solely on the decision to transfer permanent ownership that sanad must necessarily fall with the reversal of the decision on which it is based".

25. With due respects to the learned Judges, we think the proposition of law as laid down by them cannot be accepted. The allotment of property, no doubt can be cancelled in revision under Section 24 of the Act; but after a sale takes place, it cannot be disturbed by setting aside the order of allotment The sale cannot be held to be only a formal expression of the order of allotment. Title to property is created by the sale and the vendee thereby acquires interest in the property. It would be too much to read in Section 24 of the Act to hold that it extends to cancellation of sales by expressly providing for cancellation of allotments. We are unable to regard execution of a sale deed as only a formal expression of an order of allotment dependent on its subsistence. This Court had occasion to consider this aspect of the question in Govind Ram's case, ILR (1960) 10 Raj 594: (AIR 1960 Raj 177). After referring to the various provisions of the Act and the rules under which evacuee property may be allotted, leased and sold, it was observed as follows:

"In our opinion, it is inconceivable on the very face of it that a transfer of property by the Central Government under Section 10 read with Rule 33, should be challenged in an appeal to the Chief Settlement Commissioner. We may also in this connection refer to Section 20 which empowers the Managing Officer or Corporation to transfer the property. These powers are distinct from the powers of the Central Government under Section 10 of the Act. Even, these powers are to be exercised subject to rules. Rule 33 will operate in such cases also and, therefore, the transfer in such cases will also be on behalf of the President. Further, Rule 34 inter alia provides that when a property is transferred to any person under Chapter 3 of the Rules, the property shall be deemed to have been transferred to him where such person had made an application for payment of compensation before 31st October, 1953, from the first day of November, 1953. Section 20 read in the light of these rules, contemplates an act of sale and not an order liable to be challenged in appeal or revision. In these circumstances, the respondent's contention that the actual transfer should pre-suppose an order of transfer and that order of transfer could be challenged by means of appeal or revision under Sections 23 and 24 of the Act. .....

27. We are definitely of the opinion that under Section 24 of the Act, the Settlement Commissioner, New Delhi had no authority of cancelling the sale executed in favour of petitioner No. 2 and his order in this behalf

is wholly without jurisdiction and cannot be regarded as valid, and the Managing Officer cannot be allowed to take shelter under an invalid order of the Settlement Commissioner, for resuming the property of the petitioners and in auctioning the same. The action of the Managing Officer in doing so is not warranted by law and as it interferes with the fundamental rights of the petitioner, he is entitled to protection under Article 226 of the Constitution. The petition is allowed and a direction in the nature of a writ of prohibition is issued against the Managing Officer, and the Regional Settlement Commissioner restraining them from interfering with the property of the petitioners as described in the petition and auctioning the same. The petitioners shall get costs of this petition from the opposite parties Nos. 1 and 2."

29. The Full Bench judgment of the Rajasthan High Court in Partumal (supra) was also quoted with approval by the Apex Court in the Constitution Bench judgment in Smt. Mithoo Shahani Vs. Union of India [(1964) 7 SCR 103]. Again in Shankara Cooperative Housing Society Ltd. Vs. M. Prabhakar and others [(2011) 5 SCC 607], the provisions of Section 24 was considered by the Apex Court in Paras 134 and 135 of the said judgment, which are reproduced:-

"134. Section 24 of the Act gives power of revision to Chief Settlement Commissioner either on his motion or an application made to him to call for the record of any proceeding under the Act in order to satisfy himself as to legality or propriety of any order passed therein and to pass such order in relation thereto as he thinks fit. The Section also provides that the said powers can be used in relation to the orders passed by Settlement Commissioner, an Assistant Settlement Commissioner, an Additional Settlement Commissioner, a Settlement Commissioner, a Managing officer or a managing corporation. A bare reading of the Section shows that the Chief Settlement Commissioner can revise the order if in his opinion that the orders passed by the officers named in the Section are either illegal or improper.

135. In the instant case, the Chief Settlement Commissioner has invoked his revisional powers at the request of the allottees/displaced persons to revise the proceedings and the order passed by the Collector-cum-Deputy Custodian under the provisions of the Evacuee Property Act dated 28.05.1979. In view of the plain language of the Section, there cannot be two views. In our view, what the Chief Settlement Commissioner can do is only to revise the orders passed by those officers who are notified in the Section itself and not of the officers under the provisions of the Evacuee Property Act, if the orders passed by the named officers in this Section is either illegal or improper. To this extent, we are in agreement with the submission made by the learned senior counsel Shri Ranjit Kumar. Therefore, the orders passed by the Chief Settlement Commissioner in exercise of his revisional powers under the Displaced Persons Act is without jurisdiction and non-est in law."

In view of the discussions made above, this Court finds that the sale certificate dated 14.6.1968, did not qualify to be an order passed by the authorities, which could be subjected to challenge in a revision under Section 24 of the Act, and the question is answered accordingly.

Question No.(iv)-

30. Sri Mandhyan referring to the judgment of the Delhi High Court in M.C. Rahbar Vs. Union of India [1968 (4) DLT 78] has submitted that the power of Chief Settlement Commissioner to proceed even suo moto, does not admit of a limitation period, as stated in Rule 104 of the Rules of 1955, providing for revision to be presented within the same period, as an appeal. The Delhi High Court after taking note of the provisions of Section 24(1) was pleased to hold that once no limitation had been prescribed in the section itself, and the expression used are 'at any time', such right of the revisional authority could not be limited under the Rules, which provided a period of 30 days for filing of the appeal/revision.

31. The argument advanced by Sri Mandhyan in so far as it refers to the period of 30 days provided under Rule 104 is concerned, is liable to be accepted. The period of revision cannot be held to subsist only for a period of 30 days. However, the question will have to be examined from a different perspective. Even if, no limitation is prescribed under the Act, yet the exercise of power has to be within a reasonable time, depending upon the facts and circumstances of each case. While dealing with the provisions of The Bombay Land Revenue Code 1879, Hon'ble Supreme Court in State of Gujarat Vs. Patil Raghav Natha [AIR 1969 SC 1297] was pleased to observe in Para 13 that expression 'at any time', even without a period of limitation prescribed in the section, has to be exercised within a reasonable time, depending upon the facts and circumstances of each case. Similar view was reiterated by the Apex Court in Mohd. Kavi Mohamad Amin Vs. Fatmabai Ibrahim [(1997) 6 SCC 71]. The term 'at any time' therefore cannot be given an unguided and arbitrary scope. Examining the issue from a different perspective also, this Court finds that as the provisions of the Indian Limitation Act have not been excluded, therefore, by virtue of Section 29(2) of the Limitation Act, the outer limit of three years stipulated in Article 137 of the Limitation Act will have to be read.

32. Coming to the facts of the present case, this Court finds that the sale certificate was issued in the year 1968. Tota Mal remained alive for a period of 12 years, but no challenge to the sale certificate was made by him. Upon his death, his widow Smt. Gyani Devi has instituted suit, which is pending since 1983. Even if complete knowledge of the facts are to be taken from 1983, the filing of the revision in 1990 was clearly beyond the period of three years. The revision, therefore, was clearly barred by time. The issue is answered accordingly.

Question No.(v)-

33. In view of the discussions and findings aforesaid, I am of the considered opinion that exercise of power by the revisional court, in passing the order impugned, without the petitioner having been impleaded and heard, was wholly arbitrary and illegal. In view of the findings already returned, this Court has no hesitation in holding that neither the revision was maintainable against the sale certificate, nor such a revision could be entertained after 23 years, as has been done. Even the reasoning assigned for passing the order on merits is not liable to be sustained. Accordingly, the orders dated 10.1.1995 and 6.4.1995 have not been passed in accordance with law, and are unsustainable.

34. In view of the discussions aforesaid, the writ petition succeeds and is allowed, and the order impugned dated 10th January, 1995, and subsequent order dated 6th April, 1995, as well as all consequential action pursuant to it, are set aside.

35. Before parting, however, this Court would like to clarify that this judgment has been delivered only in the context of the orders passed by the revisional court, and the claim of the parties has not been adjudicated on merits. Any observation made in this judgment shall not prejudice the rights and contentions of the parties in the pending Suit No. 386 of 1989, which would be determined by the competent civil court, in accordance with law. It is unfortunate that despite a direction issued by the Division Bench of this Court in FAFO No. 905 of 1995, the proceedings of the suit have not been concluded so far. The interim arrangement, so far as the property is concerned, shall continue to be governed by the order dated 15.5.1995 passed in Original Suit No. 386 of 1989, as affirmed by the Division Bench of this Court in FAFO No. 905 of 1995, on 27.9.1995. The proceedings of the suit would be concluded forthwith by the civil court on merits, by fixing short dates, without granting any adjournment to either of the parties, except by imposing cost, which would not less than Rs.1,000/- for a day.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Civil Misc. Writ Petition No. 20632 of 2009

Gajendra Prasad Saxena ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Anil Bhushan

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Doctrine of 'Partial quashing'-explained-where invalidity can be emarked and separated from valid part of order-while imposing minor penalty-if major penalty inflicted contrary to rules-it can be interfered by Writ Court-without touching the minor penalty-petition partly allowed.

Held: Para-25
In a position of this nature, this Court exercising powers under Article 226 of the Constitution of India can very well proceed to partially quash an order if it finds that the invalidity can be earmarked and separated/excised from the otherwise valid part of the order assailed before it. In the facts of the present case, this Court finds that the invalidity by which the impugned order suffers pertains only to the imposition of major penalties. The said part of the order is severable and it is to that extent alone that this Court feels compelled to interfere.

Case Law discussed:
W.P. No. 10637 of 2007; 1997 (1) LLJ 831; AIR 1960 SC 321; AIR 1966 SC 951; (2014) 12 SCC 106; (1976) 2 SCC 495; AIR 1963 SC 779.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The petitioner, a Senior Assistant in the Department of Food and Civil Supplies has sought to assail the validity of the order dated 22/5/2007 passed by the respondent no.3 as affirmed in appeal by the respondent no.2 vide is order dated 25/2/2009. In terms of the impugned order and consequent to culmination of

the disciplinary proceedings taken against him he has been inflicted the following punishments:

(a) A recovery of Rs.59927/- on account of excess withdrawal from the G.P.F. Account.

(b) Recovery of a sum of Rs.412789.68/- from him;

(c) the stoppage of one increment with cumulative effect.

(d) the recordal of an adverse entry in the character roll of the petitioner.

2. This order passed by the respondent no.3 has been affirmed by the respondent no.2 acting as the Appellate Authority under the relevant rules.

3. This Court has heard Shri Adarsh Bhushan in support of the writ petition and Shri Ravi Shankar Prasad, learned Additional Chief Standing Counsel appearing on behalf of the State respondents.

4. The salient facts which may be noticed and as would be relevant for disposal of the instant writ petition are as follows. The petitioner was initially appointed as a Class-III employee in the respondent Department in 1975. He was promoted to the post of Senior Assistant in 1978 and upon attaining the age of superannuation retired on 29/2/2008.

5. It appears that on 18/7/2005, a charge-sheet was issued against him alleging therein that because of his negligence and misconduct the Government had suffered huge losses consequent to his failure to rectify supplies and accordingly disciplinary proceedings were instituted against him. Upon receipt of the said charge-sheet, the petitioner appears to have elicited further information from the Department vide his letter dated 16/8/2005 and ultimately submitted a reply on 26/9/2005 denying the charges levelled against him. The Inquiry Officer upon receipt of the reply of the petitioner appears to have proceeded in the matter and ultimately submitted a report dated 21/1/2006. The objections of the petitioner were invited upon the findings recorded in the said inquiry report and after receipt of the same and upon a consideration of the reply submitted by the petitioner, the impugned order dated 22/5/2007 came to be passed.

6. Aggrieved by the aforesaid, the petitioner preferred a Departmental appeal which also came to be dismissed by the order dated 25/2/2009.

7. Shri Adarsh Bhushan, learned counsel for the petitioner has submitted that the impugned order is clearly arbitrary and illegal inasmuch as in the course of the inquiry proceedings the petitioner was neither called before the Inquiry Officer to submit his case, no witnesses were examined in his presence, he was afforded no opportunity of cross-examination nor was the petitioner provided any of the documentary evidence relied upon and referred to in the inquiry report. He has submitted that the provisions of the U.P. Government Servant (Discipline and Appeal) Rules, 1999 apply in the facts of the present case and that since a major penalty of stoppage of one increment with cumulative effect had been imposed upon him, the same could not have been inflicted without following the procedure prescribed under the Rules aforementioned and holding of a detailed oral inquiry.

8. Learned counsel for the petitioner has submitted with reference to the pleadings taken in the writ petition and the inquiry report submitted in this regard to contend that the inquiry proceedings were taken ex-parte and that the impugned order is liable to be quashed consequently.

9. Learned Standing Counsel has on the other hand submitted that grave and serious charges had been levelled against the petitioner including those of having caused loss to the Department. He has submitted that the Inquiry Officer has recorded cogent grounds and has taken into consideration evidence existing on record while recording his conclusion that Charge Nos.1, 2, 3, 7 and 8 stood proved against him. He has further drawn the attention of the Court to the fact that insofar as Charge Nos. 4 and 9 are concerned, the same were found to have been partly proved and Charge Nos.5 and 6 were not found proved against the petitioner.

10. It is the admitted case of parties that the provisions of Rules, 1999 referred to hereinabove govern the proceedings taken against the petitioner. In order to appreciate the rival contentions canvassed before this Court, it would be apposite to refer to the following relevant provisions of the aforesaid rules.

"3. Penalties.-The following penalties may, for good and sufficient reason and as hereinafter provided, be imposed upon the Government Servants:-

Minor Penalties:-

(i) Censure;

(ii) Withholding of increments for a specified period;

(iii) Stoppage at an efficiency bar;

(iv) Recovery from pay of the whole or part of any pecuniary loss caused to Government by negligence or breach of orders.

(v) Fine in case of persons holding Group 'D' posts:

Provided that the amount of such fine shall in no case exceed twenty-five per cent of the months pay in which the fine is imposed.

Major Penalties:-

(i) Withholding of increments with cumulative effect;

(ii) Reduction to a lower post or grade or time-scale or to a lower stage in a time scale;

(iii) Removal from the service which does not disqualify from future employment;

(iv) Dismissal from service which disqualifies from future employment.

Explanation.- The following shall not amount to penalty within the meaning of this rule, namely:-

(i) Withholding of increment of a Government Servant for failure to pass a Departmental examination or for failure to fulfil any other condition in accordance with the rules or orders governing the service;

(ii) Stoppage at the efficiency bar in the time scale of pay on account of ones not being found fit to cross the efficiency bar;

(iii) Reversion of a person appointed on probation to the service during or at the end of the perioid of probation in accordance with the terms of appointment or the rules and orders governing such probation;

(iv) Termination of the service of a person appointed on probation during or at the end of the period of probation in accordance with the terms of the service

or the rules and orders governing such probation.

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 actioin 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 evidences and the name of witnesses proposed to prove the same along with oral evidences, 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, along with the copy of documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government servant personally or by registered post at the address mentioned in the offical 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 calculation:

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 evidences, the Inquiry Officer shall call and record the oral evidence which the charged Government servant record 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 stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the Inquiry Officer 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 pactitioner, to be known as "Presenting Officer" to present on its behalf the case in suppot 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 pactitioiner 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 held an inquiry in the manner provided in these rules; or

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

10. Procedure for imposing minor penalties.-(1) Where the Disciplinary Authority is satisfied that good and sufficient reasons exist for adopting such a course, it may, subject to the provisions of sub-rule (2) impose one or more of the minor penalties mentioned in Rule 3.

(2) The Government servant shall be informed of the substance of the imputations againt him and called upon to submit his explanation within a reasonable time. The Disciplinary Authority shall, after considering the said explanation, if any, and the relevant records, pass such orders as he considers proper and where a penalty is imposed, reasons thereof shall be given. The order shall be communicated to the concerned Government servant."

11. The Inquiry Officer in terms of his report and as noticed above found that Charge Nos.1, 2, 3, 7, and 8 stood fully proved, Charge Nos. 4 and 9 were found partly proved and Charge Nos. 5 and 6 were found to be not proved against the petitioner. This report was accepted by the Disciplinary Authority and the petitioner was also provided an opportunity to submit his representation against the same. The order of the Disciplinary Authority records that despite the said opportunity being afforded to the petitioner he submitted no reply. It was in the above background that the Disciplinary Authority proceeded to inflict upon the petitioner the four punishments enumerated hereinabove. It

becomes relevant to note here that the charge on the petitioner having caused loss to the extent of Rs.4,12,789.68/-stood comprised in Charge No.1. Similarly, the charge of withdrawal of Rs. 59927/- from the G.P.F. was also found proved against the petitioner.

12. This Court finds that the punishment (a), (b) and (d) are liable to be classified as minor penalties. The recovery of loss caused to the Government by negligence or breach of orders from the pay and other dues of the employee is clearly classified as a minor penalty. Insofar the imposition of minor penalties are concerned they are governed by the provisions of Rule 10. This Rule does not envisage the appointment of any Inquiry Officer or the Department instituting regular disciplinary proceedings as envisaged and provided for in Rule 7. The only requirement that Rule 10 places upon the Disciplinary Authority is that he would inform the Government servant of the substance of the charges against him and call for his explanation. The Disciplinary Authority thereafter considering the said explanation and the relevant records may proceed to impose the penalties described as minor penalties under Rule 3.

13. The only major penalty which has been inflicted upon the petitioner is that of withholding of one increment with cumulative effect. The provisions and procedures laid down in Rule 7 were liable to be followed in respect of the imposition of this penalty alone.

14. There is no dispute with the basic proposition advanced by Shri Adarsh Bhushan, learned counsel for the petitioner that before imposition of a major punishment an oral inquiry must necessarily be held. Shri Adarsh Bhushan has in this connection relied upon a judgment rendered by a learned Single Judge of this Court in Writ Petition No. 10637 of 2007, Shiv Prasad Ram Vs. State of U.P. & Ors, decided on 25/11/2010. For our purposes, it would be relvant to notice what the learned Single Judge held in the above matter. The relevant extracts whereof read as under:

"4. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subhash Chandra Sharma Vs. U.P. Cooperative Spinning Mills & others, 2001 (2) UPLBEC 1475 and Laturi Singh Vs. U.P. Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005.

5.An oral inquiry would be necessary even if the delinquent employee has failed to submit reply to the charge sheet. In State of U.P. & another Vs. T.P. Lal Srivastava, 1997 (1) LLJ 831, the Hon'ble Apex Court held that even if the employee has failed to submit reply to the charge sheet, it would not absolve the Inquiry Officer from proceeding with the oral inquiry and submit report as to whether charge is proved or not. After recording of evidence, he will find out whether the charge is proved or not and submit report to the disciplinary authority. The aforesaid exposition of law makes it clear that the delinquent employee has a right to defend himself at different stages. When the charge sheet is served upon

him, he has a right to submit his reply and in case he does not submit reply, that itself would not amount to admission of guilt or that the charge stand proved. If the allegations are serious and may result in major penalty, the disciplinary authority may appoint Inquiry Officer. Such Inquiry Officer, thereafter would have to fix a date for oral evidence. At this stage the delinquent employee has a right to participate in the oral inquiry, examine witnesses, if produced by the Department, and after the evidence of the Department is completed, the delinquent employee may produce evidence in his defence. During the course of oral inquiry, the delinquent employee has right to participate at every stage and date and if there is any failure in participation on one or more occasions, the Inquiry Officer cannot deny him participation from the subsequent stage. The delinquent employee can participate at subsequent other stage also. The Inquiry Officer, after completion of oral inquiry, will submit its report after discussing the entire material and if any charge is proved, the disciplinary authority shall supply a copy of the inquiry report to the delinquent employee and he would again have a right to submit reply to the inquiry report.

6.Non holding of oral inquiry, therefore, is a serious flaw which vitiates the entire disciplinary proceeding, including the order of punishment."

15. This Court does not dispute the proposition advanced by Shri Adarsh Bhushan, nor does it disagree with what was recorded by the learned Single Judge in the judgment aforementioned. If the Department felt that a major punishment was liable to be imposed upon the petitioner it was obliged and mandated to follow the procedure prescribed in Rule 7. This ordinarily would have set the controvery to rest. The Court, however, is further obliged to consider the question as to whether the non-following of the procedure prescribed under Rule 7 would also invalidate the imposition of minor penalties. Or to put it differently, will the impugned order fall in entirety on account of this flaw in the procedure adopted by the Respondents?

16. In the opinion of this Court, minor penalties were not liable to be inflicted after following the procedure prescribed under Rule 7. The procedure of a detailed oral inquiry was liable to be followed only in respect of the imposition of the punishment of stoppage of one increment with cumulative effect. The learned counsel for the petitioner has not advanced any submissions touching upon the merits of the charges levelled against him nor has it been contended before this Court that the findings returned by the Inquiry Officer in respect of the charges found proved against him were arbitrary and unsustainable. In fact as noticed above, the sole submission canvassed by Sri Bhushan was the failure of the Respondents to hold an oral enquiry which was mandated for imposition of a major penalty.

17. This Court has gone through the inquiry report and finds that the Inquiry Officer has duly applied his mind to the charges levelled and on the basis of the evidence before him recorded his conclusions with respect to Charge Nos.1, 2, 3, 7 and 8.

18. The question therefore is whether the order impugned is to be quashed in entirety or whether the doctrine of "partial quashing" is to be

applied in the facts and circumstances of the case. In other words this Court would have to consider whether the objectionable part of the order is severable from the valid.

19. The principle of an unconstitutional provision of a statute being severed and struck down leaving other parts untouched is well known. The said principle of severability has been extended to orders also. This is how the above position was explained by the Constitution Bench of the Apex Court in Y. Mahboob Sheriff and Sons Vs. Mysore State Transport Authority AIR 1960 SC 321.

"(10a) This brings us to the question of relief to be granted to the petitioners. It is contended on behalf of the Department that all that this Court can do is to quash the order of December 15, 1958, and send the case back to the Authority for consideration of the question of renewal afresh. On the other hand, the petitioners contend that this Court should quash the illegal condition limiting the duration of the renewal to one year and direct the Authority to specify a period of not less than three years and not more than five years in conformity with Section 58(1)(a) in the order of renewal. This raises the question of severability of a part of the order passed by the Authority. The principles on which any unconstitutional provision can be severed and struck down leaving other parts of a statute untouched were laid down by this Court in R.M.D.. Chamarbaugwalla v. The Union of India, 1957, S.C.R. 930:((S) AIR 1957 SC 628) and the first principle is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid. This principle relating to statutes was extended by this Court to orders in Shewpujanrai Indrasanrai Ltd. v. The Collector of Customs, 1959 SCR 821; (AIR 1958 SC 845), where a part of the order of the Collector of Customs was quashed. The question therefore resolves into this: would the Authority have ordered renewal if it knew that it could not reduce the period of a permit to below three years ? Looking at the facts of these cases which we have set out earlier, it is to our mind obvious that the Authority would have granted renewal in the circumstances of these cases when it did so in December 1958. The previous permits in these cases had expired on March 31, 1958, and the petitioners had been plying their stage carriages right up to the time when the order was passed on December 15, 1958; they could not do so without a permit in view of S. 42 of the Act. Therefore, renewal in these cases was certain when the order was passed on December 15, 1958. In the circumstances it is open to us to sever the illegal part of the order from the part which is legal, namely, the grant of the renewal."

20. Following the principle laid down above, the doctrine of severability was applied to an order of dismissal with retrospective effect by the Apex Court in R. Jeevaratnam Vs. State of Madras AIR 1966 SC 951 in the following manner:-

"4. The order dated October 17, 1950 directed that the appellant be dismissedfrom service with effect from the date of his suspension, that is to say, from May 20, 1949. In substance, this order directed that (1) the appellant be dismissed, and (2) the dismissal do operate retrospectively as from May 20, 1949. The two parts of this composite order are separable. The first part of the order operates as a dismissal of the

appellant as from October 17, 1950. The invalidity of the second part of the order, assuming this part to be invalid, does not affect the first part of the order. The order of dismissal as from October 17, 1950 is valid and effective. The appellant has been lawfully dismissed, and he is not entitled to claim that he is still in service".

21. The above position in law as struck by the Hon'ble Supreme Court was reiterated again in State Bank of Patiala Vs. Ram Niwas Bansal (2014) 12 SCC 106 in the following words:-

"15. Regard being had to the nature of controversy, we shall proceed to deal with the first point first, that is, whether the order of removal could have been made with retrospective effect. Mr Patwalia, learned Senior Counsel appearing for the employee, has submitted that the disciplinary authority could not have passed an order of removal by making it operational from a retrospective date. He has commended us to a three-Judge Bench decision in R. Jeevaratnam v. State of Madras [R. Jeevaratnam v. State of Madras, AIR 1966 SC 951] . In the said case, the appellant therein instituted a suit for a declaration that the order of dismissal from service was illegal and void. The trial court dismissed the suit and the said decree was affirmed in appeal by the High Court. One of the contentions raised before this Court was that the order of dismissal dated 17-10-1950 having been passed with retrospective effect i.e. 29-5-1949, was illegal and inoperative. This Court opined that an order of dismissal with retrospective effect is, in substance, an order of dismissal as from the date of the order with the superadded direction that the order should operate retrospectively as from an anterior date. The two parts of the order are clearly severable. Assuming that the second part of the order is invalid, there is no reason why the first part of the order should not be given the fullest effect. The said principle has been followed in Gujarat Mineral Development Corpn. v. P.H. Brahmbhatt [(1974) 3 SCC 601 : 1974 SCC (L&S) 102]."

22. One may in this connection also usefully refer to the enunciation of the principle of severability as laid down by the Apex Court in State of Mysore Vs. K. Chandrasekhara Adiga (1976) 2 SCC 495.

"27. The only question that remains to be considered is, whether the High Court should have quashed the order of assignment in toto or only the illegal part of it. This question depends on the exigencies of each case because this Court is not fettered in the exercise of its discretion by the technical rules relating to the issue of writs by the English courts. The first point to be considered in the context of making an appropriate order or direction in such cases is whether the valid and the invalid portions of the order are severable, and if so, whether after excision of the invalid part, the rest remains viable and self-contained. In the instant case the illegal condition in the order of assignment is not an integral part of the assignment, in the sense, that its deletion cannot render the rest which has been found to be valid, truncated and ineffective."

23. This Court is of the opinion that in light of what was found by the Enquiry Officer on the evidence and material before it, the Disciplinary Authority would have been fully justified in

imposing the minor penalties finding mention in the impugned order. In situations like these the Court is also mindfull of what the Apex Court held in State of Orissa Vs. Bidyabhushan Mohapatra AIR 1963 SC 779-

"9. .....The recommendation of the Tribunal was undoubtedly founded on its findings on Charges 1(a), 1(c), 1(d) and Charge (2). The High Court was of the opinion that the findings on two of the heads under Charge (1) could not be sustained because in arriving at the findings the Tribunal had violated rules of natural justice.....Therefore if the order may be supported on any finding as to substantial misdemeanour for which the punishment can lawfully be imposed, it is not for the Court to consider whether that ground alone would have weighed with the authority in dismissing the public servant....."

24. In the opinion of the Court, therefore, the imugned order of punishment is clearly severable. The part of the impugned order insofar as it imposes minor penalties upon the petitioner cannot be upset or set-aside by this Court either in exercise of its powers of judicial review or on the basis of the submissions advanced by the learned counsel for the petitioner.

25. In a position of this nature, this Court exercising powers under Article 226 of the Constitution of India can very well proceed to partially quash an order if it finds that the invalidity can be earmarked and separated/excised from the otherwise valid part of the order assailed before it. In the facts of the present case, this Court finds that the invalidity by which the impugned order suffers pertains only to the imposition of major penalties. The said part of the order is severable and it is to that extent alone that this Court feels compelled to interfere. It is the undisputed position that under the Rules, 1999 insofar as the power of imposition of minor penalties is concerned, the same was not liable to be preceded by an oral enquiry. The Rules, 1999 only mandated that the authority would elicit an explanation from the concerned employee and proceed to pass orders after taking the same into consideration. The authority, therefore, would have been fully justified in making the order impugned on the basis of the response submitted by the Petitioner and the material before him. This Court is further convinced in arriving at the above conclusion in light of the fact that the findings recorded by the Enquiry Officer and the Disciplinary Authority have not been assailed on merits before this Court and the submissions have been confined to the infraction of Rule 7 of the Rules, 1999 and the principles of natural justice.

26. Accordingly, and in view of the above, this writ petition is partly allowed. The impugned order insofar as it imposes punishment of stoppage of one increment with cumulative effect is hereby quashed. Consequential reliefs, if any, which are liable to flow to the petitioner shall be considered by the respondents in light of what is recorded by this Court hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 22901 of 2011

Kashi Nath Upadhyay ...Petitioner

Versus

Commissioner Varanasi Division Varanasi & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.N. Singh, Sri Vineet Kumar Singh

Counsel for the Respondents:
C.S.C.

U.P. Stamp Rules 1997-Rule 2(d)-read with Stamp Act 1899, Section 47-A-stamp duty-deficiency reported on basis of report of Tehsildar-Land recorded-agricultural one since 1988, 89 used as show room for selling tractor absence of any economic activity-plot in question can not be treated commercial building having potential value-held-mere report not sufficient to discharge burden-in absence of similar exemplar that property in vicinity being sold or purchased at commercial rate-order impugned unsustainable-quashed.

Held: Para-52 & 53

52. Having due regard to the material available on record i.e the undisputed spot inspection report, coupled by the spot inspection of the Collector (undertaken in 2013), the property in question was not being used commercially on the date of execution of the deed, the property is located in a urban area (municipal area), the predominant land use appears to be residential as the property is surrounded by residential buildings, and there being no reference of any economic activity in the vicinity of the property, therefore the property in this background cannot be said to be having commercial potential on the date of the execution of the sale deed.

53. Therefore, the determination by the Collector that the property in question would have to be valued commercially, merely because the property, in the past, was being used for non agricultural purposes, would not bring the property within the expression of commercial building/shop.

Case Law discussed:

AIR 2012 All 100; 2008 (3) AWC 299 All; AIR 1996 SC 1170; AIR 2010 SC 1779; (2010) 4 SCC 350; AIR 2008 SC 166; AIR 2008 SC 590; 2008 (3) AWC 299 All; AIR 2008 All 176; AIR 1985 SC 989; AIR 1996 1 SCC 609; AIR 1976 SC 1753; AIR 1998 All 72 (75); AIR 2000 SC 355; (2009) 14 SCC 716; AIR 1985 SC 989; 2000 (91) RD 566 (HC); 2008 (104) RD 235; 1996 (87) RD 419 (SC); 2010(4) All LJ 96(All); JT 1994 (2) SC 605; Civil Appeal No. 8286 of 2014; 1990 (9) RD 57; AIR (2008) ALJ 363.

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

1. Petitioner purchased plot no.764/1M, 764/2M and 764/2 M and 764 M admeasuring 0.135 hectares vide instrument no.697/04 dated 6.2.2004.

2. The Sub Registrar, Jaunpur on 24.2.2004, reported that the property in question is surrounded by a boundary wall and approximately 2000 square ft. tin shed was standing on pillars, earlier the property was used by Mahendra Tractors for service station, the property is surrounded by residential houses, hence, the property having commercial potential, had to be valued as a commercial property, accordingly deficient stamp duty of Rs.5,74,000/- have to be recovered.

3. On reference, proceedings was instituted under the Indian Stamp Act 1899,1 being case no.1652 of 2004, the petitioner in objection to the notice urged that the sale deed was executed for Rs.11,00,000/- lacs, the property in question being recorded as an agricultural land in the revenue records, accordingly, stamp duty @ Rs.50,000/- per decimal on agricultural land, as fixed by the Collector under the 1997 Rules was paid. The Collector called for a report from the Tahsildar, who vide report dated

11.12.2008 noted that the property in question is situated within Nagar Palika Parishad, Jaunpur, was earlier used as a godown by a tractor agency, is adjacent to the Abadi, 3 k.m from the Railway Station and presently the property has a two storey building and is being used for a Eye Clinic and residential purposes.

4. The Collector vide order dated 27.3.2010 held that since the property in question was earlier used for commercial purposes, by a tractor company, and merely because the company had shut down the agency, way back in 1998-1999, would have no bearing regarding the potentiality of the property, accordingly, the property was valued at commercial rate. The area of the property being 9169.46 square metre, of which 185.87 square metre being covered by tinshed, accordingly the land was valued at Rs.35,28,486.59 @ Rs.3850/- square metre, the covered area was valued at Rs.33,45,660/- @ Rs.60/- per square metre per month being the prescribed rent, accordingly, deficiency of stamp duty of Rs.5,61,449/- was determined, penalty of Rs.1000/- and interest @ of Rs.1.5% per month from the due date was imposed.

5. Aggrieved, petitioner preferred an appeal before the Chief Controlling Revenue Authority/Additional Commissioner(Judicial) Varanasi Division, Varanasi being Stamp Appeal No.43 of 2010. The appellate authority vide order dated 31.3.2011 affirmed the order of the Collector.

6. The orders passed by the appellate authority and the Collector is being assailed by the petitioner under Article 226 of the Constitution of India.

7. This Court vide order dated 29.1.2013 remanded the matter to the Collector to examine whether or not commercial building was existing on the site in question on the relevant date and whether it could be called commercial activity at all or not.

8. The order is extracted:

This writ petition has been filed by the petitioner being aggrieved by an order passed by the Collector regarding an instrument executed on 6.2.04. The Collector has come to the conclusion that 185.87 square meters of plot was having a building of commercial nature and this fact has not been disclosed in the sale deed at all by the petitioner.

Learned Standing Counsel states that the tin shed, which has been found in the premises, clearly indicates that commercial building was standing there. Learned counsel for the petitioner strongly refused this factum and states that business of the tractor show room had come to an end in the year 1998-99 and on the date of the execution of the instrument, no commercial activity was carried on, so as to attract provisions of Rule 2(d) of the U.P. Stamp Rules, 1997, which defines commercial building.

Learned counsel for the petitioner has argued that the commercial rate, which has been settled by the Collector is arbitrary and excessive, especially in view of the fact that no commercial activity is being carried on.

Learned counsel for the petitioner has argued that even though he has raised this objection before the Collector, his objection has not been considered by the Collector.

The matter is, therefore, remanded to the Collector for consideration on this point, to examine whether or not commercial building was existing on the

plot in question on the relevant date and whether it could be called a commercial activity at all or not.

The Collector may fix a date in the matter with due notice to the petitioner and hear him on this point and, thereafter, pass fresh orders on merits and in accordance with law.

9. Pursuant thereof, the Collector Jaunpur vide order dated 26.4.2013 reiterated and re-affirmed his earlier order, but enhanced the penalty from Rs.1000/- to half of the deficient stamp duty at Rs. 2,80,724/- along with interest @ Rs.1.5% from the due date. The order of the Collector is under challenge by amending the writ petition.

10. The learned standing counsel has raised a preliminary objection that the order is appellable/revisable under section 56 of the Act, the petitioner should first approach the forum prescribed under the Act.

11. Per contra, it is submitted on behalf of the petitioner that facts are not in dispute, the order of the Collector was passed on the direction of the Court, the Collector has merely reaffirmed his earlier order without answering the query of the Court, the only difference being that penalty has been enhanced, hence, the matter be heard by the Court.

12. The facts are not in dispute, the question for determination is as to whether the property in question could be valued as a commercial property merely because the property was earlier put to commercial use.

13. I have heard Shri H.N.Singh, learned senior advocate assisted by Shri Vineet Kumar Singh for the petitioner and learned standing counsel for the State respondent.

14. It would be apposite to examine the provisions of the Uttar Pradesh Stamp (Valuation of Property) Rules, 19972, framed under the Act. 1997 Rules defines commercial building by adopting the definition of commercial establishment and shop contained in Uttar Pradesh Dookan Aur Vanijya Adhishthan Adhiniyam, 19623, the definition reads as follows:

2(d) 'Commercial building' means commercial establishment or shop as defined respectively in clause (4) and clause (16) of Section 2 Uttar Pradesh Dookan Aur Vanijya Adhishthan Adhiniyam, 1962.

15. Adhiniyam defines commercial establishment and shop as follows:

(1) 'Commercial establishment' means any premises, not being the premises of a factory, or a shop, wherein any trade, business, manufacture, or any work in connection with, or incidental or ancillary thereto, is carried on for profit and includes a premises wherein, journalistic or printing work, or business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, or which is used as theatre, cinema, or for any other public amusement or entertainment or where the clerical and other establishment of a factory, to whom the provisions of the Factories Act, 1948, do not apply, work:

(2)'Shop' means any premises where any wholesale or retail trade or business is carried on, or where services are rendered to customers, and includes, all offices, godowns or warehouses, whether in the

same premises or not, which are used in connection with such trade or business;

16. Section 2(h) & 2(k) of the 1997 Rules defines semi-urban area and urban area as follows:

2(h) 'Semi-urban area' means an area -

(i)other than the urban area declared as development area under Section 3 of the Uttar Pradesh Urban Planning and Development Act, 1973;

(ii)other than the urban area to which Avas Evam Vikas Parishad Adhiniyam, 1965 is applicable:

(iii)of two kilometres width of revenue villages peripheral to an urban area not covered by clause (i) or clause (ii);

2 (k) 'Urban area' means an area-

(i)comprised in metropolitan area or a municipal area as defined in the Uttrar Pradesh Municipal Corporation Act, 1959; or

(ii)comprised in a smaller urban area as defined in the United Provinces Municipalities Act, 1916, or

(iii)comprised in a cantonment as defined under Section 3 of the Cantonments Act, 1924; or

(iv)demarcated for industrial, commercial and residential purposes by the concerned Industrial Development Authority under clause (c) of sub-section (2) of Section 6 of the Uttar Pradesh Industrial Area Development Act, 1976.

17. Rule 3 of 1997 Rules, mandates the particulars of the immovable property that should be truly stated in the instrument regarding land and building, in addition to market value. Rule 3 read as follows:

Rule 3. Facts to be set forth in an instrument- In case of an instrument relating to immovable property chargeable with an ad volorem duty, the following particulars shall also be fully and truly stated in the instrument in addition to the market value of the property:-

(I) In case of land-

(a) included in the holding of a tenure holder, as defined in the law relating to land tenures-

(i) the Khasra number and area of each plot forming part of the subject-matter of the instrument;

(ii) whether irrigated or unirrigated and if irrigated, the source of irrigation;

(iii)if under cultivation whether do-fasali or otherwise;

(iv)land revenue or rent whether exempted or nor and payable by such tenure-holder;

(v)classification of soil, supported in case of instruments exceeding twenty thousand rupees in value, by the certified copies, or extracts from the relevant revenue records issued in accordance with law;

(vi)location (whether lies in an urban area, semi-urban area, or countryside); and

(vii)minimum value fixed by the Collector of the district;

(b) being non-agricultural land-

(i)area of land in square metres;

(ii)minimum value fixed by the Collector of district;

(iii)location (whether lies in urban area, semi-urban area, or country -side).

(3)In case of buildings-

(a) total covered area and open land, if any, in square metres;

(b) number of storeys, area and covered area of each storey in square metres;

(c) whether pucca or katchha construction;

(d) year of construction;

(e) actual annual rent;

(f) annual value assessed by any local body and the amount of house tax payable thereon, if any;

18. Rule 6 of Rule 1997 requires furnishing of statement of market value of the immovable property in the prescribed Form.

Rule 6. Statement of market value to be furnished to the Registering Officer: (1) The party presenting an instrument relating to immovable property chargeable with an ad valorem duty, shall submit along with the instrument a statement in duplicate in the Form appended to these rules.

(2) .....

(3) .....

19. The Form referred to under Rule 6 requires the transferor to furnish, interalia, the following information in respect of the immovable property.

Form

2. .....

3. .....

4.Location of property (whether located in Urban/Semi-Urban area/Country side.....

5.Approximate distance (in kilometres or metres) of property from nearest road with the name of road and its approximate width.....

6.Approximate distance (in kilometres or metres) of property from railway station, bus-station, public offices, hospitals, factories and educational institution, etc. Mention any one which is nearest to the property under transfer.....

7.Nature of Economic, Industrial, Developmental activity, if any, prevailing in the locality in which property is situate.....

8.Any other special feature affecting the value of the property.....

9.....

10.....

11.Fair market value of the property:

12.Other information:-

In case of Agricultural land:

(i) The Khasra number;

(ii)Area in hectare;

(iii)If Cultivable, whether do-fasali or otherwise;

(iv) Land revenue or rent (Whether exempted or not) payable by the tenure-holder;

(v)Land revenue per hectare;

Whether irrigated by canal, lift canal, well, tank, pumpset, tubewell water or any other sources (name the sources)

(vii)Minimm value of land, fixed by the Collector of the district;

Non-agricultural land;

(i)Khasra/Plot number;

(ii)area (in hectare/squre metre);

(iii)minimum value of land fixed by the Collector of district:

Signature of transferor

20. Rule 5 for the purposes of payment of stamp duty, provides for calculation of the minimum value of land and building both non-commercial and commercial building.

21. Rule 7 provides for the procedure for the Collector to determine the market value of the property, in case the Collector has reasons to believe that the market value of the property has not been correctly set forth in the instrument.

22. Sub section (3) of Section 47 A requires the Collector to "examine the instrument for satisfying himself of the correctness of the market value", after such examination Collector has "reasons to believe" that the market value has not been truly setforth, he may 'determine the market value of such property"

23. Stamp Act being a taxing statute, the purpose is duty chargeable on an instrument, the immovable property has to be valued as per the provisions of the 1997 Rules. Under Rule 5, for non commercial building value is to be calculated by multiplying the constructed area of each floor by the minimum value fixed by the Collector under Rule 4, whereas, for commercial building minimum value is determined by multiplying the minimum monthly rent as fixed by the Collector under Rule 4, by the area of the construction by three hundred times.

24. In respect of commercial property, the Collector would inter alia, consider:

(1)location of the property whether in Urban/Semi Urban area/Country side,

(2)nature of economic activity in the locality,

(3)whether the property is a commercial building.

25. The facts that emerge from the record reflects that the property in question:

(1)is recorded as an agricultural property;

(2)earlier (1998-99) was used for non-agricultural purpose,

(3) no economic activity was being carried on the property on the date of execution of the instrument;

(4)surrounded by residential buildings;

(5)property presently being used for residential cum clinic;

26. Collector valued the property having commercial potential, merely for the reason that the property was used for non-agriculture purpose in the past, admittedly, the property on the date of execution of the instrument was not being used for commercial purpose, as none of the activities, mentioned in the expression "commercial establishment/shop" as contained in Adhiniyam, was being carried on the said property. Neither the property was being used as an agricultural property. Though the property was put to non agricultural use in the past but continued to be recorded as agricultural property in the revenue records, therefore it is being contended that the property be valued as an agricultural property.

27. This Court in Ratna Shanker Dwivedi versus State of U.P and others4 explained the objects of the Stamp Act as follows:-

"The sole object of Stamp Act under its various provisions is to require the parties concerned to set forth correct market value of the property at which the transaction has taken place so that appropriate duty in accordance with the Act is paid by them to avoid large scale evasion of stamp duty. It also mandates that while setting forth the correct market value of the property in dispute the competent authority must not apply their mind in a fact fashion and in a haphazard way. "

(Refer Himalaya House Company versus Chief Controlling Revenue Authority5).

28. The minimum value (circle rate) is only for the purpose of collecting the stamp duty and it cannot form the foundation to determine the market value. (U.P Jal Nigam versus Kalra Properties(P) Ltd.6; State of Haryana versus Manoj Kumar7) .

29. Market value of the property has to be determined with reference to the date on which the document is executed. (Hari Om Agarwal versus Prakash Malviya8; State of Rajasthan versus Khandaka Jain Jwellers 9).

30. Market value as referred to in the expression conveyance is the price which a willing purchaser would pay to a willing seller for the property. The court in Vijay Kumar and another Versus Commissioner10, explained the expression "market value":

"The 'market value' means what a willing purchaser would pay to a willing seller for the property having regard to the advantages available to the land and the development activities which may be going in the vicinity and potentiality of the land."

31. Again in Ratna Shankar Dwivedi (supra) the Court held that:

"The term "market value" has not been defined under the Act. However there are some precedents laying down certain guidelines as to how and in what manner a market value would be determined. The consensus opinion is that the market value of any property is the price which the property would fetch or would have fetched if sold in the open market."

32. The sine qua non for invoking provisions of Section 47-A(3) of the Act is that the Collector had reason to believe, that the value had not been properly set forth in the instrument as per market value of the property. Once the instrument is registered and the stamp duty as prescribed by the Collector was paid, the burden to prove that the market value was more than the minimum prescribed by the Collector under the rules, was upon the Collector. The report of the sub-Registrar or Tehsildar was not sufficient to discharge that burden. (Vijay Kumar v. Commissioner, Meerut Division11 .

33. The expression "reason to believe" is not synonymous with subjective satisfaction of the officer. The belief must be held in good faith, it cannot be merely a pretence. It is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not irrelevant or extraneous to the purpose of the section. (Dr. Pratap Singh V. Director of Enforcement Foreign Exchange Regulation Act 12; State of Punjab versus Mahavir Singh13; ITO versus Lakhmana Mewal Deas14).

34. The term "reason to believe"occurring in sub section (3) of Section 47-A spells out that the Registering Officer, must have some material-direct, circumstantial or even intrinsic evidence on the basis of which he may come to a reasonable belief that the market value of the property has not been truly set forth in the instrument. (Duncans Industries Ltd. Versus State of U.P 15 (affirmed by Supreme Court in appeal)16 .

35. It was not enough for the authority for the purpose of invoking section 47-A of the Act that the consideration amount shown in the agreement for sale was less than the prevailing market value, but the authority must be satisfied as to an attempt on the part of the party to under value the property. (Residents Welfare Association v. State of U.P17)

36. It is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not irrelevant or extraneous to the purposes of the section. (Dr.Pratap Singh versus Director of Enforcement Foreign Exchange Regulation Act18).

37. The binding precedent referred hereinabove would suggest that the burden to prove that the property was undervalued was upon the Collector. The only material available with the Collector was the report of the Tehsildar dated 11.12.2008. The report was not sufficient to discharge that burden. Evidence of comparable bonafide sales of land situated of near about land, possessing same or similar advantageous feature would furnish basis for determining the market value. Merely because the property at some point of time was put to non-agricultural use would not mean that the market value of the property could be valued at commercial rate. The Collector has not referred to a single exemplar to indicate that similar property in the vicinity is being sold and purchased at commercial rate. The Tehsildar's report on the contrary is indicative of the fact that property in question is surrounded by residential houses, suggesting that there has been a change of land use from agricultural to an urban agglomeration predominantly being of residential use.

38. The object of the Act is to collect proper stamp duty on an instrument or conveyance. An obligation is cast on the authorities to properly ascertain its true value. The market value of a property may vary from village to village, from location to location and even may differ from the sizes of land area and other relevant factors viz. predominant land-use. Entry in revenue record though relevant is not the sole determining factor of the market value under the Act. This apart there has to be some material before the authority as to what is the likely value of such property in that area. Such 'reason to believe' must be based on tangible, relevant and legally admissible evidence. There must be an intelligible nexus between the 'reason' and the 'belief'. Such belief should not be substitute for roving enquiries or the authorities 'reason to suspect'.

39. Having due regard to the provisions of the Rules and the law referred to, I am of the opinion that the Collector was in error in determining the value of the property merely for the reason that the property was put to non agricultural use ten years back. The reason becomes untenable as it fails to subscribe to the parameters for determining the market value as detailed in the Rules. The impugned orders on that count cannot be sustained.

40. It is urged on behalf of the petitioner that the property being recorded as an agricultural property in the revenue records, therefore, the property should have been valued as such and not as a property having commercial potential. The

contention cannot be accepted as explained in the earlier part of the order. Market value is dependent on several factors and not merely on the nature of the property as described in the revenue record.

41. The Court in Aniruddha Kumar and Ashwini Kumar Versus Chief Controlling Revenue Authority U.P. Alld. and another19, laid down that where in respect of agricultural land there is no declaration under section 143 of the U.P.Z.A. & L.R. Act 1950 its nature would not change and its market value for the purposes of payment of stamp duty would be determined on the basis of the agricultural character of the land not on the future potentiality.

42. A Division Bench in Kishore Chandra Agarwal Versus State of U.P. and others20, in the facts of that case, where the land which was recorded as a bhoomidhari or agricultural land and stamp duty was being demanded treating the land commercial land to be in semi-urban area. The Court made following observation:-

" The agricultural land situate on the roadside of a highway in semi-urban area or countryside area cannot be treated as commercial or residential unless that area is declared as commercial or residential in the Master Plan prepared by the State Government."

43. In Prakashwati Vs. Chief Controlling Revenue Authority Board of Revenue, Allahabad,21 the Hon'ble Supreme Court held that situation of a property in an area close to a decent colony would not by itself make it part thereof and should not be a factor for approach of the authority in determining the market value. Accordingly, valuation has to be determined on constructive materials, which could be made available before the authorities concerned.

44. This Court in Shivkali Devi Versus Commissioner,22 relying upon Prakashwati (supra) and Kishore Chandra Agarwal (supra), observed that the land recorded in revenue record as agricultural land cannot be treated as non agricultural land merely on the report of Additional Collector.

45. Market value of the property has to be seen irrespective of the fact whether it is residential, commercial or agricultural. Nature of the land and its current use may not be relevant, if around the plot in question, properties were being sold and bought at commercial rates, then for determination of stamp duty, market value of the property would be the same as that of property bought for commercial use. (D.P.R. Foods (P) Ltd. Versus State of Uttar Pradesh 23).

46. Evidence of bonafide sales between prudent vendor and prudent vendee of land acquired or situated near about land possessing same or similar advantageous features would furnish basis to determine the market value. (Jawajee Nagnatham versus The Revenue Divisional Officer, Adilabad, A.P etc.24).

47. The Supreme Court in Neeraj Jain Versus State of U.P. and others,25 decided on 26.08.2014, observed that "the Court should require State Government to put forth the material on record that there has been a change of user or there are other contemporaneous sale deeds in respect of adjacent area and the market value has been increased or there has been a change in the agricultural land to the

urban agglomeration and such other ancillary aspects."

48. In M/s. Maya Food and Vanaspati Ltd. Co. Vs. Chief Controlling Revenue Authority (Board of Revenue) Allahabad,26 the Court held that market value of the land for the purposes of payment of stamp duty can not be determined with reference to its future use or the intended use to which it is likely to be put by the purchaser.

49. The decided cases do not detail the norms or parameters for determination of the market value, the cases have been decided on the facts of those cases. It would not be proper for the Court to lay down the parameters or norms for determination of the market value. Market Value would vary from facts of each case depending upon a number of factors including entry of the nature of the property in revenue record.

50. Though entry in the revenue record regarding the nature of the property may be relevant but would not constitute the sole factor in determining the market value. Market value is dependent upon other factors viz. change of user in adjacent area or change of agricultural land to urban agglomeration or if the properties were being sold and bought at commercial rates then for the purposes of stamp duty the market value of the property would be the same as that of the property bought at commercial rate, irrespective of the entry in the revenue record.

51. The petitioner had not placed before the Collector any exemplar of similar property to show that the predominant use in the vicinity of the property in question is agricultural and not non-agricultural. So did the Collector failed to show that the predominant land use in the area was commercial irrespective of the property being entered in revenue record as agricultural.

52. Having due regard to the material available on record i.e the undisputed spot inspection report, coupled by the spot inspection of the Collector (undertaken in 2013), the property in question was not being used commercially on the date of execution of the deed, the property is located in a urban area (municipal area), the predominant land use appears to be residential as the property is surrounded by residential buildings, and there being no reference of any economic activity in the vicinity of the property, therefore the property in this background cannot be said to be having commercial potential on the date of the execution of the sale deed.

53. Therefore, the determination by the Collector that the property in question would have to be valued commercially, merely because the property, in the past, was being used for non agricultural purposes, would not bring the property within the expression of commercial building/shop.

54. Penalty could have been imposed, if there was an attempt to evade stamp duty. Penalty pre-supposes culpability and an intention to conceal or to play fraud with authorities. Before imposing penalty, authorities must record finding based on relevant material that the purchaser or the person liable to pay stamp duty had concealed relevant facts in execution of sale deed and had intention to evade payment of stamp duty. (Asha

Kapoor (Smt.) versus Additional Collector(Finance & Revenue), Ghaziabad AIR (2008) 4 ALJ 363).

55. For the reasons and law stated herein above, the impugned order dated 26.4.2013 passed by the second respondent, Collector Jaunpur is quashed.

56. The matter is remitted back to the Collector, Jaunpur for redetermination of the market value of the property in the light of the direction and observation made in the judgement within three months from the date of service of certified copy of this order.

57. Subject to above, the writ petition stands allowed.

58. The approach of the Collector in determining the market value despite the direction of this Court dated 29.1.2013 was a very casual and not based on the parameter of settled position of law in determining the market value of a property under the Act. The Collector instead of returning the determination as directed by the Court, merely reiterated the earlier reasoning and enhanced the penalty which was not called for. I am of the opinion that the petitioner has been subjected to the unnecessary hardship and inconvenience for having to resolve the writ proceedings for quashing the order. The petitioner is therefore, entitled to costs which is quantified at Rs.50,000/- payable by the Collector, Jaunpur. It will be open for the State to recover the cost from the salary of the then Collector, Jaunpur.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.03.2015
BEFORE

THE HON'BLE YASHWANT VARMA, J.

Writ -A No. 28337 of 2009

Ram Pratap Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Kripa Shanker Singh, Sri A.K. Singh, Sri Anil Kumar Aditya

Counsel for the Respondents:
C.S.C.

U.P. Government Servant Conduct Rules 1956-Rule 29-Police constable-dismissed on allegation of bigamy-in departmental enquiry-petitioner admitted the second marriage-only explanation that with consent of first wife as per practice developed in rural area-second marriage took place-Child Marriage Restraint Act 1929, again Prohibition on child Marriage 2006-such custom depriving from basic human right-held such punishment not shock the conscience of Court-warrants no interference.

Held: Para-17

Bearing in mind the above, this Court finds itself unable to accept the submissions advanced by the learned counsel for the Petitioner. The bane of child marriage has been sought to be removed by our country for centuries. Legislation to end this cursed custom was enacted as far back as 1929 in the form of the Child Marriage Restraint Act, 1929 and subsequently replaced by the Prohibition of Child Marriage Act, 2006. The custom not only amounts to child abuse, it deprives the girl child of basic human rights. A member of the police force is charged with the duty of maintaining the law, upholding the standards of a civil society. The punishment, viewed in light of the above facts, does not shock the conscience of this Court warranting substitution of the choice made by the administrator.

Case Law discussed:
[2010 (3) ADJ 487]; (2014) 9 SCC 315; (2014) 4 ADJ 612; Civil Appeal No. 1662 of 2015 decided on 09.02.2015.

(Delivered by Hon'ble Yashwant Varma, J.)

1. The petitioner seeks to assail the validity of the order dated 16.10.2008 passed by the respondent No.2 in terms of which he stood dismissed from service in exercise of powers conferred upon the said authority by the U.P. Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules 1991. The aforesaid order of punishment came to be imposed upon the petitioner on culmination of departmental proceedings initiated against him on the charge of having consummated a second marriage without the permission of the appropriate authority. The charge asserted that the aforesaid conduct of the petitioner was in violation of Rule 29 of the U.P. Government Servant Conduct Rules 1956. The order of termination also stood confirmed in appeal by the respondent No.3 vide his order dated 30.01.2009 and in revision by the respondent No.4 by his order dated 26.12.2009.

2. The undisputed facts, which emerge from the record, appear to be that the petitioner was appointed as a Constable in the Civil Police on 01.08.1972. During the course of his career, he rose to become a Head Constable and was drawing salary in the grade of Sub Inspector.

3. It appears that one Smt. Hausila Devi asserting herself to be the first wife of the petitioner made a complaint to the respondents alleging ill treatment having been meted out to her. It was at this stage that the petitioner having committed the misconduct of bigamy came to light.

4. Taking cognizance on the complaint made by Smt. Hausila Devi, a show cause notice was issued to the petitioner on 04.08.2008 for violation of the Rules 1956, referred to above. Finding the reply of the petitioner to the aforesaid show cause notice to be unsatisfactory, a charge sheet dated 25.04.2008 was served upon him and to which a detailed reply was submitted by the petitioner on 05.05.2008. Disciplinary proceedings taken against the petitioner culminated in a report dated 05.06.2008 being submitted by the Enquiry Officer.

5. It becomes relevant to note here that the Enquiry Officer in the course of those proceedings recorded the statements of the first wife of the petitioner viz., Smt. Hausila Devi as well as his second wife Smt. Geeta Devi.

6. The first wife of the petitioner in these proceedings made a statement that she had been married to the petitioner in 1965 at a time when he was unemployed and that he subsequently married Smt. Geeta Devi in 1978 with her consent. She further submitted that she had no cause for complaint against the petitioner who makes adequate provisions for her livelihood. The second wife of the petitioner also stated that she had been married to the petitioner in 1978 with the consent of his first wife and that out of wedlock she along with the petitioner was looking after a family comprising of 4 children. The Enquiry Officer while returning a finding that the factum of bigamy stood admitted and proved from the statements of persons who had deposed before him found that the petitioner had not obtained any permission of the appropriate authority and accordingly recommended that three

annual increments of the petitioner be stopped.

7. After receipt of the aforesaid report and the representation of the petitioner in respect thereof, the respondent No.2 found that the petitioner had not obtained any permission for contracting the second marriage and that his contention that he had obtained such permission from his Platoon Commandant was not liable to be accepted as he was not the appropriate authority under the relevant rules. He accordingly proceeded to impose the punishment of dismissal upon the petitioner by an order dated 16.10.2008. It is this order, which has been affirmed by the respondent Nos. 3 and 4 in appeal and revision and are impugned in the present writ petition.

8. Learned counsel for the petitioner has submitted that the punishment imposed upon the petitioner is clearly disproportionate inasmuch as in his entire service of 36 years, he was not found guilty of wrong doing or misconduct. He has submitted that his first marriage had occurred at a time when he was only a minor and was studying in Class XI. He has submitted that the petitioner belonging to a poor family was perhaps got married of in terms of the age old custom of child marriage prevailing in the rural areas of the country. He has submitted that the petitioner was only 14 years of age when he was married to Smt. Hausala Devi and that such a marriage was not liable to be countenanced at all. He would contend that in fact the petitioner contracted the second marriage in 1978 on the proposal and with the consent of his first wife. He therefore submitted that the authorities should have taken a lenient view in the matter.

9. Learned standing counsel opposing the writ petition has however contended that once the factum of bigamy was accepted and admitted to the petitioner, the charge stood fully proved and therefore the respondents rightly dismissed the petitioner from service in the absence of any permission of the appropriate authority. He has submitted that the punishment imposed upon the petitioner, who was a member of the police force, could not be termed as disproportionate in the facts and circumstances of the case.

10. Having heard learned counsel for the parties, this Court finds that the fact that the petitioner was only a minor and 14 years of age when he was married of for the first time in 1965 is not disputed. This fact is an embodiment of the age old curse and malady of child marriages, which unfortunately prevailed at the time in our country. This practice was more prevalent in the rural areas of our country, despite the promulgation of legislation to counter such practices. It is also not disputed by the parties that the first wife of the petitioner appeared in the proceedings and in fact admitted the above and also stated that the petitioner entered into the second marriage with her consent.

11. Be that as it may, from the records it is apparent that the factum of second marriage is admitted to the Petitioner. This is not a case where the so called child marriage stood annulled as provided in law. Insofar as prior permission of the appropriate authority is concerned, the Petitioner failed to prove the same before the Disciplinary Authority. The sole question, therefore, which in the opinion of this Court, falls

for consideration would be whether the punishment inflicted upon the Petitioner, is disproportionate to the misdemeanor alleged.

12. On this score, the Petitioner has placed strong reliance upon the judgment rendered by a Learned Single Judge of this Court in Pancham Giri Vs State of U.P. And others [2010 (3) ADJ 487] wherein this Court made the following observations:-

"To allow a man to peacefully continue to almost complete his journey as a public servant for 28 years and then make him stand at the edge of cliff and and push him over, resting the justification in law as misconduct, has to be observed, to my mind with a tittle diluted but human approach. The reason is his exceptionally long period of service. It is true that passage of time will not reduce the guilt, but the punishment can be proportioned with an approach towards the lesser punishments that are available in the rules itself. The mind has to be applied to find out a reason, in the peculiar facts of a case like the present one as to why the lesser punishments would not be appropriate when they have been provided under the same rules. This takes one to the gravity of the misconduct which in this case became a discovery after 28 years. It is here where one's sense of mature justice is brought to test. The proportionality of the punishment therefore requires a careful measurement on the scales of reason and justice combined. Merely because it is a serious misconduct, does not necessarily categorise it for the extreme penalty of dismissal. It has to be assessed on its own facts and the nature of the indiscipline. The petitioner has not runaway with somebody's elses wife so as to bracket the action involving moral turpitude nor has he attempted to shield himself on any such count. His case has been consistent throughout supported by his first wife. These factors, which are the other side of the coin have not been assessed by the authorities appropriately which do require a consideration. The conscience of the Court on the above noted principles has been thoroughly disturbed which in my opinion calls upon my "conscious" approach to command the authorities to invoke the principle of proportionality. The petitioner has to live with a disrepute of misconduct but that can be done with a lesser punishment without putting the entire family of the petitioner to peril. That would be unjustly outrageous.

To my mind, the said aspect has to be considered in the backdrop of the aforesaid facts. The continuance of the petitioner at the fag end of his career was found detrimental to a disciplined force which may in given circumstances be correct, but in my opinion, the said aspect deserves an examination by the appropriate authority as it strikingly moves the conscience to the extent as to why a lesser major penalty would not serve the purpose. Even though the Rules do not indicate any other penalty like compulsory retirement but the same can be explored by the appropriate authority in the given set of circumstances provided it is permissible under rules.

The conduct of the petitioner was an absolute personal affair of the petitioner in relation to the consummation of second marriage and the same had got nothing to do with the affairs of the State or the discharge of his public duty to that extent. The judgment in the case of Amal Kumar Baruah of the Guwahati High Court (supra) comes to the aid of the petitioner."

13. This submission advanced by the counsel for the Petitioner and the only issue in fact which in the opinion of this Court falls for determination must be considered and approached bearing in mind the parameters of judicial review set for exercise of power upon this Court. To bear in mind the contours of this exercise, one may usefully refer to what the Hon'ble Supreme Court of India stated in LIC Vs. S. Vasanthi (2014) 9 SCC 315:-

"10. The scope and power of judicial review of the courts while dealing with the validity of quantum of punishment imposed by the disciplinary authority is now well-settled. In Kendriya Vidyalaya Sangthan v. J. Hussain, the law on this subject, is recapitulated in the following manner: (SCC pp. 110-12, paras 7-10)

"7. When the charge is proved, as happened in the instant case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of the charge. The disciplinary authority is to decide a particular penalty specified in the relevant Rules. A host of factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist.

8. The order of the appellate authority while having a relook at the case would, obviously, examine as to whether the punishment imposed by the disciplinary authority is reasonable or not. If the appellate authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the disciplinary authority. Such a power which vests with the appellate authority departmentally is ordinarily not available to the court or a tribunal. The court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts. (See UT of Dadra & Nagar Haveli v. Gulabhia M. Lad.) In exercise of power of judicial review, however, the court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when the punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.

9. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with doctrine of Wednesbury rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the court and the court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality was propounded by Lord Diplock in Council of Civil Service Unions v. Minister for Civil Service in the following words: (AC p. 410 D-E)

"... Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads of the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". This is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality".'

10. An imprimatur to the aforesaid principle was accorded by this Court as well in Ranjit Thakur v. Union of India. Speaking for the Court, Venkatachaliah, J. (as he then was) emphasising that "all powers have legal limits' invokes the aforesaid doctrine in the following words: (SCC p. 620, para 25)

"25. ... The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.'"

11. We are of the opinion that the High Court transgressed its limits of judicial review by itself assuming the role of sitting as a departmental appellate authority, which is not permissible in law. The principles discussed above have been summed up and summarised as follows in Lucknow Kshetriya Gramin Bank v. Rajendra Singh: (SCC p. 382, para 19)

"19.1. When charge(s) of misconduct is proved in an enquiry the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.

19.2. The courts cannot assume the function of disciplinary/departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.

19.3. Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.

19.4. Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more

serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge-sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable."

14. Put more pithily, this Court would be compelled to interfere in the quantum of punishment if the same is in outrageous defiance of logic and moral standards.

15. With due deference to what the learned Single Judge came to hold in Pancham Giri (supra), this Court finds that the said judgment came to be cited before a Division Bench of this Court in Pawan Kumar Misra Vs. State of U.P. and another (2014) 4 ADJ 612 when this Court held as follows:-

"16. In the case of Pancham Giri vs. State of U.P. and others 2010 Indlaw ALL 459 (supra), Hon'ble Single Judge while deciding the writ petition has remanded the matter to the authorities to take a fresh decision on dismissal from service on account of the fact that the delinquent employee was at the verge of retirement. A lenient view was taken by Hon'ble Single Judge keeping the facts and circumstances of the case, which does not seem to be applicable to the present case.

17. In the case in hand, the appellant-petitioner had committed an offence of bigamy after enjoying 11 years of matrimonial life. Once the 1956 Rules provides that second marriage by a government servant during the lifetime of first wife is an offence, and it amounts to misconduct, then it is not open for the court to take a different view than what has been considered by the disciplinary authority.

18. In the case of Union of India and another vs. K.G. Soni 2006 Indlaw SC 421 (supra), relied upon by learned counsel for the appellant-petitioner, Hon'ble Supreme Court in identical situation held that the High Court ordinarily should not interfere in such a matter by exercising power conferred by Article 226; rather it has to look into the deficiency in the decision-making process and not the decision. For convenience, relevant paras 3, 8, 13 and 14 of the aforesaid judgment are reproduced:

"3. Background facts in a nutshell are as follows: Respondent was a Store Attendant in the Bank Note Press, District Dewas (M.P). A charge-sheet was issued against him on the foundation that though he had got married with one Parvathibai in the year 1973, while filling up the attestation form on 16.3.1974, he did not show her name as his wife. It was further alleged that he got married for the second time in October, 1974 with one Ushabai. On the basis of this non-disclosure, which, authorities considered to be a misconduct, a disciplinary proceeding was initiated. It is to be noted that the non-disclosure came to the notice of the authorities when Parvathibai made a complaint about the second marriage. The enquiry was conducted under Central Civil Services (Classification, Control and Appeal) Rules, 1965 (in short the 'Rules'). The Enquiry Officer recorded findings in favour of the respondent. The Disciplinary Authority differed with the findings of the Inquiry Officer and came to hold that second marriage had in fact

been performed and accordingly it issued show cause notice to the respondent and eventually came to hold that the respondent was guilty of misconduct and imposed the punishment of removal by order dated 2.4.1996.

8. The High Court was of the view that ordinarily it would have remanded the matter to Tribunal for fresh consideration on merits but it was of the view that this is a fit case where the matter should be remitted to the Appellate Authority for reconsideration with regard to the quantum of punishment. The only basis for coming to the conclusion that the complaint was made by the wife about the alleged second marriage belatedly, and this is not such a misconduct which warrants compulsory retirement before his superannuation.

13. In Union of India and Anr. v. G. Ganayutham (1997 [7] SCC 463 1997 Indlaw SC 587), this Court summed up the position relating to proportionality in paragraphs 31 and 32, which read as follows:

"The current position of proportionality in administrative law in England and India can be summarized as follows:

(1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into or whether irrelevant matters had been taken into account or whether action was not bona fide. The court would also consider whether the decision absurd or perverse. The court would however go into the correctness of the made by the administrator amongst the various alternatives open to. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test.

(2) The court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational \026 in the sense that it was in outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English administrative law in future is not ruled out. These are the CCSU (1985 AC 374) principles.

(3)(a) As per Bugdaycay (1987 AC 514), Brind (1991 (1) AC 696) and Smith (1996 (1) All ER 257) as long as the Convention is not incorporated into English law, the English courts merely exercise a secondary judgment to find out if the decision-maker could have, on the material before him, arrived at the primary judgment in the manner he has done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the courts/tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the

court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the courts in our country will apply the principle of "proportionality" and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the courts will have a primary role only if the freedoms under Articles 19, 21 etc. are involved and not for Art. 14."

14. The common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case (supra) the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decisionmaking process and not the decision."

19. Keeping the principle emerging from Union of India and another vs. K.G. Soni 2006 Indlaw SC 421 (supra), there appears to be no reason to interfere with the order passed by Hon'ble Single Judge and the disciplinary authority, as held by their Lordships of Hon'ble Supreme Court that the courts should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the court. The department moved ahead to charge the appellant-petitioner in pursuance of complaint submitted by his own first wife and factum of remarriage has not been denied by the appellant-petitioner. Accordingly, the appellant-petitioner has been punished in pursuance to 1956 Rules (supra).superannuation."

16. Considering a matter arising out of the same U.P. Government Servants Conduct Rules, 1956 this is what the Apex Court held recently in Khursheed Ahmad Khan Vs. State of U.P. & others Civil Appeal No. 1662 of 2015 decided on 09.02.2015:-

"9. As regard the charge of misconduct in question, it is patent that there is no material on record to show that the appellant divorced his first wife before the second marriage or he informed the Government about contracting the second marriage. In absence thereof the second marriage is a misconduct under the Conduct Rules. The defence of the appellant that his first marriage had come to an end has been disbelieved by the disciplinary authority and the High Court. Learned counsel for the State has pointed out that not only the appellant admitted that his first marriage was continuing when he performed second marriage, first wife of the appellant herself appeared as a witness during the inquiry proceedings and stated that the first marriage was never dissolved. On that basis, the High Court was justified in holding that the finding of proved misconduct did not call for any interference. Learned counsel for the State also submits that the validity of the impugned Conduct Rule is not open to

question on the ground that it violated Article 25 of the Constitution in view of the law laid down by this court in Sarla Mudgal v. Union of India[1]. He further submitted that the High Court was justified in holding that the punishment of removal could not be held to be shockingly disproportionate to the charge and did not call for any interference.

10. We have given due consideration to the rival submissions. We are of the view that no interference is called for by this Court in the matter." .

17. Bearing in mind the above, this Court finds itself unable to accept the submissions advanced by the learned counsel for the Petitioner. The bane of child marriage has been sought to be removed by our country for centuries. Legislation to end this cursed custom was enacted as far back as 1929 in the form of the Child Marriage Restraint Act, 1929 and subsequently replaced by the Prohibition of Child Marriage Act, 2006. The custom not only amounts to child abuse, it deprives the girl child of basic human rights. A member of the police force is charged with the duty of maintaining the law, upholding the standards of a civil society. The punishment, viewed in light of the above facts, does not shock the conscience of this Court warranting substitution of the choice made by the administrator.

18. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2015

BEFORE
THE HON'BLE YASHWANT VARMA, J.

Writ A No. 28679 of 2009

Sri Krishna Prasad Yadav & Ors. .Petitioners
Versus
State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C., Sri Ashok Kumar Shukla, Sri K.K.M Tripathi

U.P. State Aided Educational Institution Employees Contributory Provident Fund-Insurance-Pension Rules, 1964-Rule 4(b) Rule 16-claim of Post Retiral benefit-working as teacher in Primary section attached to intermediate institution-denial in grab of G.O. 20.01.2004-held primary section being integral part of Institution-taken grant in aid 01.10.89-in view of Rule 4(b)-primary section being integral part of intermediate-entitled for pension-G.O. Relied by state already quashed-direction to take into account total length of service for qualifying period for pension-issued.

Held: Para-8
It is further relevant to note here that the Primary Section was an integral part of the Institution and the teachers attached thereto could not have been discriminated for the purposes of payment of pension merely because they came on to grant-in-aid list w.e.f. 1.10.1989. In the opinion of the Court, there is no provision under the Rules 1964 which curtails the computation of length of qualifying service to the time when the Primary Sections became or came under the grant-in-aid list.

Case Law discussed:
W.P. No. 17819 of 2007; .W.P. No. 17033 of 2012; W.P. No. 75746 of 2006.

(Delivered by Hon'ble Yashwant Varma, J.)

1. This petition has been preferred seeking the following primary relief:

"a writ, order or direction of suitable nature commanding the respondents to take into account the entire length of service of the petitioners computed from the date of their initial appointment for purposes of computation of the retiral benefits of the petitioners and not to limit such consideration to length of service either subsequent to 1.10.1989 alone or subsequent to 28.4.2004 alone."

2. Briefly stated the dispute arises in the following backdrop. All the petitioners were appointed as Assistant Teachers in the Primary Sections of the Educational Institutions represented by their respective Committees of Management. The Primary Sections of these colleges came on to the grant-in-aid list issued by the State Government on 6.9.1989. As is evident from the said list and the orders of the Government, the effective date for these colleges and their Primary Sections coming on to the grant-in-aid list was 1.10.1989. All the petitioners herein were in fact, working in these Institutions much prior to that starting from 1964-72. It would be apposite to notice here that while the petitioner Nos. 1, 2 and 3 have attained the age of superannuation and retired in 2006-07-08, the petitioner Nos. 1, 2, 3, 8 and 9 retired on different dates between 2006-2013, the petitioner No. 4 retired from service on 30.06.2014 while remaining petitioners are to retire in 2015 and 2016. These facts which are stated by the petitioners in Paragraphs 8, 10 and 11 of the writ petition are not disputed by the contesting State-respondents. The grievance of all these petitioners is the non-payment of pension under the provisions of the U.P. State Aided Educational Institution Employees' Contributory Provident Fund-Insurance-Pension Rules, 1964. These Rules admittedly came into force on 1.10.1964 and in terms thereof the employees were entitled to be provided pension computed on the basis of the total length of service put in by them. The dispute itself arises pursuant to a Government Order dated 20th January, 2004 and the stand of the State that the benefit under the Rules aforementioned would be permissible to be sanctioned and paid to these teachers only from the date of promulgation of the said Government Order. Resultantly, the total length of qualifying service which forms the basis for computation and grant of family pension becomes effected and it is in view of the same that the petitioners have approached this Court.

3. Sri Siddharatha Khare, learned counsel for the petitioners has submitted that all the petitioners were in service in the Primary Section of the Institutions in question much prior to the date of promulgation of the Government Order. He submitted that the Primary Section being taken on to the grant-in-aid list w.e.f. 1.10.1989 clearly made the petitioners eligible to obtain benefits falling under the Rules 1964. He submitted that the benefit of the statutory Rule could not be negated or curtailed in any manner by the Government Order dated 20th January, 2004. Elaborating his submissions Shri Khare has further relied upon the judgment rendered by a learned Single Judge of this Court in Writ Petition No. 17819 of 2007; Mangali Prasad Varma Vs. State of U.P. and Others. Considering a similar issue the learned Single Judge was pleased to hold that the benefit of past service rendered by the

petitioners could not be curtailed by the Government Order dated 20th January, 2004. It was held that the so called cut off date could not be kept as 20th January, 2004 inasmuch as pension was not being granted by virtue of the Government Order but that the same was a right which flowed from the provisions of the Rules 1964.

4. Learned Standing Counsel, on the other hand, relying upon the Affidavit filed in opposition to this petition has submitted that the Primary Sections came on to the grant-in-aid list only w.e.f. 1.10.1989 and that the provisions for payment of pension to teachers employed in such Primary Sections was provision for only vide Government Order dated 20th January,2004. He has further contended that the provisions of the 1964 Rules themselves became applicable to the petitioners only once the Institutions came on to the grant-in-aid list i.e. from 1.10.1989 and therefore, the pension could not have been paid to the petitioners computing their services rendered prior thereto.

5. It would be relevant to point out here, before proceeding to the merits of the rival contentions raised by the parties, that the Committees of Management were put to notice by an order of this Court but have failed to file any Affidavits in opposition to this petition. The Government Order around which centers the present controversy is mentioned in the Affidavits of parties as dated 28th January, 2004. However, parties were agreed that the same was a typographical error and that the correct date of the Government Order was 20th January, 2004. I proceed now to consider the contentions of parties.

6. It would be apposite to refer to some of the salient provisions of the Rules 1964.

Rule 3 reads as under:

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private Management and recognised by a competent authority as such for purposes of payment of grant-in-aid:

(1) Primary Schools;

(2) Junior High Schools;

(3) Higher Secondary Schools;

(4) Degree Colleges;

(5) Training Colleges."

Rule 17 reads as under:

"17. An employee shall be eligible for pension on--

(i) retirement on attaining the age of superannuation or on the expiry of extension granted beyond the superannuation age;

(ii) voluntary retirement after completing 25 years of qualifying service;

(iii) retirement before the age of superannuation under a medical certificate of permanent incapacity for further service; and

(iv) discharge due to abolition of post or closure of an institution due to withdrawal of recognition or other valid causes.

Notes.--(1) The age of compulsory retirement of an employee shall be such as prescribed in the relevant rules applicable to him.

The date of superannuation shall be reckoned from the date of birth of an employee as entered in his Service Book or other records. In case of the year of birth only is known, but not the month, the first July of the year shall be taken as the

date of birth. Similarly when both the year and the month of birth are known, but not the date, the16th of the month shall be taken as the date of birth."

Rule 18 reads as under:

"18. The amount of pension that may be granted shall be determined by the length of qualifying service, vide Rule 31 below. Fractions of a year shall not be taken into account in the calculation of pension under these rules. Pension shall be calculated to the nearest multiple of 5 paisa:

(a) The full pension admissible under these rules will not be sanctioned unless the service rendered has been considered satisfactory and is approved by the Controlling Authority.

(b) If the service has not been thoroughly satisfactory the authority sanctioning the pension may order such reduction in the amount as it thinks proper."

Rule 19 reads as under:

"19. (a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b).....
(c).....
(d).....
(e)....."

7. It is apparent that the grant of pension is squarely covered by the provisions of the statutory Rules referred to above. The said rules in unequivocal terms provide that they shall apply to the permanent employees serving in State Aided Educational Institutions run either by a Local Body or by a Private Management and recognized by a Competent Authority as such for purposes of payment of grant-in-aid.

8. The category of Institutions referred in Rule 3 clearly include Primary Sections. It is the undisputed position that the Institutions in which the petitioners were serving had Primary Sections and even though run by Private Management were recognized for the purposes of payment of grant-in-aid. These Rules did not prescribe a cut off date for the purposes of a person becoming eligible for grant of pension thereunder. In fact, Rule 4(b) clearly throws light on this aspect of the matter when it grants an option to existing members in permanent service to opt and elect to be governed by these Rules. The Rules themselves came into effect from 1.10.1964 and would, therefore, be applicable to all thereof. Insofar as the aspect of deposit of management contribution as envisaged under the said Rule is concerned, this Court had already struck down the cut of date of 31st March, 2002 as prescribed by the Government Order dated 26.07.2001 in Smt. Shanti Solanki Vs. State of U.P. and Others passed in W.P. No. 75746 of 2006 and the said decision has been consistently followed in various other cases decided by this Court including W.P. No. 17033 of 2012, Lal Chand Singh Vs. State of U.P. And Others. About the payment of pension being governed solely by the provisions of the Rules 1964, this Court is of the opinion that its applicability could not have been eclipsed or in any manner straddled over by the Government Order dated 20th January, 2004. This Court is in agreement with the judgment rendered by a learned Single Judge in Mangali Prasad (supra) on the issue that merely because there was

delay in issuing appropriate clarifications with regard to the applicability of the Rules to Primary Sections, the same could not have denuded the petitioners of their right to claim pension under the Rules 1964. It is further relevant to note here that the Primary Section was an integral part of the Institution and the teachers attached thereto could not have been discriminated for the purposes of payment of pension merely because they came on to grant-in-aid list w.e.f. 1.10.1989. In the opinion of the Court, there is no provision under the Rules 1964 which curtails the computation of length of qualifying service to the time when the Primary Sections became or came under the grant-in-aid list.

9. Accordingly and in view of the above, this writ petition is allowed and it is accordingly held that the petitioners shall be entitled to pension under the provisions of the Rules 1964. The management contribution required to be deposited may be so made within a period of two months and thereafter the respondents shall proceed to compute the pension of the petitioners taking into account the total length of qualifying service rendered by them and in light of the observations made hereinabove. The pension so computed and becoming liable to be paid to the petitioners from their respective dates of superannuation will be paid within a period of two months from the date of deposit of management contribution and the arrears shall carry interest of 12 per cent per annum.

10. The writ petition is accordingly allowed in terms indicated above.

ORIGINAL JURISDICTION
CRIMINAL SIDE

DATED: ALLAHABAD 21.01.2015
BEFORE
THE HON'BLE RAMESH SINHA, J.

Application U/s 482 No. 29717 of 2013

Kahkashan Begum & Ors. ...Applicants
Versus
State of U.P. & Anr. ...Opp.Parties

Counsel for the Applicants:
Shabana Nizam

Counsel for the Respondents:
Govt. Advocate, Shibli Naseem

Cr.P.C. Section 482-Quashing of criminal proceeding-offence u/s 323, 384, 504, 506 IPC-on ground of misuse of process of law and malicious prosecution -as a counter blast to criminal case pending against respondent 2-admittedly the applicant and respondent 2 are husband wife-matrimonial dispute going on-mediation failed-all allegations general in nature-not corroborated by independent evidence-even if accepted to be true-not disclose any offence-entire proceeding including summoning order quashed.

Held: Para-7

Considered the submissions advanced by the learned counsel for the parties and perused the material available on record. It is admitted case that applicant no.1 and op. party no.2 are husband and wife who were married to each other in the year 2006 according to Muslim traditions and there appears to have been some bitterness between them after marriage and she was being tortured by her husband opp. party no.2 and her in-laws for demand of a colour T.V. and a motorcycle from applicant no.1 and her parents, which could not be fulfilled and on account of which harassment which was made by opp. party no.2 and his family members physically and mentally, the applicant no.1 who was carrying a child in her womb became so much

stressed and gave a birth of a dead child in the year 2008 and ultimately she was ousted from her in-laws matrimonial home on 1.10.2012. The opp. party no.2 is also facing prosecution at the hands of his wife wife applicant no.1 in which he and his family members are being prosecuted and proceedings initiated by him against his wife and her family members who are applicants in the present case are only vague and general allegations have been made which does not corroborate by any independent and cogent evidence excepting his evidence and his family members and even if the same is taken to be true on the face of it, the same does not disclose any offence against the applicant. The prosecution of the applicant further appears to be a malicious one which has been initiated by op. party no.2 against the applicant no.1 and her family members to pressurize them to withdraw the criminal prosecution launched against them by the applicants for the offence under Section 498 I.P.C. etc.

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

1. Heard Ms. Shabana Nizam, learned counsel for the applicants, Sri Shibli Naseem, learned cousnel for opp. party no.2 and Sri R.K. Maurya,learned A.G.A. for the State.

2. The applicants, through the present application under Section 482 Cr.P.C., have invoked the inherent jurisdiction of this Court with a prayer to quash the entire proceedings of complaint case no.1548 of 2012 (Mohd. Sarfaraz Vs. Kahkashan Begum and others), under Sections 384,323,504 I.P.C., Police Station Jafrabad, District Jaunpur, pending in the court of Ist, Judicial Magistrate, Jaunpur as well as summoning order dated 10.7.2013 passed in the aforesaid complaint case.

3. No counter affidavit has been filed by learned counsel for opp. party no.2 or learned AGA for the State.

4. Brief facts of the case are that the marriage of applicant no.1 and opp. party no.2 was solemnized on 20.2.2006 according to Muslim rites and rituals and sufficient household articles and other gifts were given in the said marriage. When the applicant no.1 went to her in-laws' house, her in-laws were not satisfied with the aritles given in the marriage and they started demanding a colour T.V. and a motorcycle from the applicant no.1 and her parents and for which the applicant no.1 was being tortured and cruelly treated by them, but she continued to discharge her matrimonial obligations. In the year 2008 she was so badly beaten and on account of which she gave birth to a dead baby. Ultimately, She was ousted from the house on 1.10.2012 as she gave birth to a dead child. Thereafter, the applicant no.1 tried to lodge an FIR against her husband opp.party no.2 but in spite of her efforts the same could not be registered, hence she filed a complaint before the Court below which was registered as Complaint Case No.645 of 2013 (Kahkashan Vs. Sarfaraz and others). The opp. party no.2 in retaliation filed the present complaint against his wife who is applicant no.1 and her family members on 20.10.2012, on which the statement of opp. party no.2 was recorded under Section 200 Cr.P.C. and his witness under Section 202 Cr.P.C. respectively and the applicants have been summoned by the learned Magistrate vide order dated 10.7.2013 to face the trial for the offence under Sections 384,323,5-04 I.P.C.,Police Station Jafrabad, District Jaunpur. Hence, the present 482 Cr.P.C. application has been filed by the applicants for quashing the entire proceedings of the

present complaint case as well as summoning order.

5. It has been contended by the learned counsel for the applicant that applicant no.1 is the wife of opp. party no.2 and she after her marriage was tortured and cruelly treated by opp. party no.2 and his family members, for which the applicant no.1 had filed a complaint under Section 498A etc. against opp. party no.2 and his family and they have been summoned by the trial court and are facing the prosecution, in order to harass the applicant no.1 and her family members the op. party no.2 has filed the present complaint as a pressure tactics to the applicant no.1 to withdraw her complaint which she has filed against opp. party no.2. He further submits that the present complaint filed by opp. party no.2 against the applicant is nothing but a misuse of the process of the law for malicious prosecution of the applicants. Moreover, no offence whatsoever is disclosed against the applicants at all as the compliant is a vague and bald allegations have been made in the complaint against the applicants by opp. party no.2 He further submits that matter was earlier taken up by this court on 25.9.2013 and the same was referred to the Mediation Centre of this court vide order dated 25.9.2013 for settlement of their dispute, but the mediation has failed on 27.11.2013.

6. Learned counsel for opp. party no.2 as well as learned AGA on the other hand, opposed the prayer for quashing of the proceedings as well as summoning order, but they could not dispute the fact that opp. party no.2 who is husband of applicant no.1 is also facing prosecution at her hands in matrimonial litigation.

7. Considered the submissions advanced by the learned counsel for the parties and perused the material available on record. It is admitted case that applicant no.1 and op. party no.2 are husband and wife who were married to each other in the year 2006 according to Muslim traditions and there appears to have been some bitterness between them after marriage and she was being tortured by her husband opp. party no.2 and her in-laws for demand of a colour T.V. and a motorcycle from applicant no.1 and her parents, which could not be fulfilled and on account of which harassment which was made by opp. party no.2 and his family members physically and mentally, the applicant no.1 who was carrying a child in her womb became so much stressed and gave a birth of a dead child in the year 2008 and ultimately she was ousted from her in-laws matrimonial home on 1.10.2012. The opp. party no.2 is also facing prosecution at the hands of his wife wife applicant no.1 in which he and his family members are being prosecuted and proceedings initiated by him against his wife and her family members who are applicants in the present case are only vague and general allegations have been made which does not corroborate by any independent and cogent evidence excepting his evidence and his family members and even if the same is taken to be true on the face of it, the same does not disclose any offence against the applicant. The prosecution of the applicant further appears to be a malicious one which has been initiated by op. party no.2 against the applicant no.1 and her family members to pressurize them to withdraw the criminal prosecution launched against them by the applicants for the offence under Section 498 I.P.C. etc.

8. In view of the foregoing discussions, the entire proceedings of aforesaid complaint

case no.1548 of 2012 (Mohd. Sarfaraz Vs. Kahkashan Begum and others), as well as summoning order 10.7.2013 are hereby quashed. The present 482 Cr.P.C. application stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2015

BEFORE
THE HON'BLE VIVEK KUMAR BIRLA, J.

Writ -C No. 30711 of 20003

Union of India & Ors. ...Petitioners
Versus
Addl. District Judge & Ors. ..Respondents

Counsel for the Petitioners:
Ajit Kumar Singh

Counsel for the Respondents:
S.C., Sri P.K. Jain, Sri Vikrant Rana

Arbitration Act-Section-30-Jurisdiction of arbitrator-once award made rule-appellate authority remanded for fresh consideration-arbitrator already retired before order of remand-held-can not be allowed to take breath of hot and cold wave-once petitioner participated proceeding before arbitrator-can not be allowed to say without jurisdiction.

Held: Para-14
Thus, in the facts and circumstances of the case and in view of the various decisions of Hon'ble Apex Court, it is no longer open to the petitioners, Union of India to challenge that the award was without jurisdiction as Shri Ashok Kumar, the Sole Arbitrator had no jurisdiction to proceed with the matter after his retirement.

Case Law discussed:
AIR 1988 SC 205; (2012) 12 SCC 513; (1998) 2 SCC 89; (2014) 11 SCC 366.

(Delivered by Hon'ble Vivek Kumar Birla, J.)

1. Heard learned counsel for the petitioners and Shri Vikrant Rana appearing for the contesting respondents.

2. The facts of the case in brief are that a contract was entered into between the Union of India and the respondent no.3 (M/s P.A.B.(India) Private Ltd., Partapur (hereinafter referred to as the 'Firm") on 22.02.1990 for construction of Air Conditioning Accommodation for data entry system at Ordinance Factory, Muradnagar. Subsequently, the time for completion of work was extended till 30.09.1991. Thereafter, certain disputes arose between the parties and as per clause 70 of the agreement, the matter was referred to sole Arbitrator. The Chief Engineer Bareilly Zone, Bareilly appointed Shri Ashok Kumar, Additional Chief Engineer (Planning), CEBZ Bareilly as Arbitrator by letter dated 15.12.1992. The Arbitrator gave its award on 21.01.1994 awarding certain amount in favour of the Firm. The Firm also filed an application under Section 14 of the Arbitration Act for making the award, Rule of the Court. The petitioners filed objection under Section 30 of the Arbitration Act before the Court below. By order dated 26.10.1996, the IVth Additional Civil Judge (Senior Division), Meerut rejected the objections of the petitioners and allowed the case of the Firm. This order dated 26.10.1996 was further challenged by the Union of India before the IVth Additional District Judge, Meerut by filing Misc. Appeal No.414 of 1996. On 18.11.1997, the appeal was allowed and the order dated 26.10.1996 passed by the Civil Judge (Senior Division) Meerut making the award, Rule of the Court was set aside and the matter was remanded back to the sole Arbitrator, Shri Ashok Kumar, Additional Chief Engineer for decision afresh. Certain findings were recorded by the Lower

Appellate Court to the effect that the Arbitrator has not accepted the claim of the Firm, insofar as, claim nos.2, 3, 4, 6, 7 and 9 are concerned but while deciding item no.8 interest was awarded, which was a gross illegality and therefore, the same could not have been awarded. The Appellate Court remanded back the matter by judgment and order dated 18.11.1997 to Shri Ashok Kumar, Additional Chief Engineer and it is not in dispute that Shri Ashok Kumar had retired on 31st August, 1995 i.e. much prior to the date of decision of the Appellate Court given on 18.11.1997. This judgment was not challenged by Union of India before any higher Court and thus attained finality.

3. Shri Ashok Kumar proceeded with the arbitration proceedings and no objection was taken by the Union of India before him that after retirement he was no longer competent to proceed with the arbitration proceedings. Ultimately, a fresh award was passed on 15.06.1998 (which may be referred to as the "last award"). The Firm filed an application to make the (last) award, Rule of the Court. Against the last award, an objection was also filed by the Union of India under Section 30 of the Arbitration Act before the concerned Court. By judgement and order dated 15.09.1999, the Vth Additional Civil Judge (Senior Division), Meerut rejected the objection of the petitioners and directed that the Award dated 15.06.1998 be made, Rule of the Court. Against the aforesaid judgment of the Additional Civil Judge dated 15.09.1999, two miscellaneous appeals came to be filed by the Union of India being Misc. Appeal No.54 of 1999 and Misc. Appeal No.80 of 2000. Both the appeals were dismissed by the Lower Appellate Court on 31.03.2003.

4. In nutshell, the objection of the Union of India was dismissed and application of the Firm was allowed to the effect that the award be made, Rule of the Court.

5. The present petition has been filed primarily challenging the aforesaid decisions on the ground that the Arbitrator had no jurisdiction to proceed with the Arbitration Proceedings as he had retired from service and was not competent to proceed with the arbitration proceedings.

6. The counsel for the petitioners has also weakly attempted to show that the Firm specifically gave an undertaking that for the unfinished work done during the extended period the Firm shall not claim any excalation of cost. He submits that the Arbitrator has illegally granted the same for the work done in extended time and that the same is wholly without jurisdiction and contrary to the terms agreed between the parties.

7. Per contra, Shri Vikrant Rana, Advocate appearing for the Firm had submitted that the objections, which are now being taken regarding competence of the Arbitrator, were never taken by the petitioners before the Arbitrator. He submits that it was well within the knowledge of the petitioners that the arbitrator had already retired from service during the pendency of the appeal whereby first award was challenged by the Union of India, and subsequent thereto no objection was raised before the Arbitrator regarding his competence to proceed with the arbitration proceedings. He, therefore, submits that it is no longer open to the petitioners to claim that Shri Ashok Kumar had no jurisdiction to proceed with the arbitration after his retirement. He further pointed out that the judgment and order dated 18.11.1997 passed

by the Lower Appellate Court in Appeal No.414 of 1996 was never challenged by the petitioners and thus, became final and the petitioners also submitted before the Arbitrator and completed their arguments without raising any such objection. He further submits that insofar as, claim of payment of escalated cost against work done during extended period, the same was never challenged before the Arbitrator as well as by filing objections under Section 30 of the Arbitration Act while challenging the judgment and order dated 15.09.1999 passed by the Vth Additional Civil Judge (Senior Division), Meerut in appeal, hence now the same is not open to challenge as it will be deemed that the Union of India, by its conduct has waived the terms of agreement. In support of his arguments, Shri Rana has relied upon several judgements of Hon'ble Apex Court to contend that once the petitioners failed to raise any objection with regard to competence of the Arbitrator that he cannot proceed with the arbitration proceedings after his retirement, it is no longer open to the petitioners to challenge the same and the present petition deserves to be dismissed as the order passed by Lower Appellate Court are perfectly just and legal.

8. I have considered the rival submissions and perused the record. A perusal of record demonstrates that the objections filed by the Union of India under Section 30 of the Arbitration Act against the last award are too vague in nature and except one line objection that the Arbitrator after retirement was not competent to give award, there is no specific challenge to the last award. Further, there is nothing on record to show that any attempt was made by the petitioners before the lower appellate court, before or at the time of passing of the judgment dated 18.11.1997 in Misc. Appeal No. 414 of 196 when matter was remanded back to Shri Ashok Kumar, to intimate the Court that he had already retired and therefore was not competent to proceed with arbitration. Undisputedly, after remand the petitioners pursued their case before Shri Ashok Kumar.

9. Insofar as the competence of the Arbitrator after his retirement is concerned, it is very much clear from the operative portion of the judgment of the Lower Appellate Court dated 18.11.1997 that Shri Ashok Kumar, Additional Chief Engineer was directed to pass the fresh award within three months. This judgement and order dated 18.11.1997 was never challenged by Union of India by filing writ petition or by availing any other remedy available in law. Not only this, Union of India appeared before the Arbitrator, Shri Ashok Kumar, who had already retired during the pendency of the appeal before the Court below with full knowledge. It is also clear from the record that arguments were also advanced before the Arbitrator only on merits and his competence to proceed with the arbitration proceedings was never raised before him.

10. In Prasun Roy Vs. Calcutta Metropolitan Development Authority and others, AIR 1988 SC 205, the Hon'ble Apex Court held that the principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceeding preclude such a party from the contending that the proceedings were without jurisdiction. Paragraphs 6, 7 and 8 of the said judgment are quoted hereinunder:-

"6. Mr. Kacker submitted that this principle could be invoked only in a situation

where the challenge is made only after the making of an award, and not before. We are unable to accept this differentiation. The principle is that a party shall not be allowed to blow hot and cold simultaneously. Long participation and acquiescence in the proceedings preclude such a party from contending that the proceedings were without jurisdiction.

7. Russel on Arbitration, 18th Edition page 105 explains the position as follows:

"If the parties to the reference either agree beforehand to the method of appointment, or afterwards acquiesce in the appointment made, with full knowledge of all the circumstances, they will be precluded from objecting to such appointment as invalidating subsequent proceedings. Attending and taking part in the proceedings with full knowledge of the relevant fact will amount to such acquiescence."

8. The Judicial Committee in decision in Chowdhury Murtaza Hossein V. Mussumat Bibi Bechunnissa (1876) 3 Ind App 209 observed at p. 220:

"On the whole, therefore, their Lordships think that the appellant, having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceedings to make their awards, did submit to the arbitration going on; that he allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself; and that is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award."

Relying on the aforesaid observations this Court in N. Chellappan V. Secy, Kerala State Electricity Board, (1975) 1 SCC 289: (AIR 1975 SC 230) acted upon the principle that acquiescence defeated the right of the applicant at a latter stage. In that case the facts were similar. It was held by conduct there was acquiescence. Even in a case where initial order was not passed by consent of the parties a party by participation and acquiescence can preclude future challenges."

11. In the case of Durga Charan Rautray Vs. State of Orissa, (2012) 12 SCC 513, in paragraph 16 the Hon'ble Apex Court held that once the disputes raised by appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable.

12. In M/S Construction India Vs. The Secretary, Works Department, Government of Orissa and others, (1998) 2 SCC 89, the Hon'ble Apex Court held that a conscious acquiescence on the part of the respondents in the continued jurisdiction of the arbitrator, it is no longer open to them to challenge the same on the ground of jurisdiction. In this case also (as in the case in hand) the appointment of arbitrator was by name and he continued even after he was no longer Chairman of Orissa Arbitration Tribunal. The decision of the Hon'ble Apex Court in Prasun Roy Vs. Calcutta Metropolitan Development Authority and others, AIR 1988 SC 205 = 1987 (4) SCC 217 is also cited with approval in paragraph 13 of this decision. Paragraph 6 of the said judgment is quoted hereinunder:-

"6. The order of appointment clearly shows that the appointment of Shri G.S. Patnaik, Chairman of the Orissa Arbitration Tribunal, is of a named arbitrator. The order of appointment does not qualify this appointment either by prescribing that he can

act as an arbitrator so long as he continues as Chairman of the Orissa Arbitration Tribunal; nor is there any implication to this effect in the Sub-Court's order. The reference to arbitration is also not to the Orissa Arbitration Tribunal. This would require three members constituting the Tribunal to sit together. Therefore, it is difficult to hold that the arbitrator who was named was to act as an arbitrator only so long as he held the office of the Chairman of the Orissa Arbitration Tribunal. The parties may choose an arbitrator for various reasons. They may rely on his expertise or his special skills at the time when they choose the arbitrator. According to the respondents they agreed to the name because there were departmental instructions to refer disputes to the arbitration of any member of the Orissa Arbitration Tribunal. But when the arbitrator is named, unless there is a clear intention spelt out in the agreement of reference to indicate that he would continue to be an arbitrator only so long as he holds a particular office, a mere reference to the office held by the arbitrator will not disqualify him from being an arbitrator after he ceases to hold that office. The arbitrator, therefore, had jurisdiction to give the awards."

13. Recently again while considering the competence/jurisdiction of the Arbitrator, the Hon'ble Apex Court in Union of India Vs. Pam Development (P) Ltd. (2014) 11 SCC 366 clearly held that since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned Arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996. Relevant paragraphs no. 16, 17, 18 and 19 are quoted hereunder:

16. As noticed above, the appellant has not only filed the statement of defence but also raised a counterclaim against the respondent. since the appellant has not raised the objection with regard to the competence/jurisdiction of the Arbitral Tribunal before the learned Arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.

17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16 clearly recognises the principle of kompetenz-kompetenz. Section 16 (2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in BSNL v. Motorola India (P) Ltd. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows: (SCC p. 349, para 39)

"39. Pursuant to Section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object.

The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived."

19. In our opinion, the obligations are fully applicable to the facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of jurisdiction of the Arbitral Tribunal."

14. Thus, in the facts and circumstances of the case and in view of the various decisions of Hon'ble Apex Court, it is no longer open to the petitioners, Union of India to challenge that the award was without jurisdiction as Shri Ashok Kumar, the Sole Arbitrator had no jurisdiction to proceed with the matter after his retirement.

15. In my opinion, except the aforesaid ground, no other ground to challenge the award and the judgements passed by the Court below can be now raised. This Court cannot sit in appeal over the decision of the Arbitrator by examining and re-examining the material and evidence before him. Further, no challenge to the finding of facts was made in the objections filed by the Union of India before the Courts below. Even otherwise apparently on the basis of arguments findings have been recorded by both the Courts below against the petitioners, which in my opinion are not open to challenge and cannot be re-appreciated under Article 226 of the Constitution of India.

16. No other point is pressed by the counsel for the petitioners.

17. In view of the aforesaid, the petition lacks merit and is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

Writ-C No. 33430 of 2012

Raghvendra Jeet Singh ...Petitioner
Versus
Board of Revenue & Ors. ...Respondents

Counsel for the Petitioner:
Sri Triveni Shankar, Sri Ajay Shankar, Sri Rajendra Kumar Pandey.

Counsel for the Respondents:
C.S.C.

Stamp Act, Art.-55 Schedule I-B- Surrender of title and interest-by coparcener in favor of Karta of Joint hindu family-whether can be termed release on gift?- held-'release'-each coparcener having common interest and title-can not be treated transfer-hence treating gift deed demand of additional stamp duty with penalty-held illegal in view of Dharmapal Case-petition allowed.

Held: Para-36
In the facts of the present case, the releasors together released 1/3rd share (each having 1/9th share) in favour of Karta and other co-parcener and not to a particular co-owner, the property was being held jointly and there was no partition of the interest in the property among co-owners, the document in question would be a release deed and not conveyance or a gift deed.

Case Law discussed:
AIR 1984 Allahabad 107; 2009 (1) AWC 473; (DHC) 2012-10-156; AIR 1998 Raj 348; AIR 1967 SC 1395; AIR 1979 SC 1395; AIR 1986 AP 42; AIR 2005 Bom 29; AIR 1998 Raj 223; 2009 (107) RD 438; (1985) 2 SCC 321:AIR 1985 SC 716; AIR 1958 SC 706:1959 SCR 479; (2007) 10 SCC 571; (2000) 8 SCC 249.

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

1. Mahendra Jeet Singh created H.U.F. of immovable property, Banglow No. 15/198, Civil Lines, Kanpur, during his life time in the name and style "Mahendra Jeet Singh H.U.F.". He died in 2002 leaving behind his son petitioner KARTA of the H.U.F., Geeta Mitthal (daughter), Rohan Singh (grandson), Sunaina Shah (grand daughter) and Ratna Singh (grand daughter) as heirs.

2. Rohan Singh settled in Canada, Sunaina at Kathmandum, Ratna Singh in Bombay, since over 20 years and are blood relations of the petitioner, accordingly, executed a release deed on 19.04.2011 relinquishing their claim, interest and title in the H.U.F. property.

3. The Sub-Registrar on 21.04.2011 declined to register the document, accordingly, referred the instrument to the Collector, stating that stamp duty of Rs. 500 has been paid, whereas, the deed seeks to transfer the share of the co-owners without consideration, in favour of the petitioner, therefore is a gift within the meaning of sub-section (14A) of section 2 of the Act. Collector by order dated 25.07.2011 assessed the property under Article 33 of Schedule 1-B of the Indian Stamp Act, 18991, accordingly, determined the deficiency of stamp duty at Rs. 1,13,74,710/-, penalty of Rs. 11,37,471/- and interest @ 1.5 per month from the due date was imposed. Aggrieved, by the order passed of the Collector Kanpur Nagar, petitioner preferred revision before the Chief Controlling Revenue Authority, which was dismissed by order dated 28.05.2012. The revisional authority was of the view that since the instrument is covered within the definition of conveyance, under sub-section (10) of Section 2 of the Act, as amended on 01.08.1981, being transfer by a co-owner of their share and interest to another co-owner would also be a conveyance, thus affirming the order of the Collector.

4. The petitioner is assailing the orders dated 25.07.2011 and 28.05.2012 passed by the Collector and Chief Controlling Revenue Authority.

5. I have heard learned counsel for the parties and perused the record.

6. Sub-section (10) of Section 2 defines conveyance as follows:-

"(10) "Conveyance".- includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for [by schedule 1, Schedule 1-A or Schedule 1-B]2, [as the case may be]3"

Explanation.-An instrument whereby a co-owner of a property having defined share therein, transfers such share or part thereof to another co-owner of the property, is for the purposes of this clause an instrument by which property is transferred.

7. Explanation was inserted vide U.P. Act No. 19 of 81 w.e.f. 01.08.1981.

8. Article 55 of the Schedule 1-B defines "Release" which is as follows:-

"55. Release, that is to say, any instrument not being such a release as is provided for by Section 23(A) whereby a person renounces a claim upon another person or against any specified property-

(a) if the amount or value of the claim does not exceed Rs. 2,500

(b) in any other case."

9. Gift has been defined in sub-section (14-A) of Section 2 which reads as follows:-

"(14-A) "Instrument of Gift"- "Instrument of Gift" includes an instrument whether by way of declaration or otherwise, for making or accepting an oral gift."

10. Article 33 provides for duty payable on gifts. Article 33 is as follows:-

"Gift-Instrument of, not being a Settlement (No. 58), or Will or Transfer (No. 62)."

11. Having noted the provisions of the Act, I proceed to examine the instrument and the pleadings of the parties.

12. Facts are not in dispute. The instrument is titled release deed and recites that the releasers, mentioned earlier, do declare, relinquish and release all rights, title, claims and interest which they might have or had in H.U.F. be land and a Pakka house/building thereon. Release was in favour of the petitioner and Smt. Geeta Mittal, the releasor namely Rohan Singh, Sunaina and Ratna together were having 1/3rd share in the property (1/9th each). The release is on free will and without any consideration.

13. The question, however, to be determined is as to whether the co-owners/co-parcener by relinquishing their interest and title in the H.U.F. property to another co-owner/co-parcener would fall within the Explanation to the definition of conveyance under section 2(10) of the Act.

14. The Explanation was incorporated on 01.04.1981, providing that, where a co-owner of a property having defined share therein, transfers such share or part there of to another co-owner of the property, is for the purpose of the sub-section an instrument by which the property is transferred.

15. Earlier interpreting the expression conveyance, as it stood prior to 01.08.1981, a Full Bench of this Court in Smt. Balwant Kaur and others Versus State of U.P.4, held that a document executed by one heir renouncing for consideration his claim in the inherited property in favour of other heir cannot be construed as a deed of conveyance.

16. After the amendment, Explanation to Section 2(10) was incorporated, this court (Single Judge) in State of U.P. Versus Dharam Pal and another5, interpreting the Explanation held that the co-sharers transferring their share to another co-sharers-having pre-existing right in property did not amount to transfer, rather, it only amounted to extinguishing of their existing share. Since there was no transfer to an outsider it would not amount to sale or conveyance.

17. Sri P.K. Jain, Senior Advocate, assisted by Sri Rajendra Kumar Pandey, learned counsel for the petitioner, would submit that the impugned orders are without application of mind. The document is a release document, does not fall within the Explanation to the expression of conveyance, the Collector has valued the entire property of the H.U.F., whereas, admittedly, only 1/3rd of the property has been released, the property, being a nazul property, belonging to the State could not have been sold and finally, the penalty could not have been imposed as every fact had been disclosed in the instrument, there was no suppression of any material fact in order to avoid payment of stamp duty.

18. Per contra, learned Standing Counsel, Sri Nimai Das, would submit that the instrument itself states that the releasors are co-owners/coparcener of the H.U.F. property, their share was released in favour of the KARTA and other coparcener, which would amount to transfer falling within the Explanation to Section 2(10), and is covered by the judgment rendered in Sarla Agarwal Versus Ashiwini Kumar Agarwal6 by the High Court of Delhi.

19. Rival submission fall for consideration.

20. The Collector was of the view that since there is no consideration mentioned in the instrument, therefore, the instrument would fall under Article 33 of Schedule 1-B of the Act, being a gift, whereas, the Chief Controlling Revenue Authority was of the opinion that the instrument would be covered under the expression conveyance being a transfer by a co-owner to another co-owner. In either case, stamp duty is chargeable on the value of the property.

21. Formal renunciation of a claim which the party relinquishing is entitled to put forward is a release chargeable under Article 55, whether the claim is legally correct or not is not relevant. Where by a document a person voluntarily renounces for consideration coparcenary rights of succession to impartible estate it is a release. There can be no release by one person in favour of another, who is not already entitled to the property as co-owner. Thus, by release, there is no transfer of interest or title to another person, who has no preexisting right to such property. A release can, therefore, be made in favour of a person who has a preexisting right and interest in the property. It would make no difference even where the release is without consideration.

22. Where the property is owned by two co-owners each having undivided equal share therein and one of them by a deed claims title while the other possession, the document would be a release and not a conveyance. Even where one of the co-sharers of the joint agricultural land had simply renounced his claim in favour of another co-sharer in respect of the same agricultural land, the document in question would be release deed and not a gift deed. (Vide State of Rajasthan Versus Alokik Jain7).

23. To distinguish between a release deed, or a gift deed or a sale deed, the decisive factor is the actual character of the transaction and precise nature of the rights created by the instrument. In the case of co-owners each co-owner is in theory entitled to enjoy the entire property in part or in whole. It is not therefore necessary for one of the co-owners to

convey his interest to the other co-owner. It is sufficient if he released his interest. The result of such a release would be the enlargement of the share of the other co-owner. The result of such a release should be the enlargement of the share of the other co-owner. A release can only feed title and cannot transfer title. (Vide Kuppuswami Versus Arumugam8, and Kuppuswami Chettiar v. S.P.A. Arumugam Chettiar9)

24. A document under which a Hindu coparcener purports to give up his right to the family property in favour of the remaining coparcener would not be a deed of conveyance but a deed of release. There is no difference in principle between such a document as between members of a coparcenary and as between co-owners. In order to class as a release, the executant of the instrument having common or joint interest along with other should relinquish his interest which automatically results in the enlargement of the interest and others. But where he executes the document in respect of his share in favour of a particular co-owner, it cannot be treated as a release and must come within the definition of conveyance. (Vide Kothuri Venkata Subba Rao Versus Deputy Registrar Gudur10).

25. A transaction to assume a character of conveyance, what is necessary is, transfer of interest from one co-owner to another co-owner. As against this, the provision of Article 55 of Schedule 1B of the Act stipulates that the release is that whereby a person renounces a claim upon another person or against any specified property.

26. A similar provision as contained in the Explanation to Section 2(10) of the Act (section 2g of the Bombay Stamp Act) came up for interpretation before the Bombay High Court. In Sri Shailesh Harilal Poonatar v. District Collector of Stamps and others11, the Court held that the co-owner having defined share or undefined share in the property will make no difference in order to be release.

"9. We are not impressed by the argument of the learned counsel for the respondents. Firstly because in every case of a release it is the release of a share or interest which is a defined share or interest in favour of other co-owners or persons who are holding a joint title in respect of the said property. Even in the case of Hindu Undivided property, every co-parcener will have a defined share which may not have been partitioned and in our view this shall make no difference whether a person is having a defined share in the property or an undefined share in the property as long as the interest is held jointly and there is no partition of the said interest among co-owners. Thus, we find that even if there is a defined share or interest in the property it can still be released in favour of another person. In such a case share or interest of the other co-owner will be accelerated and acquire a larger share than what he was originally holding. In Mulla's Transfer of Property, the word 'release' is explained as under:-

"A relinquishment is not an alienation".

(Refer: Gyan Chandra Versus State and others12)

27. The Explanation to the definition of conveyance under the Bombay Stamp Act refers to 'share' whereas the Uttar Pradesh amendment refers to 'defined

share', thus the co-owner should have a defined share in the property which could be transferred.

28. From the record of the instant case, I find that the release deed does not transfer any defined share in favour of a particular co-owner. The instrument merely relinquishes the right and interest in the property to the other co-owners. The releasers though they are co-owners have merely relinquished their right and interest in the property in question, thus, enhancing the share of the other co-owners and is not transfer of interest from one co-owner to another co-owner. The property in question is held jointly and there is no partition of the said interest among the co-owners, the instrument could not fall within the Explanation to the definition of conveyance. Release can be with consideration or without consideration. The document of release, merely, being without consideration would not qualify the instrument as an instrument of gift, for gift there must be a donor and a donee.

29. Under Section 3 of the Act, it is the 'instrument' which is chargeable to duty, and not the transaction. If the instrument, as in the present case, cannot be said to fall under the import of the Explanation to section 2(10) of the Act, the revenue authorities, on the basis of their own assumed transaction cannot impose stamp duty

30. Court in the case of Nand Kumar Agarwal Versus State of U.P.13, observed that:

"It is an acknowledged legal position that there are two guiding principles for applicability of the Stamp Act in respect of a particular document. They are :(1) The Court is not bound by the apparent tenor of an instrument, it shall decide according to the real nature or substance of the document; and (2) The duty is on the instrument and not on the transaction."

31. While under the Mitakshara Hindu Law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law, every coparcener takes a defined share in the property and he is the owner of that share. But there is unity of possession. The share does not fluctuate by births and death. Thus as regards the Dayabhaga law also the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family. (Refer: State of Maharashtra v. Narayan Rao14)

32. Where a coparcener expresses his individual intention in unequivocal language to separate himself from the rest of the family, that effects a partition, so far as he is concerned, from the rest of the family. By this process, what was a joint tenancy has been converted into a tenancy in common. Tenancy-in-common means that the share of each owner is specified and on his death it devolves on his heirs. A tenant-in-common is as to his own share, precisely in the same position as an owner of a separate property. The change of status from a joint member of a coparcenary to a separated member having a defined share in the ancestral property, may be effected orally or it may be brought about by a document, so long as there has been no partition in that sense, the interest of the separated member continues to extend over the whole joint property as before. (Refer: Nani Bai v. Gita Bai15)

33. Where the defendants acquired (purchased) the undivided interest of the coparceners in the joint property, it was held that they did not acquire the title to any defined share in the property and were not entitled to joint possession from the date of their purchase. They could work out their rights only by a suit for partition and their right to possession would date from the period when a specific allotment was made in their favour. (Refer: Subhodkumar v. Bhagwant Namdeorao Mehetre16)

34. Explanation to the definition of conveyance requires a co-owner of property having a "defined share", meaning thereby, the Explanation will not cover those co-owners who merely have a share in the property and their share has not been defined; as in the case of H.U.F. property, every coparcener will have a definite share and in my view this will make no difference as long as the interest is held jointly and there is no partition of the said interest among the co-owners.

35. In H.U.F., the co-parceners do not have exclusive rights on any specific property of the family, the property allotted to their share become specified only on partition; same is the position in the case of a partner of a firm, though the co-parceners like partners of a firm have a definite share in the H.U.F./partnership. (Refer: Jagatram Ahuja Versus The Commissioner of Gift Tax17)

36. In the facts of the present case, the releasors together released 1/3rd share (each having 1/9th share) in favour of Karta and other co-parcener and not to a particular co-owner, the property was being held jointly and there was no partition of the interest in the property among co-owners, the document in question would be a release deed and not conveyance or a gift deed.

37. I see no reason to take a different view as has been taken by this Court in Dharam Pal case (supra).

38. For the law and reasons stated, herein above, the impugned orders dated 28.05.2012 passed by the first respondent, Chief Controlling Revenue Authority/Board of Revenue, U.P. at Allahabad and order dated 25.07.2011 passed by the second respondent, Collector, Kanpur Nagar, respectively, is quashed.

39. The writ petition is allowed with cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.02.2015

BEFORE
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE ANJANI KUMAR MISHRA,J.

Writ-A No. 35877 of 2014

Dr. Virendra Singh ...Petitioner
Versus
Banaras Hindu University, Varanasi & Ors. ...Respondents

Counsel for the Petitioner:
In Person
Counsel for the Respondents:
Ajit Kumar Singh, S.C.

Constitution of India, Art.-226-dis-continuance of re-appointment-serious allegations of sexual misconduct with girl student of 4th year of civil engineering-three members committee-submitted detail report against petitioner-allegations regarding violation of natural justice-not available-held-no detail enquiry required-considering

verdict of Supreme Court in Avinash Nagra case-petition dismissed.

Held: Para-24
In Hira Nath Mishra (supra), the Supreme Court observed that the responsibility of an Institution towards its girl students was very great and it was not necessary to hold a detailed enquiry in matters relating to a complaint made by girl students regarding sexual misconduct. The Enquiry Committee that had been constituted by the Principal of the Institute also consisted of three teachers of the College which had recorded the statements and thereafter had submitted its report to the Principal who passed the order expelling the male students. The Supreme Court observed that in cases where girl students are involved, it is not necessary to hold a detailed enquiry or provide an opportunity to cross examine the witnesses. The Supreme Court also observed that in such circumstances it was not necessary to serve a copy of the enquiry report to the male students against whom the allegations had been made by the girl students. This is also what was observed subsequently by the Supreme Court in Avinash Nagra (supra). It is, therefore, not possible to accept the contention of the petitioner that the principles of natural justice have been violated in any manner.

Case Law discussed:
(1999) 1 SCC 759; (2004) 8 SCC 129; (2005) 3 SCC 409; (1973) 1 SCC 805; (1997) 2 SCC 534.

(Delivered by Hon'ble Dilip Gupta, J.)

1. The petitioner, who retired as a Dean in the Faculty of Engineering and Technology of the Banaras Hindu University, Varanasi1 in January 2011 but who was subsequently re-employed as a Professor in the Department of Civil Engineering in the Indian Institute of Technology (Banaras Hindu University) Varanasi2 upto 30 July 2014, has filed this petition to assail the order dated 26 April 2014 by which he was informed by the Institute that in view of the complaint that was received from a girl student of his Department regarding allegation of sexual misconduct and in view of the report submitted by the Women's Grievance Cell which examined the complaint, his re-employment as a Professor in the Institute stands discontinued with immediate effect.

2. It transpires from the records of the writ petition that after the petitioner retired as a Dean in the Faculty of Engineering and Technology of the University in the month of January 2011, he applied for re-employment. A letter dated 20 July 2012 was sent to the petitioner by the University informing him that the Executive Council of the University in its meeting held on 29 July 2012 had been pleased to re-employ him as a Professor and that if he was willing to accept the offer, he could submit his joining report to the Director of the Institute. The petitioner accepted the terms and conditions stipulated in the order and was deputed to the Department of Civil Engineering of the Institute for a period of one year or till the post was filled up on a regular basis. Before the term of one year was come to an end on 30 July 2013, the petitioner moved an application for extension of his re-employment as a Professor. It needs to be noted that the erstwhile Institute of Technology of the University became the Indian Institute of Technology (Banaras Hindu University), Varanasi with effect from 29 June 2012 under the provisions of the Institutes of Technology (Amendment) Act, 2012. A communication dated 10/11 December 2013 was sent to the petitioner by the Institute extending his re-employment for a further period of one year with effect from 30 July 2013 on the existing terms and conditions. The term of re-employment of

the petitioner as a Professor in the Institute, therefore, stood extended upto 30 July 2014.

3. On 18 April 2014, a girl student who was studying in Part-IV in the Department of Civil Engineering of the Institute submitted a complaint to the Director of the Institute that she had been sexually harassed by the petitioner and the complaint is as follows :-

"I wish to bring to your notice an incident of great concern and sorrow that happened on 18 April 2014 at around 5:30 pm.

I was sexually harassed by a senior professor, Virendra Singh (ex H.O.D. and ex Dean), of my department after he took me to a lonely place saying that he wanted me to have a look at the new apartment he had purchased. He first invited me to have tea with him at Vishwanath Temple and then asked me to accompany him to Lanka as he wanted to drink lassi. I tried to settle him to have his drink at the temple but he was adamant on going to Lanka. Out of respect, as he is the senior most professor of our department, I followed him dutifully to his car. On our way we met Prof. K.P. Singh. After the drink he said that he wanted to visit his newly purchased flat to check progress of its work and I had no option but to follow him.

In the lonely apartment after we passed the guards he put his arm on my shoulder. When I resisted he asked me if I wanted to see his apartment from inside. By that time I was feeling uneasy and refused the offer. After that he turned towards me in an attempt to kiss and forced me to enter the room.

Alarmed by the situation I ran away from the place. He followed me, forcefully hold my hand and shamelessly tried to persuade me to return to the apartment or least enter his car. Somehow I ran away from him and managed to inform Prof. Rajesh Kumar and Prof. P.R. Maiti, professors of my department.

Apart from this, he used to call me to his chamber very frequently, for project works, as he did to other female students of the department too. He would often ask us to visit his home in person to discuss work. On some earlier occasions when he had asked me to meet him outside the department, I had taken some friends with me to accompany us. This time he particularly asked me not to bring anyone with me saying that he did not feel comfortable in discussing his work that way. Thinking that the temple was a safe place, I agree to it. So finding me alone this time, he tried to take advantage of me.

This is a very shameful incident for our institute and extremely disturbing for me as I considered him to be my mentor. I request you to please do the needful by taking serious action against him and making sure that nothing like this happens again with any other girl. I also request you to take care of my security."

4. The complaint, which was submitted by the girl student on the same day the incident had happened, was forwarded by the Director of the Institute to the Women's Grievance Cell for making an enquiry into the conduct of the petitioner. A Committee was then constituted consisting of senior members of Departments of the Institute and the constitution of the Committee is as follows:-

1. Prof. Rekha Srivastava, Dept. of Mathematical Sciences, IIT
Chairperson

2. Dr. Kalpana Chaudhary, Department of Electrical Engineering, IIT Member

3. Dr. Medha Jha, Department of Civil Engineering, IIT Member
4.Smt. Swati Biswas Deputy Registrar, IIT Member Secretary

5. The Committee met on 22 April 2014, 23 April 2014 and 24 April 2014. The complainant, the petitioner, Dr. Rajesh Kumar (Associate Professor in the Department of Civil Engineering), Sri Karan Modi (a student of Part-III in the Department of Civil Engineering) and Dr. P.R. Maiti (Assistant Professor in the Department of Civil Engineering) were called to appear before the Committee. The Committee recorded the statements of the aforesaid persons and gave it findings on 25 April 2014 against the petitioner on the allegation made by the girl student. The Director of the Institute, thereafter, issued the order dated 26 April 2014 for discontinuance of the re-employment of the petitioner as a Professor in the Department of Civil Engineering of the Institute with immediate effect.

6. The petitioner, who appeared in person, refuted the allegation made by the girl student and submitted that the order was passed in complete breach of the principles of natural justice as no disciplinary enquiry was conducted against him. The petitioner submitted that the Committee merely recorded his statement and the statement of other persons and even the enquiry report submitted by the Committee was not supplied to him. The petitioner pointed out that the impugned order could not have been passed merely on the basis of the said report. In this connection, the petitioner placed reliance upon Statute 31(a) of the Statutes of the University as also Ordinance 23 to substantiate that his services could have been terminated only in accordance with the procedure prescribed therein which requires a detailed disciplinary enquiry to be held. The petitioner also submitted that as he had been re-employed by the University, it was not permissible for the Institute to have dispensed with his services.

7. Sri Ajit Kumar Singh, learned counsel appearing for the University and the Institute, however, submitted that in view of the seriousness of the allegations that had been made against the petitioner by a girl student of his Department which allegations were found to be true by the Committee consisting of Senior Professors of the Departments of the Institute, the re-employment of the petitioner as a Professor in the Department of Civil Engineering was discontinued and that in such circumstances, a detailed enquiry was not required to be held nor a copy of the report was required to be served on the petitioner. Learned counsel also submitted that the petitioner was re-employed by the Institute by order dated 10/11 December 2013 for a further period of one year with effect from 30 July 2013 and, therefore, the contention of the petitioner that the Institute did not have the power to dispense with his services and only the University could have dispensed with his services is not correct.

8. We have considered the submissions advanced by the learned counsel for the parties.

9. The petitioner retired as a Dean in the Faculty of Engineering and Technology of the University in January 2011. He, however, submitted an application for re-employment. He was re-employed as a Professor in the Department of Civil Engineering of the Institute for a period of one year. This decision was taken by the Executive Council of the University. Though the Institute of Technology of the University

became the Indian Institute of Technology (Banaras Hindu University), Varanasi in view of the provisions of the Act, the Executive Council of the University was to continue to function until the new Board was constituted for the Institute. It is for this reason that the Executive Council of the University took a decision on 29 July 2012 to depute the petitioner in the Department of Civil Engineering of the Institute for a period of one year. Subsequently, the Institute, by order dated 10/11 December 2013, extended the re-employment of the petitioner upto 30 July 2014. However, three months before the said period was to come to an end, a girl student in the Department of Civil Engineering in which the petitioner was a Professor made a complaint dated 18 April 2014 against the petitioner regarding sexual misconduct.

10. The Director of the Institute placed the complaint made by the girl student before the Women's Grievance Cell for immediately making an enquiry. A Committee consisting of senior members of the Institute comprising of Prof. Rekha Srivastava (Department of Mathematical Sciences), Dr. Kalpana Chaudhary (Department of Electrical Engineering) and Mrs. Medha Jha (Department of Civil Engineering) was constituted with Smt. Swati Biswas (Deputy Registrar of the Institute) as the Member Secretary. The complainant and the petitioner were called to appear before the Committee on 22 April 2014 and their statements were recorded. Dr. Rajesh Kumar, Associate Professor in the Department of Civil Engineering and Karan Modi, a student of Part-III in the Department of Civil Engineering were also called to appear before the Committee on 23 April 2014. The statements made by them were also recorded. Dr. P.R. Maiti, Assistant Professor appeared before the Committee on 24 April 2014 and his statement was also recorded. On the basis of the statements, the Committee submitted its report to the Director of the Institute which is as follows -

"1. Miss X, IDD Part-IV, Department of Civil Engineering, IIT (BHU), received a phone call at 3.30 p.. on 18.4.2014 from Prof. Virendra Singh, ex-head, Department of Civil Engineering & ex-Dean, IT, BHU to have 'Lassi' at Lanka. Whereas Prof. Virendra Singh informed the committee that invitation was from the student and he was not sure whether he called her or the student called him. (Further as per letter dated 23.04.14 of Prof. Virendra Singh addressed to the Director, ITT (BHU) he has accepted that he phoned her if she is coming to his room to interact about the research and asked her to come alone). But Miss X insisted him to have the drink at Vishwanath Temple. After reaching Vishwanath Temple at around 5.30 p.m., Prof. Virendra Singh asked her to accompany him to Lanka for lassi. The fact is that both of them went to Lanka together in the car of Prof. Virendra Singh which has been accepted by both of them.

2.Prof. K.P. Singh, ex-Director, IT, BHU met them in Lanka where both of them were walking to have 'Lassi'. Again this has been accepted by both of them.

3.After seeing off Prof. K.P. Singh, they drank 'Lassi. After drinking 'Lassi', Prof. Virendra Singh asked the complainant to visit his flat near Samne Ghat to check the progress of work of the flat. Prof. Virendra Singh denied the fact that she accompanied him to Samne Ghat and further narrated that the complainant left him after taking 'Lassi' in Lanka, but he accepted that from lanka he went to his

brothers place which is near to his apartment alone.

4. The complainant further narrated that, "In the lonely apartment after we passed the guard he put arm on my shoulder. When I resisted he asked me if I wanted to see his apartment from inside. By that time I was feeling uneasy and refused the offer. After that he turned towards me in an attempt to kiss and forced me to enter the room". These facts were denied by Prof. V. Singh. He accepted that he went alone to his brothers house which is near to 'Ojha Apartments'.

5.The complainant called her friend Mr. Karan Modi (her junior) IDD Part-III Department of Civil Engineering, ITT BHU after coming out of the flat and asked him to pick up her from Lanka. In the meantime, when she was walking towards Lanka from Samne Ghat, Prof. Virendra Singh called on her mobile and asked sorry for whatever happened.

6. Mr. Karan Modi picked her from Lanka and they called Ishu Bansal classmate of Miss X and all of them went to the house of Dr. Rajesh Kumar. From there, all of them went to the Department of Civil Engineering in the chamber of Prof. Rajesh Kumar. She narrated the whole incident in from of Prof. Rajesh Kumar and Dr. P.R. Maiti who eventually was present in the Department of Civil Engineering at that time. Dr. Rajesh Kumar informed the committee that at that time, the mental condition of the girl student was not good and she was in tremendous tension and this fact was supported by Dr. P.R. Maiti and Mr. Karan Modi also."

11. It is on a consideration of the statements made by the aforesaid persons that the Committee found as a fact that the complainant and the petitioner went to Lanka to have 'Lassi' and thereafter the petitioner took the complainant to his apartment where, according to the complainant, the sexual misconduct happened. The petitioner admitted that he went with the girl student to have 'Lassi' at Lanka but he denied that he took the girl student to his apartment. The Committee, however, found that other factors like calling Karan Modi, the complaint to Dr. Rajesh Kumar and the timing of the incident corroborated the statement of the girl student. The Committee also found that it was most unbecoming of a Professor of the Institute to have accompanied a girl student and that too to a lonely place which indicates his bad intention. The Board of Governors, therefore, ordered that the re-employment of the petitioner as a Professor in the Department of Civil Engineering of the Institute should be discontinued with immediate effect. It is this decision that was communicated by the Institute to the petitioner.

12. The petitioner has refuted the allegation of sexual misconduct made by the girl student and has submitted that a false complaint had been made by the girl student because of an incident that had happened on 12 April 2014. According to the petitioner, the complainant had earlier invited him for a cup of tea in a hotel on 12 April 2014. The petitioner accepted the invitation and during the meeting he found that the complainant and a third year student who were sitting on a bench in front of the petitioner started flirting in his presence. The petitioner claims that since he rebuked them she had filed a false complaint against him.

13. It is difficult to accept this submission of the petitioner. In the first instance, as is seen from the documents

which have been enclosed with the counter affidavit, this incident which the petitioner claimed had happened on 12 April 2014 was brought to the notice of the Director of the Institute only on 23 April 2014 when the girl student had filed the complaint on 18 April 2014 against the petitioner. It appears that as an after thought the petitioner has so stated to make out a defence for himself.

14. This apart, as noticed above, the Committee which consisted of senior teachers of the Institute had arrived at a conclusion on the basis of the statements made by the complainant, two Assistant Professors teachers and a student. The complaint was submitted by the girl student to the Director of the Institute on the same date the incident had happened. She narrated the sequence of events including what had happened in the lonely apartment. Soon after the incident she also informed two other Professors of the Department. The petitioner did admit before the Committee that he knew the complainant for the last 10 months; that after taking lassi he was with the complainant in Vishwanath Temple at 5:30 p.m. where he met Professor K.P. Singh at around 5:45 p.m. Though the petitioner has denied that he went to his new flat in Lanka/Samne Ghat with the complainant after having taken lassi, but he admits that he went alone to his brother's house situated closeby in front of Ojha Apartments at around 6:15 p.m. Prof. Rajesh Kumar also gave his statement before the Committee. He stated that the complainant had contacted him on 18 April 2014 immediately after the incident that had taken place and that he had advised her to make a complaint to the appropriate authority. On a query being made as to whether the complaint made by the girl student was correct, he stated that in his opinion the complaint was correct. He also stated that the mental condition of the complainant was not good and she was in tremendous tension at the time of reporting the incident. Sri Karan Modi stated before the Committee that the complainant had told him everything about the incident that happened on 18 April 2014. He also stated that when he and the complainant were studying in the Library at about 4:30 p.m., the complainant informed him that the petitioner had asked her to accompany him for a visit to Lanka to drink lassi. He also stated that the complainant had told him that she had narrated the entire incident to Prof. Rajesh Kumar. The statement of the girl student when appreciated in the background of the statements of the two Professors and the student to whom the girl student also confided, does inspire confidence.

15. In this regard, we need to remind ourselves of the observations that were made by the Supreme Court in Apparel Export Promotion Council Vs. A.K. Chopra3 that in a case involving charge of sexual harassment, the Courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities. The statement of the victim has to be appreciated in the background of the entire case, and when the evidence of the victim inspires confidence, the Courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity and sympathy is wholly misplaced and mercy has no relevance. The observations of the Supreme Court are as follows:-

"..... In the instant case, the behavior of respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer. In a case involving charge of sexual harassment or attempt to sexually molest, the courts are

required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or the dictionary meaning of the expression "molestation". They must examine the entire material to determine the genuineness of the complaint. The statement of the victim must be appreciated in the background of the entire case. Where the evidence of the victim inspires confidence, as is the position in the instant case, the courts are obliged to rely on it. Such cases are required to be dealt with great sensitivity. Sympathy in such cases in favour of the superior officer is wholly misplaced and mercy has no relevance....."

16. It is, in such circumstances, not possible for the Court to conclude that the findings recorded by the Committee of senior teachers of the Institute are perverse.

17. The issue, however, that also arises for consideration is whether in the facts and circumstances of the case, it was necessary for the Institute to have held a detailed disciplinary enquiry against the petitioner before discontinuing his re-employment.

18. It is trite that the rules of 'natural justice' are not embodied rules and they cannot be put into a strait-jacket formula. The underlying principles of natural justice is to check arbitrary exercise of power and, therefore, the principle implies a duty to act fairly. It is not possible to lay down a rigid rule as to when the principles of natural justice would apply as the requirements of natural justice must depend on the facts and circumstances of the case, the nature of the enquiry, the subject-matter to be dealt with. The Supreme Court in State of Punjab Vs. Jagir Singh4 and Karnataka SRTC Vs. S.G. Kotturappa5 has held that the principles of natural justice are required to be complied with having regard to the fact situation obtaining therein and cannot be applied in a vacuum without reference to the relevant facts and circumstance of the case.

19. In Hira Nath Mishra & Ors. Vs. The Principal, Rajendra Medical College, Ranchi & Anr.6 the Supreme Court examined at length the application of principles of natural justice in the context of an order that was passed by the Principal of a College expelling certain male students against whom the girls had made a complaint that they had entered the compound of the girls' hostel without clothes and had tried to pull the hand of one of the girls. The Principal of the College, when the complaint was filed by 36 girl students, entrusted the enquiry to a three member Committee consisting of teachers of the College. The Committee directed the four male students to appear in connection with the enquiry and were asked to write down whatever they had to say. The girl students, who were parties to the complaint, also gave their statements before the Enquiry Committee. The statements of the girl students had not been recorded in the presence of the male students. After making the necessary enquiry, the Committee found that the male students were guilty of grave misconduct and recommended that they should be expelled. Acting on this report, the Principal passed the order of expulsion. The Supreme Court held that in such circumstances, the requirement of natural justice was fulfilled and the relevant observations are as follows:-

"10. We think that under the circumstances of the case the requirements of natural justice were

fulfilled. The learned Counsel for the respondents made available to us the report of the Committee just to show how meticulous the members of the Committee were to see that no injustice was done. ..... The Committee on a careful consideration of the material before them came to the conclusion that the three appellants and Upendra had taken part in the night raid on the girls Hostel. The report was confidentially sent to the Principal. The very reasons for which the girls were not examined in the presence of the appellants, prevailed on the authorities not to give a copy of the report to them. It would have been unwise to do so. Taking all the circumstances into account it is not possible to say that rules of natural justice had not been followed. In Board of Education v. Rice 1911 AC 179 Lord Loreburn laid down that in disposing of a question, which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on everyone who decided anything. He did not think that the Board was bound to treat such a question as though it were a trial. The Board need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. More recently in Russell v. Duke of Norfolk 1949 1 All ER 109 Tucker, L.J. observed: "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." More recently in Byrne v. Kinematograph Renters Society Ltd. 1958 2 All ER 579 Harman, J. observed "what, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

11. Rules of natural justice cannot remain the same applying to all conditions. We know of statutes in India like the Goonda Acts which permit evidence being collected behind the back of the goonda and the goonda being merely asked to represent against the main charges arising out of the evidence collected. Care is taken to see that the witnesses who gave statements would not be identified. In such cases there is no question of the witnesses being called and the goonda being given an opportunity to cross-examine the witnesses. The reason is obvious. No witness will come forward to give evidence in the presence of the goonda. However unsavory the procedure may appear to a judicial mind, these are facts of life which are to be faced. The girls who were molested that night would not have come forward to give evidence in any regular enquiry and if a strict enquiry like the one conducted in a court of law were to be imposed in such matters, the girls would have had to go under the constant fear of molestation by the male students who were

capable of such indecencies. Under the circumstances the course followed by the Principal was a wise one. The Committee whose integrity could not be impeached, collected and sifted the evidence given by the girls. Thereafter the students definitely named by the girls were informed about the complaint against them and the charge. They were given an opportunity to state their case. We do not think that the facts and circumstances of this case require anything more to be done."

(emphasis supplied)

20. In Avinash Nagra Vs. Novodaya Vidyalaya Samiti & Ors.7, the Supreme Court also observed that in the facts and circumstance of the case, the conduct of the appellant was unbecoming that of a teacher and held that dispensing with a regular enquiry under the rules and denial of cross-examination was legal and not vitiated by violation of the principles of natural justice. It was found that the appellant, who was a Post Graduate teacher, went to the girls' hostel at 10:00 p.m. in the night and made sexual advances to a girl and when she ran away from his presence, he pursued her to the room where she locked herself. A report was submitted to the Director who found the appellant not worthy to be a teacher in the Institution. It is in this context that the Supreme Court observed that dispensing with a regular enquiry and denial of cross-examination did not vitiate the enquiry on the ground of violation of principles of natural justice. The observations are as follows:-

"12. ..... Therefore, greater responsibility is thrust on the management of the schools and colleges to protect the young children, in particular, the growing up girls, to bring them up in disciplined and dedicated pursuit of excellence. The teacher who has been kept in charge, bears more added higher responsibility and should be more exemplary. His/her character and conduct should be more like Rishi and as loco parentis and such is the duty, responsibility and charge expected of a teacher. The question arises: whether the conduct of the appellant is befitting with such higher responsibilities and as he by his conduct betrayed the trust and forfeited the faith whether he would be entitled to the full-fledged enquiry as demanded by him? The fallen standard of the appellant is the tip of the iceberg in the discipline of teaching, a noble and learned profession; it is for each teacher and collectively their body to stem the root to sustain the faith of the society reposed in them. Enquiry is not a panacea but a nail on the coffin. It is self-inspection and correction that is supreme. ..... Under those circumstances, the conduct of the appellant is unbecoming of a teacher much less a loco parentis and, therefore, dispensing with regular enquiry under the rules and denial of cross-examination are legal and not vitiated by violation of the principles of natural justice."

(emphasis supplied)

21. In Apparel Export Promotion Council (supra), the Supreme Court also explained what constitutes sexual harassment and that it is incompatible with the dignity and honour of a female and needs to be eliminated. The Supreme Court also pointed that there can be no compromise on such violations and any sympathy shown in such cases would have a demoralizing effect on women. Though the observations were made in connection with sexual harassment to a woman at work place, they would equally apply to sexual misconduct by teachers. The observations of the Supreme Court are as follows:-

"25. An analysis of the above definition shows that sexual harassment is a form of sex discrimination projected

through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such a conduct by the female employee was capable of being used for effecting the employment of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her.

26. There is no gainsaying that each incident of sexual harassment at the place of work results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty - the two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the 1LO Seminar held at Manila, it was recognized that sexual harassment of women at the work place was a form of 'gender discrimination against women'. In our opinion, the contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facets of gender equality, including prevention of sexual harassment and abuse and the courts are under a constitutional obligation to protect and preserve those fundamental rights. That sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate.

.....

28. The observations made by the High Court to the effect that since the respondent did not "actually molest" Miss X but only "tried to molest" her and, therefore, his removal from service was not warranted rebel against realism and lose their sanctity and credibility. ..... The High Court overlooked the ground realities and ignored the fact that the conduct of the respondent against his junior female employee, Miss X, was wholly against moral sanctions, decency and was offensive to her modesty. Reduction of punishment in a case like this is bound to have demoralizing effect on the women employees and is a retrograde step. There was no justification for the High Court to interfere with the punishment imposed by the departmental authorities. The act of the respondent was unbecoming of good conduct and behavior expected from a superior officer and undoubtedly amounted to sexual harassment of Miss X and the punishment imposed by the appellant was, thus commensurate with the gravity of his objectionable behavior and did not warrant any interference by the High Court in exercise of its power of judicial review."

22. What has been emphasised by the Supreme Court in the aforesaid decisions is that rules of 'natural justice' cannot remain the same under all conditions and that girls, in cases of sexual harassment, may not give evidence if a regular enquiry is held. Under since circumstance, the Committee of teachers that is constituted can record statements and no opportunity of cross-examination is required to be given nor a copy of the enquiry report is required to be supplied. The dispensation of a regular enquiry, therefore, under such circumstance does not result in violation of the principles of natural justice.

23. It is, therefore, not possible to accept the contention of the petitioner that a detailed disciplinary enquiry was required to be conducted. The petitioner was aware of the allegation that had been made against him as is clear from the reply that he had

submitted and had been given an ample opportunity to state his defence when he appeared before the Committee. The petitioner gave his statement before the Committee which constituted of three senior teachers of the Institute. The Committee also recorded the statements of the complainant and the other persons to whom the complainant had narrated the incident soon after it happened. The witnesses included Dr. Rajesh Kumar, Associate Professor and Dr. P.R. Maiti to whom the complainant had narrated the whole incident soon after it happened. The complaint was also filed by the complainant on the same day i.e. 18 April 2014.

24. In Hira Nath Mishra (supra), the Supreme Court observed that the responsibility of an Institution towards its girl students was very great and it was not necessary to hold a detailed enquiry in matters relating to a complaint made by girl students regarding sexual misconduct. The Enquiry Committee that had been constituted by the Principal of the Institute also consisted of three teachers of the College which had recorded the statements and thereafter had submitted its report to the Principal who passed the order expelling the male students. The Supreme Court observed that in cases where girl students are involved, it is not necessary to hold a detailed enquiry or provide an opportunity to cross examine the witnesses. The Supreme Court also observed that in such circumstances it was not necessary to serve a copy of the enquiry report to the male students against whom the allegations had been made by the girl students. This is also what was observed subsequently by the Supreme Court in Avinash Nagra (supra). It is, therefore, not possible to accept the contention of the petitioner that the principles of natural justice have been violated in any manner.

25. The contention of the petitioner that the Institute did not have the authority to discontinue the re-employment of the petitioner and the University alone could have dispensed with his services cannot also be accepted. As noticed above, the erstwhile Institute of Technology of the University became the Indian Institute of Technology (Banaras Hindu University) with effect from 29 June 2012 under the provisions of the Institutes of Technology (Amendment) Act, 2012. It was the Institute that granted him re-employment by letter dated 10/11 December 2013 for a further period of one year with effect from 30 July 2013. The Institute alone and not the University, therefore, could have dispensed with his services, which it did.

26. Thus, for all the reasons stated above, the order passed by the Chairperson of the Board of Directors of the Institute to discontinue the re-employment of the petitioner as a Professor in the Department of Civil Engineering of the Institute does not suffer from any illegality so as to call for interference of the Court under Article 226 of the Constitution.

27. The writ petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2015

BEFORE
THE HON'BLE SHASHI KANT, J.

Writ -A No. 37358 of 2012

Ram Nagina Lal Srivastava ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri Vivek Kumar Singh

Counsel for the Respondents:
C.S.C.

Civil Services Regulation-Regulation-370-Post retiral benefits-work charge employee-working on post of helper 01.08.79-regularized on 04.12.2008-retired on 31.01.2012 whether entitled for pension?-held-'yes'-considering verdict of Apex Court in Principal Secretary PWD in which judgment of Single Judge affirmed in special appeal-SLP dismissed period of work charge is to be counted for qualifying period of pension.

Held: Para-22
For the discussion made above, answer to question arisen before the court for consideration is in the affirmative, i.e., despite the provisions of Regulation 370 of Civil Services Regulations, services rendered by the petitioner as work charge employee will be counted in his regular services for determination of minimum period of 10 years qualifying services, for grant of pension and other retiral benefits.

Case Law discussed:
Writ-A No. 36803 of 2008; Writ-A 68515 of 2006; 2006 (2) ALJ 66; 2008 (4) AWC 3546 (LB); 2006(6) ADJ 384(DB); 2008(119) FLR 492; (2010) 4 Supreme Court Cases 317; SLP No. 2770 of 2014; 2009 (27) LCD 1163.

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

1. Heard Sri Vivek Kumar Singh, learned counsel for the petitioner and Sri Brajesh Kumar Yadav, learned Standing Counsel for the State of U.P.

2. By means of the present writ petition under article 226 of the Constitution of India, the petitioner seeks following reliefs:-

"(i) To issue a writ, order or direction in the nature of mandamus directing the respondent authorities to grant all post retiral benefits including the pension to the petitioner forthwith.

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

(iii) To award cost of the petition to the petitioner."

3. Brief facts according to the writ petition are that :

3.1. The petitioner had initially appointed as a work charge employee being a helper in the Tube-well Division, Azamgarh of Irrigation Department vide appointment order dated 01.08.1979 (Annexure-1 to the writ petition) and joined the services on 02.08.1979.

3.2. The petitioner was continuously worked on his post as work charge employee to the entire satisfaction of his superior officers and there was no complaint against him during his entire service period. As such, his entire service period was unblemished. His services were regularized by the order dated 04.12.2008, (Annexure-2 to the writ petition), he was appointed as Mate in the Laghu Dal Canal Division, Mirzapur. The petitioner worked there till attaining the age of superannuation on 31.01.2012.

3.3. After retirement he has made a representation before the Executive Engineer, i.e., respondent no. 4 on 03.03.2012 (Annexure-3 to the writ petition) requesting therein to release the post retiral benefits as well as pension to the petitioner at the earliest.

3.4. After receiving the above representation, Executive Engineer issued a letter dated 19.03.2012, (Annexure -4 to the writ petition) to the petitioner to provide him his signature as well as joint

photograph along with his wife for payment of gratuity. But there was nothing in the letter regarding payment of pension to the petitioner.

3.5. Despite completion of directions given in the letter dated 19.03.2012, payment of gratuity is not made to the petitioner.

3.6. The petitioner has sent a reminder on 26.04.2012 requesting therein to give pension to the petitioner and payment of gratuity.

3.7. The petitioner met the respondent no. 4 several times personally and requested him to pass the order for pension to the petitioner.

3.8. The respondents-authorities are sitting tight over the matter and are not deciding the claim of the petitioner for retiral benefit which caused irreparable loss to the petitioner.

3.9. Therefore, the petitioner has filed the present writ petition.

4. Learned counsel for the petitioner submits that it is well settled law that person, who had worked for such a long period as temporary employee and subsequently regularised on the said post then for the purposes of retiral benefits, services rendered by him on temporary basis, may also be counted for grant of pension. But the respondent no. 4 fails to consider this aspect of the matter. He is arbitrarily not passing any order on the application/ representation to release the pension or refuse the same. The representation moved by the petitioner for payment of post retiral benefits is still pending with the respondent authorities even the petitioner had not been paid the gratuity, despite completions of all formalities required in the letter dated 19.03.2012.

5. In support of his arguments, learned counsel for the petitioner has placed his reliance on the decisions of Thakur Prasad vs. State of U.P. Through Principal Secretary Food & Others (Writ-A No. 36803 of 2008) decided on 24.08.2009, Jawahar Prasad Tripathi vs. State of U.P. and others (Writ-A No. 68515 of 2006) decided on 29.11.2011, Board of Revenue, Lucknow & Ors. Vs. Prasidh Narain Upadhyay, reported in 2006 (2) ALJ 66 and Chedi Ram Maurya Vs. Uttar Pradesh Basic Education Board, Allahabad and others, reported in 2008 (4) AWC 3546 (LB).

6. Per contra, Sri Brajesh Kumar Yadav, learned Standing Counsel has vehemently opposed the submissions made by the learned counsel for the petitioner on the ground that the services of the petitioner were regularized on 04.12.2008 and he has served till 31.01.2012, i.e., date of his retirement.

7. In this way, the petitioner performed only about four years of his regular services. According to Government Order No. Sa-3-1152/Dus-915/89 dated 01.07.1989 only those incumbents are entitled for post retiral pension benefit, who have completed 10 years regular services. As such petitioner is not entitled for the pension beng made to the petitioner. He also submitted that payment of gratuity has been issued vide letter No.948/Ko.Mi. dated 24.8.2012 (Annexure- C.A. 2 to the writ petition) issued by Treasury Officer, Mirzapur.

8. He has placed his reliance in the cases of Bansh Gopal vs. State of U.P., reported in 2006 (6) ADJ 384 (DB) and State of U.P. Through Its Secretary, Irrigation Department, Vs. Ram Pratap

Shukla Son of Late Kewla Prasad Shukla, reported in 2008 (119) FLR 492.

9. In reply to above arguments, learned counsel for the petitioner submits that the Government Order dated 01.7.1989 (Annexure C.A.-1) provides about the pension and pensionary benefits to those Government employees who, were retired or died as a temporary employee and their services could not be regularized, and by perusal of the same, it is manifestly clear that the pension is provided to those government employees also who were not regularized in their department but they had continued for a minimum period of 10 years in the respective departments. In the present case, admittedly, the petitioner had worked for more than 10 years from his initial appointment dated 01.08.1979 till he reached at the age of superannuation on 31.01.2012. The respondents also admit that the petitioner had continuously worked from his initial appointment and there is no break in service and he had regularised on the post of Mate vide order dated 04.12.2008. As such, the petitioner is also eligible and entitled for pensionary benefits as per the Government Order dated 01.07.1989.

10. I have considered the rival submissions made by the learned counsel for the parties and perused the record.

11. In the facts and circumstances of the case, the question arises for consideration before this Court is as to whether the petitioner on the basis of services rendered after his regularization coupled with services rendered by him prior to his regularisation is entitled for pension and other retiral benefits or not ?

12. There is no factual dispute that on 02.08.1979 the petitioner had joined the services, as work charge employee (as helper) in the Tube-well division Azamgarh. His services were regularized on 4.12.2008 and he was retired on 31.01.2012 on attaining the age of superannuation and payment of gratuity was made to the petitioner vide order dated 24.08.2012 (Annexure C.A.-2)

13. Petitioner was denied benefits of pension on the ground that he has not completed minimum period of 10 years regular qualifying service as permanent or temporary Government Servant as required by Government Order dated 01.07.1989 (Annexure- C.A.-1).

14. Regulation 370 of Civil Services Regulation and Government Order dated 01.07.1989 are being reproduced herein below :

"370, Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post shall qualify except-

(i) periods of temporary or officiating service in non- pensionable establishment;

(ii)periods of service in work-charged establishment; and

(iii) periods of service in a post paid form contingencies."

Government Order dated 01.07.1989 :

उत्तर प्रदेश सरकार
वित्त (सामान्य) अनुभाग–3
सं0 : सा0–3–1152 / दस – 915 / 89
लखनऊ : दिनांक 1 जुलाई, 1989
कार्यालय ज्ञाप

विषय : अस्थायी सरकारी सेवकों की सेवा निवृत्ति/मृत्यु पर पेन्शनरी लाभों की अनुमन्यता।

महोदय,

1– उपर्युक्त विषय पर अधोहस्ताक्षरी को यह कहने का निदेश हुआ है कि सिविल सर्विस रेगुलेशन्स के अनुच्छेद 368 की व्यवस्था के अनुसार राज्य सरकार के अन्तर्गत की गयी सेवा पेंशन हेतु तब तक अर्ह नहीं मानी जाती है जब तक की सरकारी सेवक किसी पद पर स्थायी न हो गया हो। सरकारी सेवकों के यथा समय स्थायीकरण किये जाने हेतु शासन के विद्यमान आदेशों के बावजूद कुछ मामलों में प्रक्रिया सम्बन्धी अपेक्षायें पूरी न हो पाने के कारण सम्बन्धित कर्मचारी स्थायी हुए बिना ही अधिवर्षता पर सेवा निवृत्त हो जाते हैं जिससे उन्हें पेन्शनीय लाभ, अनुमन्य नहीं हो पाते हैं।

2– उपरोक्तानुसार अस्थायी रहते हुए सेवा निवृत्त हो जाने के कारण सरकारी सेवकों को होने वाली कठिनाइयों को दूर किये जाने का प्रश्न काफी समय से शासन के विचाराधीन रहा है और सम्यक विचारोपरान्त राज्यपाल महोदय ने सहर्ष यह आदेश प्रदान किये हैं कि ऐसे सरकारी सेवकों को जिन्होंने कम से कम 10 वर्ष की नियमित सेवा पूर्ण कर ली हों, अधिवर्षता पर सेवा निवृत्त होने अथवा सक्षम चिकित्सा प्राधिकारी द्वारा आगे सेवा करने हेतु पूर्णतया अक्षम घोषित कर दिये जाने पर अधिवर्षता / अशक्तता पेंशन सेवा निवृत्ति ग्रेच्युटी तथा पारिवारिक पेंशन उसी प्रकार स्वयं उन्ही दरों पर देय होगी जैसी कि स्थायी कर्मचारियों को उन्हीं परिस्थितियों में संगत नियमों के अन्तर्गत अनुमन्य होती है।

3– यह व्यवस्था उन मामलों में भी लागू होगी जहां अस्थायी रहते हुए 20 वर्ष की सेवा पूर्ण करने अथवा 45 वर्ष की आयु पूर्ण करने, जो भी पहले हो, के उपरान्त मूल नियम 56 के अन्तर्गत स्वेच्छया सेवा निवृत्त होने की अनुमति प्रदान की गयी हो।

4– यह आदेश 1.6.89 से लागू माने जायेंगे। उक्त दिनांक से पूर्व अस्थायी रहते हुए अधिवर्षता /अशक्तता पर अथवा स्वेच्छया सेवा निवृत्त हो चुके ऐसे कर्मचारियों के मामलों में जो उक्त दिनांक को जीवित हो, संगत व्यवस्थाओं के अन्तर्गत मिल चुकी ग्रेच्युटी, यदि कोई हो, का कोई पुनरीक्षण नहीं किया जायेगा। जिन मामलों में, संगत नियमों के अन्तर्गत, कोई ग्रेच्युटी अनुमन्य नहीं थी उनमें इस कार्यालय ज्ञाप के अन्तर्गत कोई ग्रेच्युटी अनुमन्य नहीं होगी। ऐसे सरकारी सेवकों को जो अस्थायी रहते हुए दिनांक 1–6–89 के पूर्व सेवा निवृत्त हो चुके थे और जिन्हें उसके कारण कोई पेंशन अनुमन्य नहीं हुई थी, दिनांक 1–6–89 से सेवा निवृत्ति के पूर्व सेवा की अन्तिम दस मास की औसत परिलब्धियों (दिनांक : 1–1–86 के पूर्व सेवा निवृत्त कर्मचारियों के मामलों में औसत परिलब्धियों का आशय उस वेतन से है जो उन्हें मूल वेतन 9(21) के अन्तर्गत मिल रहा था तथा 1–1–86 अथवा उसके उपरान्त के मामलों में परिलब्धियों का आशय उस वेतन से है जो मूल नियम 9(21)(1) में परिभाषित है) के 50 प्रतिशत की दर से उस दशा में पेंशन अनुमन्य होगी जब सेवा निवृत्ति के पूर्व उन्होंने 33 वर्ष की अर्हकारी सेवा पूर्ण कर ली हो। यदि अर्हकारी सेवा 33 वर्ष से कम रही हो तो पेंशन उसी अनुपात में कम हो जायेगी। इस प्रकार आगणित ऐसे कर्मचारियों की पेंशनों को जो दिनांक 1–1–86 के पूर्व सेवा निवृत्त हो चुके थे वित्त विभाग द्वारा निर्गत शासनादेश संख्या : सा–4–1120 / दस–87–301 / 1987 दिनांक 28–7–87 के रेडी रिकनरी भाग–1 एवं भाग–2 जैसी स्थिति हो के अनुसार 608 मूल्य सूचकांक के बराबर मंहगाई राहत का लाभ देते हुए पुनरीक्षित कर दिया जायेगा और दिनांक 1–6–89 से पुनरीक्षित धनराशि का लाभ दिया जायेगा।

5– इस कार्यालय ज्ञाप के अन्तर्गत पेंशन का किसी ऐसे कर्मचारी को राशिकरण अनुमन्य नहीं होगा जो 31–5–1974 अथवा उसके पूर्व सेवा निवृत्त हुआ हो। यदि इस कार्यालय ज्ञाप के अन्तर्गत किसी ऐसे कर्मचारी को पेन्शन दी जाये जो 31–5–1974 के उपरान्त सेवा निवृत्त हुआ हो तो उसे 1–6–89 के उपरांत अगली जन्म तिथि के समय उसकी आयु के समरूप दर पर मूल पेंशन की धनराशि पर राशिकरण अनुमन्य होगा और उसकी पेंशन से कम की गयी धनराशि उसकी वास्तविक सेवा निवृत्ति के दिनांक के 15 वर्ष के बाद रेस्टोर कर दी जायेगी।

6– दिनांक 1–6–1989 अथवा उसके बाद सेवा निवृत्ति / मृत्यु के जिन मामलों में उपर्युक्त व्यवस्था का लाभ दिया जाएगा, उनमें कार्मिक अनुभाग–1 के शासनादेश संख्या 19–8–1980 कार्मिक–1 दिनांकः 29–4–80 के अन्तर्गत, आनुतोषिक का लाभ नहीं होगा।

ह0/
विजय कृष्ण सक्सेना
प्रमुख सचिव।

15. There is no factual dispute that the petitioner had started the service on 02.08.1979 as work charge employee and he was regularised 04.12.2008 and retired 31.01.2012 on attaining the age of superannuation and he was denied the benefit of pension on the ground that he has not completed 10 years regular qualifying services as permanent or temporary Government servant, as such, he is not entitled for the pension, to the pension under Government Order dated 01.07.1989.

16. Cases of Thakur Prasad, Board of Revenue and Chedi Ram Maurya (All Supra), relied upon by the learned counsel for the petitioner, are not related to work charge employees, therefore, they are not applicable to the facts of the present case.

17. In the Case of Jawahar Prasad Tripathi (Supra), the petitioner was appointed as Store Munshi on 1.12.1966 in the work charge establishment of respondent no. 2 Executive Engineer Irrigation Division-II, Maharajganj. After putting long service, he was regularized in service in the establishment w.e.f. 1.8.1996. The petitioner was superannuated on 31.12.2005. He was denied the benefit of pension on the basis of Government Order No. 3/1168/Da. S-935-87 dated 22.6.1987, on the ground that employee, who does not complete his 10 years regular service in the establishment, would not be entitled to pension. The petitioner has challenged that order by means of Writ-A 68515 of 2006, which was allowed by Hon'ble learned Single Judge in terms of the following order :

"For the reasons discussed above, the writ petition is allowed and respondents are directed to provide pensionary benefit to the petitioner as is admissible under the rules. Let this process be completed within a period of two months from the date a certified copy of this order is produced before the respondent no. 2."

18. Though, in the cases of Bansh Gopal vs. State of U.P.and State of U.P. Through Its Secretary, Irrigation Department, Vs. Ram Pratap Shukla Son of Late Kewla Prasad Shukla, petitioners of those cases were denied the benefits of pension on the ground that they have not completed regular service of 10 years and their services rendered as work charge employees prior to their regularisation could not be counted in their regular service as per provisions of Regulation 370 of Civil Services Regulations referred above. But now these cases are not good law in the light of subsequent judgements of Hon'ble The Apex Court as well as of this Court, which are being discussed herein after.

19. While deciding civil appeal against the order passed by Pubjab & Haryana High Court regarding counting of work charge employees for determining qualifying services for the purposes of pension, Hon'ble Apex Court in the case of Punjab Electricity Board and another v. Narata Singh and another, reported in (2010) 4 Supreme Court Cases, 317 has held in paras 39, 40, 41 and 42 as follows :

"39. The learned counsel for the appellants pointed out the finding recorded by the Division Bench in the impugned judgment to the effect that "we are, therefore, clearly of the opinion that the work charged service of the appellant with the Board must be counted for determining qualifying service for the purpose of pension" and argued that the judgment of the High Court should not be construed to mean as giving direction to the appellant to include previous service rendered by the respondent No.1 as work charged employee of the State Government for pension purposes.

40.So far as this argument is concerned, it is true that the Division Bench of the High Court has expressed the above opinion in the impugned judgment. However, the reference to Rule

3.17(ii) of the Punjab Civil Services Rules as well as the Full Bench decision of the Punjab and Haryana High Court in Kesar Chand vs. State of Punjab & Ors. [1988 (5) SLR 27] and speaking order dated November 16, 2005 passed by the Board rejecting the claim of respondent No.1 makes it abundantly clear that the High Court has directed the appellants to count the period of service rendered by the respondent No.1 in work charged capacity with the State Government for determining qualifying service for the purpose of pension. Further, the respondent No.1 has been directed to deposit the amount of Employee's Contributory Fund which he had received from the appellants along with interest as per the directions of the Board before the pension is released to him.

41.All these directions indicate that the High Court had come to the conclusion that the period of service rendered by the respondent No.1 in work charged capacity under the State Government should be taken into consideration for determining qualifying service for the purpose of pension. Non-mention of such direction in the impugned judgment is merely a slip and the appellants cannot derive any advantage from this.

42. The net result of the above discussion is that this Court does not find substance in any of the arguments advanced on behalf of the appellants. The appeal lacks merit and therefore, deserves to be dismissed. Therefore, the appeal fails and is dismissed. There shall be no order as to costs."

20. Hon'ble Apex Court has also dismissed S.L.P. No. 2770 of 2014 (State of U.P. Through Principal Secretary Public Works Department Lucknow & Others vs. Prem Chandra And Others vide judgment and order dated 17.01.2014, filed against the judgment and order dated 13.05.2013 passed in Special Appeal (Defective) No. 264 of 2013 whereby a Division Bench of this Court has affirmed the judgment and order dated 9.5.2011 passed by Bench of a Single Judge of this Court in the case of Mohd. Mustafa vs. State of U.P., reported in 2009 (27) LCD 1163, relevant paras of that judgement and order runs as follows :

"11. In the case of State of U.P. and others v. Rajendra Nath Pandey (supra) a Division Bench of this Court while deciding the special appeal has granted pension to a person who has rendered regular service of only 7 months and 26 days. Their Lordships dismissed the special appeal of the State and held that the entire service of the petitioner shall be counted for the purpose of pensionary benefits and the employee was granted pension without giving any benefit of seniority.....

14. In view of what has been stated above, the opposite parties are directed to allow the pensionary benefits to the petitioner considering him to have completed 10 years of regular service and in total 23 years of service and pay him pension regularly every month from the date he has retired from service."

21. In the case of Parmatma Ram vs. State of U.P and others, another Division Bench of this Court while deciding the appeal filed against the order granting relief of pensionary benefits to the work charged employee has held as follows :

"6. ..... Thus, the dispute has attained finality to the extent that the work charged employees are entitled for

pensionary benefits and other retiral dues as they have otherwise worked continuously for the qualifying period of 10 years or more.

8.In view of the above, the matter is no longer res-integra. The ratio has already been propounded by the Hon'ble Supreme Court that work charged employees are entitled for pensionary and other benefits if they have worked continuously for the qualifying period.

9.Hence, in the facts and circumstances aforesaid, the appeal is allowed. The order dated 22.10.2013 passed by the writ Court is quashed. The State Government is granted three months time for processing the pension and other retiral benefits, which may be permissible to the petitioner."

22. For the discussion made above, answer to question arisen before the court for consideration is in the affirmative, i.e., despite the provisions of Regulation 370 of Civil Services Regulations, services rendered by the petitioner as work charge employee will be counted in his regular services for determination of minimum period of 10 years qualifying services, for grant of pension and other retiral benefits.

23. In the result, writ petition is allowed and the respondents are directed by issuing writ in the nature of mandamus to complete the necessary formalities for grant of pension and other retiral benefits to the petitioner, by counting the services of the petitioner rendered as work charge employee in his regular service for the purposes of determination of regular qualifying services of the petitioner as required for pension, within two months from the date of production of a certified copy of this order.

24. The writ petition, is accordingly, allowed.

25. No order is being passed for payment of costs.
