ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.04.2015

BEFORE
THE HON'BLE DR. DEVENDRA KUMAR ARORA, J.

Misc. Single No. 3 of 1993

Northern India Iron Press Work (P) Ltd. ...Petitioner
Versus
State of U.P. & Anr. ...Respondents

Counsel for the Petitioner:
Sri R.A. Shankhdhar, Sri N.K. Seth

Counsel for the Respondents:
C.S.C.

Stamp Act-Section-47(2)-Market value-explained petitioner purchased agricultural land-on circle rate of Rs. 66000/-paid stamp duty on 77000/-on complaint by private person-notice issued to pay additional duty as the land being used for running cement factory-without evidence-held-market value-is the value general buyer may offer-and not future use-impugned order quashed.

Held: Para-32
This is very surprising that opposite party no. 2, on the basis of some complaint, came to the conclusion that cement factory will be established on the land in question, whereas except that complaint there is no evidence on record, which establishes that the petitioner intends to establish a cement factory. It is settled legal position that stamp duty is to be paid on the basis of the use of the land at the time of registration of document and no inference can be drawn for changing the nature of the land in future by the purchaser.

Case Law discussed:
AIR 2009 Alld. Pg. 31; 2008 (26) LCD Pg. 590; 1999 (90) RD Pg. 521; 2008 (104) RD Pg. 235.

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

1. Heard Sri N. K. Seth, learned Senior Advocate, assisted by Sri Ashish Chaturvedi and Sri Badrul Hasan, learned Addl. Chief Standing Counsel, appearing on behalf of opposite parties.

2. By means of present writ petition, the petitioner has prayed for a writ in the nature of certiorari for quashing of the impugned order dated 22nd September, 1992, passed by the Addl. District Magistrate (Finance & Revenue), Lucknow by which it was directed that since the petitioner is a company and purchased the land in question for industrial/commercial purposes, therefore, the proper value of the land should be at the rate of Rs. 13/- per square feet and not at the rate of Rs. 14,900/- per bigha, as claimed by the petitioner. After valuing the said land @ Rs. 13 per square feet, the learned Addl. District Magistrate (Finance & Revenue), Lucknow held that the market value of the said land is Rs. 14,68,519/- and the stamp duty should have been paid on such value of Rs. 14,68,519/- and, as such, petitioner was directed to deposit the deficit stamp duty of Rs. 1,73,925/- within ten days, otherwise, proceedings will be initiated against the petitioner under the provisions of Land Revenue Act.

3. Submission of learned counsel for the petitioner is that the petitioner is a Company under the provisions of Companies Act, 1956, having its registered office at Aishbagh, Lucknow. Amongst other objects of the petitioner-company one of the object was to carry on business of farming including dairy farming etc. and the same has been clearly

mentioned in clause (c) of sub-clause 5 at page 4 of the Memorandum of Association of the petitioner-company.

4. Further submission of learned counsel for the petitioner-company is that one Smt. Jairani was the owner of Khasra plot no. 854, measuring 3 bigha and 11 biswas and khasra plot no. 856 measuring 12 biswas, total measuring 4 bigha and 3 biswas in Mauja Udaipur, Pargana Nigohan, Tehsil Mohanlalganj, District-Lucknow in which she was carrying on farming. Smt. Jairani was interested in selling a piece of said land and the petitioner being interested in purchasing the same, offered a price of Rs. 77,000/- which she accepted and a sale- deed was executed by Smt. Jairani in favour of the petitioner-company in respect of the said plots of land on 30.1.1992 which was presented before the Sub Registrar, Mohanlalganj, Lucknow.

5. It is also submitted by the learned counsel for the petitioner that the land purchased by the petitioner-company was 'Harfour Matiyar''. For the purposes of stamp duty and registration, the market value of the property is to be determined as per the rate notified by the Collector, Lucknow vide its order dated 24th January, 1990.

6. At the relevant time, Collector, Lucknow vide order dated 24th January, 1990 fixed the rate of the land of 'Har-4 Matiyar' as Rs. 12,500/- per bigha. On the basis of the said rate the total value of the land purchased by the petitioner comes to Rs. 44,120/-. It is also submitted that the Collector, Lucknow revised the said rate vide order dated 30.1.1992 w.e.f. 1.2.1992 and fixed rate as per Rs. 15,900/- per bigha and at such rate the total value of the land comes to Rs. 66,000/-. However, since the sale consideration was Rs. 77,000/-, stamp duty was paid by the petitioner on the said value of Rs. 77,000/- which was above the value of the land at the rate fixed by the Collector, Lucknow.

7. In view of the above, submission of learned counsel for the petitioner is that the petitioner complied all the provisions of Indian Stamp Act with respect to payment of stamp duty for the purposes of registration of the land.

8. Petitioner was asked to receive notice from opposite party no. 2 under section 47 (2) of the Stamp Act mentioning therein that the sale deed executed by Smt. Jairani in favour of the petitioner-company is under-stamped and the petitioner was required to show-cause as to why the deficit stamp duty and penalty be not realized from the petitioner. The petitioner filed objection dated 12th August, 1992 to the said notice dated 21st July, 1992 along with the affidavit of S/Sri Sushil Kumar Agarwal, Amit Kumar Gupta and Pravin Kumar Gupta, stating therein that the valuation of the land in question was in no case over Rs. 66,000/- but since the sale consideration agreed was Rs. 77,000/- stamp duty on the said value was paid and the sale deed in no case is under-stamped. In fact, the said land was purchased for the agricultural purposes and not for setting up a factory. It has further been stated that in Gosainganj, Lucknow there is no commercial complex and the fixation of the value of the land on commercial basis is absolutely illegal and arbitrary.

9. Opposite Party No. 2, without appreciating the objection raised by the petitioner, vide order dated 22.9.1992

directed the petitioner-company to pay difference of the stamp duty as petitioner is a company and had purchased the said land for industrial/commercial purposes, and, as such the proper value of the land should be at the rate of Rs. 13/- per square feet and not at the rate of Rs. 15,900/- per bigha, as claimed by the petitioner. As such, valuing the said land at the rate of Rs. 13/- per square feet the opposite party no. 2 held that the market value of the said land is Rs. 14,68,519/- and the stamp duty should have been paid on the said value and the petitioner was directed to pay deficit stamp duty of Rs. 1,73,925/-. The petitioner feeling aggrieved against the said order has approached this Court for setting aside the impugned order.

10. Shri N.K. Seth, learned counsel for the petitioner also submits that the land in question was purchased by the petitioner for agricultural purposes, which is also one of the object of the petitioner's company and, therefore, the contention of opposite party no. 2 that land was purchased by the petitioner for commercial purposes is absolutely misconceived. It is also submitted that at the relevant time there was no commercial complex in the area and fixation of the value of land on commercial basis is absolutely misconceived. It is very emphatically submitted that the land for the purposes of stamp duty cannot be valued considering its future land use. The land has to be valued considering its location etc. at the time of its purchase.

11. Further submission of learned counsel for the petitioner is that at the time of purchase, the land in question was agricultural land and was being used for agricultural purposes and specific averments to the same effect have been made in para-3 of the writ petition and the said fact has not been disputed in para-12 of the counter affidavit. Similarly, the type of land is Har-4-Matiyar and the same has also not been disputed by the opposite parties in the counter affidavit.

12. Learned counsel for the petitioner in support of his submissions placed reliance on the judgment and order rendered in following cases:

(1) ITC Ltd. Vs. State of U.P.; AIR 2009 Alld. Pg 31, Pr. 30, 31 and 32.

(2) Naresh Kumar Sonkar Vs. State of U.P. and others; 2008 (26) LCD Pg. 1590 Pr. 19, 20 and 21.

(3) Smt. Har Pyari and others Vs. District Registrar Aligarh; 1999 (90) RD Pg 521 Pr. 6 and 11.

(4) Kishore Chandra Agarwal v. State of U.P. and others; 2008 (104) RD Pg 235 Pr. 16, 23 and 25.

13. It is further submitted that the market value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. The market value is what a general buyer may offer and what the officer may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future. Even subsequent improvement or change in the nature or use of the land, which may result into enhancement of the market value of the property, is not to be taken into account.

14. A counter affidavit has been filed on behalf of opposite parties, in which it has been stated that Sub-Registrar, Mohanlalganj, Lucknow

submitted a reference/report that the purchaser of the land is an Industrial/Commercial Institution and at the time of execution of sale deed, the petitioner paid Stamp Duty at the agricultural rates. However, it would be at the rate of Rs. 13.00 per square feet. It is also submitted that in view of the report of Sub-Registrar, a Case No. 3138/Stamp, State Vs. Northern India Iron Press Works (Pvt.) Ltd. was registered against the petitioner under the Indian Stamp Act and during the time of proceedings of the case, the petitioner failed to submit any proof in its favour that the property in question has been under the agricultural uses. On the contrary, there was no evidence on record that the land will not be used for construction of Cement Factory. It is submitted that the competent court after examining the matter passed the order dated 22.09.1992 and directed the petitioner to make good the deficiency of the stamp duties.

15. A plea of alternative remedy to file an appeal has also been raised before the Chief Controlling Revenue Authority against the order dated 22.09.1992.

16. I have considered the submissions of learned counsel for the parties and gone through the record.

17. Before examining the facts of the present case, this Court examined various judgments on the issue of determination of stamp duty payable on property.

18. It is settled position that the Rule of Alternative Remedy does not oust the jurisdiction of the Court, if found necessary for promotion of justice and prevention of injustice.

19. In the case of Prakashwati Vs. Chief Controlling Revenue Authority , Board of Revenue; 1996 AWC 1331, the Apex Court had held that situation of a property in an area close to a decent colony not by itself would make it a part thereof and should not be a factor for approach of the authority in determining the market value. According to the said decision , Valuation has to be determined on constructive materials which could be made available before the authorities concerned."

20. In Anirudha Kumar and Ashwini Kumar Vs. Chief Controlling Revenue Authority, (2000 (3) AWC 2587), this court has referred the aforesaid Prakashwati's case (supra) and observed as under :

"in the present case , the market value is to be determined on the basis of the value that would satisfy the vendor. Thus . The question of future potential cannot be a factor determining the market value of such a land for the purpose of stamp duty payable under the stamp act. The vendee pays the price that satisfies the vendor and,therefore, it is the utility of the land as on the date of transfer by the vendor and as such, if the land was an agricultural land, it has to be treated as such and the valuation has to be done accordingly. Whether in Future the purchaser puts the land into residential use or changes the character is immaterial for the purpose of payment of stamp duty. The principal that has been laid down in P. Ram Reddy (supra) can be attracted for the purpose of determining the market value only to the extent of potential as on the date of transfer and not beyond. Thus, the market value has to be determined according to the factors , which include

the situation of the land, the amenities available in and around and various other factors, including close proximity of the residential area as well as any transfer made immediately before the transfer or after the transfer in close proximity if such documents are produced in respect of the area that similarly situated land by either of the parties."

21. In Rakesh Chandra Mittal and others vs. Additional District Magistrate (2004 (3) UPLBEC 2434, a Division Bench of this Court held-

" It is well settled that market value of the property has to be determined with reference to the date on which the document is executed. Market value as such keeps on varying and changing. Any subsequent improvement or change in the nature or user of the land, which may result into enhancement of the market value of the property, is not to be taken into account and it is only the value of the property on the date of execution of the document that is to be considered for the purpose of determination of proper stamp duty payable on the instrument."

22. In Shakumbari Sugar And Allied Industries Ltd. Vs. State of U.P. & others,(2007 (5) ADJ 602) some land was purchased through a Sale Deed dated 22.7.94. Since the land was agricultural in nature, the petitioner paid the stamp duty in accordance with the circle rate issued by the District Magistrate. On 13.2.1995, a notice under Section 47-A read With section 33(4) of the Stamp Act was issued to show cause , as to why the deficiency of stamp duty should not be levied. In the notice, it was alleged that the petitioner had purchased the land for industrial purposes and as such the stamp duty on the property is to be paid on the basis of market value of the land for industrial purpose. This court placing reliance on various citations has held that the market value of the property is to be determined with reference to the date on which the document is executed.

23. Apart from the above decisions, a Full Bench of this court in Shri Ramesh Chandra Srivastava, Kanpur vs. State of U.P. and others, 2007 U.P.T.C. 335 held that the market value of the property has to be determined with reference to the date of which the document is executed.

24. In the case of Sarva Hitkarini Sahkari Avas Samiti Allahabad and another Verses State of U.P and others. ,(2007(103)RD19) it has been observed that the rules framed for determining market value under the Stamp Act and circle rates circulated under said rules are relevant only for initiation of proceedings under section 47-A of Stamp Act. However, after initiation of the case the said rules become irrelevant and while deciding the case market value shall be determined on the basis of general principles for determining market value which are applicable to the land acquisition matters. Moreover, future use of the property is not decisive."

25. In the case of Kishore Chandra Agarwal; vs. State of U.P. & others, reported in 2008 (104) RD 235, this Court has held that the obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice, which the quasi-judicial authorities are bound to observe. An arbitrary action is ultra virus.

26. In the case of I.T.C. Ltd. vs. State of U.P. , reported in AIR 2009 Allahabad 31, this Court has held that market value cannot be determined with reference to use of land for which buyer intends to put it-stamp duty is payable on property as it stands on date of execution of deed. The relevant paras 30 to 32 of the judgment read as under:

Para 30. "Thus, the legal position which emerges out from the aforesaid cases is that the market value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. The market value is what a general buyer may offer and what the officer may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future. Any subsequent improvement or change in the nature or user of the land, which may result into enhancement of the market value of the property, is not to be taken into account and it is only the value of the property on the date of execution of the document that is to be considered for the purpose of determination of proper stamp duty payable on the instrument.

Para 31 In addition to above legal proposition, it may be pointed out that the State Government has issued a Government Order dated 16.9.1999 to all the Divisional Commissioners, District Magistrates and Additional District Magistrates (Finance & Revenue), providing therein that while determining the valuation of the property under 1997 Rules, neither the future potential or use of the property nor the status of the purchaser (Organization, Society, Company etc.) will not be taken into consideration. ..

Para 32. Having considered the submissions made by the learned Counsel for the parties and the materials placed before this Court, it appears that the authority had proceeded to determine the value on the presumption that though the land is agricultural land but it has not been purchased for the said purpose. The said presumption does not appear to be sound and reasonable."

27. Admittedly, the petitioner is a Company under the provisions of Companies Act, 1956 and as per Memorandum of Association of the petitioner-company, amongst other objects, one of the object for which the company was established, was to carry on business of farming including dairy farming etc., which has been mentioned in Clause (c) (sub clause-5 at page 4 of the memorandum of association of the petitioner. The same reads as under:

"To carry on the business of farming including as dairymen, fruit, farmers livestock breeders, poultry farmers, timber growers, horticulturists, seed merchants, processors of agricultural proceeds and generally to manage improve, farm cultivate, acquire, lease undertake, exchange, purchase, sell or otherwise deal with or dispose of agricultural lands and generally to carry on the business of advisers on problems relating to the administration, organization and work of farms, training of personnel thereof, of system or process relating to the production, storage, distribution, marketing and sale thereof and/ or relating to the rendering of service in connection therewith."

28. Admittedly, the petitioner is a Company under the provisions of Companies Act, 1956 and as per Memorandum of Association of the petitioner-company, amongst other objects, one of the object for which the company was established, was to carry on business of farming including dairy farming etc., which has been mentioned in

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29. The petitioner purchased a piece of land of Khasra plot no. 854 measuring 3 Bigha and 11 Biswas and Khasra plot no. 856, measuring 12 Biswas, total measuring 4 Bigha and 3 Biswas in Mauza Udaipur, Pargana Nigohan, Tehsil Mohanlalganj, District-Lucknow at the price of Rs. 77,000/- and the sale-deed was executed on 30.01.1992. As per submission of learned counsel for the petitioner, the type of land is Har-4-matiyar. As per circle rate fixed by the Collector, Lucknow, the value of the land comes to Rs. 66,000/-, since the sale consideration was Rs. 77,000/-, therefore, stamp duty was paid by the petitioner at the rate of Rs. 77,000/-, which was above the value of land as well as fixed by the Collector, Lucknow.

30. It appears that subsequently on the basis of some complaint made by some local residents, Sub-Registrar, Mohanlalganj submitted a report on the basis of which Case No. 3138/Stamp, State Vs. Northern India Iron Press Works (Pvt.) Ltd. was registered against the petitioner under the provisions of Stamp Act and notice was issued to the petitioner. After examining the reply of the petitioner, impugned order dated 22.09.1992 was passed, holding that the land in question was purchased for establishment of Cement Factory and, therefore, petitioner's company was required to pay stamp duty at the circle rate fixed for commercial purposes and the same being Rs. 13/- per square feet, the value of land was assessed as Rs. 14,68,519/- and deficiency of stamp duty of Rs. 1,73,925/- was raised against the petitioner.

31. This Court has examined the impugned order dated 22.09.1992 and from the perusal of the same, it appears that the opposite party no. 2 while examining the matter of deficiency in stamp duty in registration of document, observed that the purchaser of land in question is an industrial/commercial institution and will establish industry on the same and this fact has been confirmed by one Shri Suresh Kumar and other local residents of the area vide their complaint dated 22.09.1992 to the effect that on the land in question Cement Factory will be established and on this ground, opposite party no. 2 came to the conclusion that the land in question has not been purchased for agriculture, as no evidence has been produced with respect to agricultural activities being carried out, therefore, stamp duty is to be paid on the basis of Industrial/Commercial rates and accordingly passed the impugned order.

32. This is very surprising that opposite party no. 2, on the basis of some complaint, came to the conclusion that

cement factory will be established on the land in question, whereas except that complaint there is no evidence on record, which establishes that the petitioner intends to establish a cement factory. It is settled legal position that stamp duty is to be paid on the basis of the use of the land at the time of registration of document and no inference can be drawn for changing the nature of the land in future by the purchaser.

33. Thus, the legal position is that the market value of the land cannot be determined with reference to the use of the land to which buyer intends to put it. The market value is what a general buyer may offer and what the officer may reasonably expect. In determining the market value, the potential of the land as on the date of sale alone can be taken into account and not what potential it may have in the distant future. Any subsequent improvement or change in the nature or user of the land, which may result into enhancement of the market value of the property, is not to be taken into account and it is only the value of the property on the date of execution of the document that is to be considered for the purpose of determination of proper stamp duty payable on the instrument.

34. In view of the above, the writ petition is allowed. The order dated 22.09.1992 passed by the Addl. District Magistrate (Finance & Revenue), Lucknow is hereby quashed.

35. It has been informed by learned counsel for the petitioner that original sale-deed has been impounded by the opposite party no. 2. Accordingly, opposite party no. 2 is hereby directed to release the sale-deed within a period of one month from the date of receipt of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.04.2015

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

Misc. Bench No. 2993 of 2015

Ashish Kumar Misra [P.I.L.] ...Petitioner
Versus
Bharat Sarkar ...Respondent

Counsel for the Petitioner:
Satish Kumar Misra, Prabuddh Tripathi, Prashant Tripathi, Vineet Kumar Chaurasia

Counsel for the Respondent:
C.S.C., A.S.G., Anand Dwivedi

National Food Security Act 2013-Section-13-Issue of Ration Card-with name of eldest woman of family-apprehension-where no major women-by clause 2 of section 13 itself clarify the situation-so far discrimination with transgender concern-within purview of legislating body-to enact suitable provisions-effort of counsel raising public interest-duly appreciated.

Held: Para-6
The object and purpose of Section 13 of the Act was to bring about a sense of empowerment for women. The purpose of enacting Section 13 of the Act was to recognize the status of a woman in every household and it was in that context that the statute has enacted that the head of the household would be deemed to be eldest woman member who is above the age of eighteen. The recognition of the eldest woman as the head of the household is in contradistinction to a male member since as we have already noted above, sub-section (2) of Section 13

of the Act enables a male member of the household to be recognized as the head of the household only in the absence of a woman or if the sole woman is below the age of eighteen, until she attains the age of majority. The object and purpose of Section 13 of the Act in other words was not to exclude transgenders though in view of the judgment of the Supreme Court in National Legal Services Authority (supra) Parliament may, if we may respectfully so say, consider the appropriateness of a suitable provision to meet the situation. This is entirely within the purview of the legislating body and a matter which lies in the province of the enacting authority. The salutary public purpose, underlying the enactment of Section 13 of the Act can be furthered by incorporating a situation where a transgender can be recognized as a head of an eligible household.

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

1. The petition has been filed in the public interest by a practising Advocate in order to raise two concerns relating to the issuance of ration cards under the National Food Security Act, 20131. The first issue relates to the validity of the provisions of Section 13 of the Act on the ground that the statutory provision while recognizing the eldest woman member as the head of the household does not contemplate a situation where there may be no woman in the family.

2. In order to appreciate this grievance, we extract hereinbelow the provisions of Section 13 of the Act:

"13. Women of eighteen years of age or above to be head of household for purpose of issue of ration cards.- (1) The eldest woman who is not less than eighteen years of age, in every eligible household, shall be head of the household for the purpose of issue of ration cards.

(2) Where a household at any time does not have a woman or a woman of eighteen years of age or above, but has a female member below the age of eighteen years, then, the eldest male member of the household shall be the head of the household for the purpose of issue of ration card and the female member, on attaining the age of eighteen years, shall become the head of the household for such ration cards in place of such male member."

3. Section 13 forms part of Chapter VI of the Act which has a provision for the empowerment of women. Stipulating that the eldest woman of every eligible household, above the age of eighteen, shall be the head of the household for the purpose of the issue of ration cards is intended to recognize and strengthen the dignity, role and status of women. Parliament gave legal recognition to the significant responsibilities which women as decision makers have in a family. This includes those having a bearing on food security. In enacting Section 13, Parliament recognized the roles and responsibilities which are discharged by women. That role has been conferred with a statutory status and recognition by providing that the eldest woman, above the age of eighteen in a household, shall be regarded as the head of the household. For too long in our history and even today, women have been burdened with the obligation of maintaining home and family without a corresponding recognition or acceptance of their role as decision makers. Subjected to discrimination and domestic violence, a woman is left with no social security. Something as primary as the equal

distribution of food within the family for male and female members of the family is a casualty. Recognizing the central role of the woman in issues of food security is an integral part of the constitutional right to gender equality. Some of the worst forms of discrimination against women originate in the home and the kitchen. It was time that the law made an effort to remedy it. The submission that the statute does not account for a situation where there may be no woman in a family, is incorrect. Sub-section (2) of Section 13 of the Act contemplates a situation where a household either does not have a woman at all or where a woman member of an eligible household is yet to attain the age of eighteen. In such a situation, sub-section (2) of Section 13 of the Act provides that the eldest male member of the household shall be the head of the household for the issuance of ration cards. Where a female member of the household is below the age of eighteen, her status as the head of the household, shall upon attaining the age of eighteen, be recognized in terms of sub-section (2) of Section 13 of the Act. In view of these statutory requirements, we find no merit in the first submission.

4. The second submission raises an important issue pertaining to the availability of food security for transgenders. In National Legal Services Authority Vs. Union of India2, the Supreme Court recognized the fundamental right of the transgender population as citizens of the country to possess an equal right to realise their full potential as human beings. Incidental to the fundamental right to live in dignity under Article 21 of the Constitution, is a right of access to all facilities for development of the personality including education, social accumulation, access to public places and employment opportunities. The Supreme Court observed that since transgenders are neither male nor female, treating them as belonging to either of these categories, will be a denial of their constitutional rights. The recognition of transgenders as the third gender in law has thus become an intrinsic part of the right to life protected by Article 21 of the Constitution. It is a part of and incidental to the fundamental expression of the human personality. The full expression of gender is what the Constitution embodies. Among the directions which have been issued by the Supreme Court are the following:

"135.1. Hijras, eunuchs, apart from binary genders, be treated as "third gender" for the purpose of safeguarding their rights under Part III of our Constitution and the laws made by Parliament and the State Legislature.

135.2. Transgender persons' right to decide their self-identified gender is also upheld and the Centre and State Governments are directed to grant legal recognition of their gender identity such as male, female or as third gender.

135.3. We direct the Centre and the State Governments to take steps to treat them as Socially and Educationally Backward Classes of citizens and extend all kinds of reservation in cases of admission in educational institutions and for public appointments.

135.7. The Centre and State Governments should also take steps for framing various social welfare schemes for their betterment.

135.8. The Centre and State Governments should take steps to create public awareness so that TGs will feel

that they are also part and parcel of the social life and be not treated as untouchables.

135.9. The Centre and the State Governments should also take measures to regain their respect and place in the society which once they enjoyed in our cultural and social life."

5. A ration card is an important document issued by public authorities to enable the holder and her family to gain access to subsidized foodgrain. That is why the objective and transparent administration of schemes for the issuance of ration cards are a critical element in enhancing access to food security. Food security means no less to a transgender than to other segments of society. Impoverishment and marginalization have been endemic to the transgender population. Preventing discrimination in all walks of life is one facet of the right of transgenders to live in dignity, with the confidence that they can lead their lives on their own terms in realisation of gender identity. But the law needs to travel beyond non discrimination, by recognising an affirmative obligation of the State to provide access to social security. Food security lies at the foundation of it. Transgenders must have both.

6. The form which has been prescribed by the State Government for submitting applications under the Act contains an enumeration of several items on which a disclosure of information has been sought from the applicant. One of them requires a disclosure of the name of the woman who is the head of the household. That however cannot be read as an exclusion of a transgender to apply for the issuance of a ration card and must be read in the context of serial number twelve of the application form. Serial number twelve refers to the gender of the applicant. In parathesis, the reference to gender is construed to mean 'female/male/other'. The expression 'other' would necessarily include a transgender. Section 13 of the Act, may not have specifically incorporated a provision that would be inclusive of a head of a household as a transgender to apply for the issuance of a ration card. The object and purpose of Section 13 of the Act was to bring about a sense of empowerment for women. The purpose of enacting Section 13 of the Act was to recognize the status of a woman in every household and it was in that context that the statute has enacted that the head of the household would be deemed to be eldest woman member who is above the age of eighteen. The recognition of the eldest woman as the head of the household is in contradistinction to a male member since as we have already noted above, sub-section (2) of Section 13 of the Act enables a male member of the household to be recognized as the head of the household only in the absence of a woman or if the sole woman is below the age of eighteen, until she attains the age of majority. The object and purpose of Section 13 of the Act in other words was not to exclude transgenders though in view of the judgment of the Supreme Court in National Legal Services Authority (supra) Parliament may, if we may respectfully so say, consider the appropriateness of a suitable provision to meet the situation. This is entirely within the purview of the legislating body and a matter which lies in the province of the enacting authority. The salutary public purpose, underlying the enactment of Section 13 of the Act can be furthered by

incorporating a situation where a transgender can be recognized as a head of an eligible household.

7. For the purposes of these proceedings, we are of the view that the form which has been prescribed by the State Government, duly takes into account the concerns of the transgender population by recognizing their entitlement to seek access to food security and to avail of the status of the head of a household.

8. We are of the view that the clarification, which we have issued above, would sufficiently subserve the important public purpose, which is served by the institution of the writ petition by a member of the Bar. The effort which has been made by the learned counsel must be duly appreciated by the Court.

9. The petition is, accordingly, disposed of. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.04.2015

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE RAKESH SRIVASTAVA,J.

W.P. No. 5219 (MB) of 2011

Lakshmi Devi ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sharwan Kumar Pandey and Rajeiu Kumar Tripathi

Counsel for the Respondents:
C.S.C. , A.S.G. and Neeraj Kumar Tiwari

Constitution of India, Art.-21-claim of ex-gratia payment-denied on ground no post postmortem report produced by claimants-ignoring G.O. Dated 24.01.2005-death caused due to lightening-considering definition of Natural Calamity as well as 'ex-gratia payment'-hypertechnicalties avoided-grant of relief should be interpreted liberally-order without application of mind-not sustainable-direction to ensure payment within 2 months.

Held: Para-14
Furthermore, no material has been brought on record by the respondents to show that the cause of death of the petitioner's husband was not due to lightening but due to any other reason. Therefore, it is clear that the impugned order has been passed without application of mind and considering all aspects of matter. Even otherwise, for grant of relief provisions should be interpreted very liberally to cover every victim of natural disaster.

(Delivered by Hon'ble Rajiv Sharma, J.)

1. Petitioner's husband, namely, Ashok Kumar (deceased) died unnatural death on 18.4.2011 on account of natural calamity (lightening) while harvesting the wheat crops. According to petitioner, a "panchnama" was prepared in presence of Village Pradhan, Area Lekhpal and Naib-Tahsildar on the spot itself. In the report,cause of death of the petitioner's husband has been indicated due to "lightening" in clear words. As there is a Circular/Government Order providing for compensation to the family of the deceased under the National Calamities Emergency Fund, the petitioner preferred an application to the competent authority for ex-gratia payment of compensation and completed the necessary formalities. The said claim of the petitioner has been rejected by the impugned order dated 12.8.2011.

2. Aggrieved by the order so passed by the Assistant Collector, Bhinga, District Bahraich, the petitioner is before us in this petition.

3. We have heard the learned Counsel for the parties to the lis and also carefully perused the documents on record.

4. The grievance of the petitioner is that the petitioner is being denied her legitimate claim by the opposite party nos.3 and 4 on the ground that the petitioner has failed to furnish the copy of post-mortem report. It has been averred that the act and conduct of opposite party no.4, while passing the impugned order dated 12.8.2011 is against the very aim and object of the National Calamities Emergency Relief Fund and the guidelines framed for its disbursement.

5. It has been contended by the learned counsel for the petitioner that the impugned order dated 12.8.2011 refusing compensation is not only against the Government Order dated 24.1.2005 but shows the colourable exercise of the power of the administrative authorities.

6. The claim of the petitioner has been resisted by the respondents and a counter-affidavit has been filed on behalf of opposite party nos.2 and 3 by Sub-Divisional Magistrate, Bhinga in which it has been indicated that no post-mortem report of the deceased was furnished to establish that the death had occurred by natural calamity. It has been further averred in the counter affidavit that the body of the deceased Ashok Kumar was found burnt at the spot but in order to confirm that the body has been burnt due to sky lightening, [thunder] it was necessary that post-mortem of the dead body ought to have been done but in the instant case, the members of the family of the deceased have failed to get conducted the post-mortem of the deceased Ashok Kumar. Therefore, the claim of the petitioner for grant of compensation has been rejected.

7. Having examined the material on record minutely, we are of the view that ex-gratia payment is made with the sole object to rehabilitate the family who has lost their beloved one all of a sudden due to natural calamity or an Act of God.

8. First of all, it would be apt to understand the meaning of 'Act of God, 'Natural Calamity' and 'ex-gratia payment'.

"Act of God" (natural events) means, a direct, violent, sudden and irresistible act of nature which could not, by any reasonable care, have been foreseen or resisted. To put it differently, one cannot predict the events of nature that is why they are called "Acts of God".

"Act of God" - Vis Major has been defined in the Law Lexicon, 2nd Edition, 1997,as under: Act of God Vis Major may be defined to be any accident, due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains or care, reasonably to have been expected,could have been prevented. The general characteristics of such perils are very intelligible. LR 1 CPD 423: Province of Madras v. I.S. And G. Machado, AIR 1955 Mad 519, 524,525.

9. An act of God is an unforeseeable natural phenomenon as explained by Lord Hobhouse in Transco plc v Stockport

Metropolitan Borough Council as describing events;

(i) which involve no human agency
(ii) which is not realistically possible to guard against
(iii) which is due directly and exclusively to natural causes and
(iv) which could not have been prevented by any amount of foresight, plans, and care.

10. Natural calamity means an event that brings terrible loss, lasting distress, or severe affliction; a disaster. The natural calamities may strike at any person, at any time and keeping this in mind, the Government has created a fund with the sole object to provide immediate relief to those victims who died due to natural calamity.

"Thunder" or "Sky lightening" is a natural happening and is termed as an "Act of God" When the thunder strikes a person, death is a natural consequence.

11. Further, the word 'ex-gratia payment' means payment which is voluntarily and charitable in nature and therefore, hyper-technicalities should be ignored and equitable consideration should be kept in mind while deciding the matter. Such claim s are paid to mitigate hardship to the claimants by way of equitable relief.

12. It is the duty of the Government to safeguard the life and liberty of the people as guaranteed under Article 21 of the Constitution of India. If death occurs to a citizen due to a natural calamity, the Government whether it is State or Central Government, is expected to come forward to 'CONSOLE- COMFORT-COMPENSATE" the members of family of the victim and the Government should avoid shirking its responsibility based on arbitrary and imaginary reasons.

13. In the instant case, the stand of the opposite parties is contrary to the Government Order dated 24.1.2005. A perusal of the Government Order dated 24.1.2005 would indicate that there is no mandatory requirement for furnishing post-mortem report to get ex-gratia payment, which can be granted on the basis of inquiry conducted by the Revenue Authorities and the Area Lekhpal. It would be relevant to point out that the opposite parties have failed to establish that the Government Order dated 24.1.2005 has been rescinded/annulled or superseded by the State Government.

14. Furthermore, no material has been brought on record by the respondents to show that the cause of death of the petitioner's husband was not due to lightening but due to any other reason. Therefore, it is clear that the impugned order has been passed without application of mind and considering all aspects of matter. Even otherwise, for grant of relief provisions should be interpreted very liberally to cover every victim of natural disaster.

15. For the reasons aforesaid, the impugned order dated 12.8.2011 is hereby quashed. Taking the holistic view of the matter, we direct the District Magistrate, Shrawasti, to pass fresh order for grant of ex-gratia payment in light of the aforesaid observation and the Government Order dated 24.1.2005 within a maximum period of two months from the date of receipt of a certified copy of this order.

16. Subject to the aforesaid observations and directions, this writ

petition is disposed of finally in above terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2015

BEFORE
THE HON'BLE KRISHNA MURARI, J.
THE HON'BLE PRAMOD KUMAR SRIVASTAVA, J.

Writ-C No. 6543 of 2015

Chandra Veer Singh & Ors. ...Petitioners
Versus
Secretary Industrial Development & Ors. ...Respondents

Counsel for the Petitioners:
Tarun Agarwal, Ravi Kant

Counsel for the Respondents:
C.S.C., S.K. Dubey

(A)Land Acquisition Act, 1894-Section 4(1), 6(1)-Declaration under 6(i)-period of one year-counted-from date of last mode of publication of notification under section 4(1)-admittedly last date is 07.11.2013 when munadi made-notice served upon village Pradhan-duly patched on Panchayat Bhawan as well as on Vidyalay Bhawan-declaration under 6(1) on 30.10.14-held- well within time-no illegality found.

Held: Para-17
The next question which immediately arises for consideration is staring point of limitation of one year prescribed by clause (ii) of proviso to Section 6. Section 4(1) of the Act has already been quoted above. It prescribes three modes of publication of the intent of the Government viz. (i) official gazette, (ii) two daily newspapers having circulation in the locality, one of which should be in regional language; (iii) public notice of the substance of such notification at convenient place in locality. By Amending Act No. 68 of 1984 it was provided that last of the dates of the publication and public notice shall be referred to as the date of publication of the notification. Thus the Statute has itself prescribed that out of the three prescribed modes of publication the last of the dates of such publication and the giving of public notice shall be taken as the date of publication of notification under Section 4(1) of the Act.

(B)Land Acquisition Act 1894, Section 5-A-Acquisition-questioned-on non compliance of Section 5-A all petitioner were present-objections properly dealt-recommendation made after due application of mind-held-full compliance of Section 5.

Held: Para-34
In such view of the matter, the report on the objections along with recommendation satisfies the test. All the petitioners were present in person on the date of hearing. A perusal of the report goes to show that objections of the petitioners were properly dealt with, heard and the report along with the recommendation was made after due application of mind. We are satisfied that the report dated 10.12.2013 was made in full compliance of mandatory directions of Section 5-A of the Act. Thus the second submission advanced on behalf of the petitioners also does not merit consideration.

Case Law discussed:
2002 (1) SCC 689; (1997) 8 SCC 47; (2003) 9 SCCC 662; [2010 (8) ADJ 498 (DB)]; (1973) 2 SCC 337; (1980) 2 SCC 471; (2012) 1 SCC 792.

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

1. By means of this petition filed under Article 226 of the Constitution of India, the petitioners have challenged the notification dated 19-10-2013 issued under Section 4(1) of the Land Acquisition Act, 1894 (in short the 'Act') as well as notification dated 30-10-2014 issued under Section 6(1) of the Act. A further writ of mandamus has also been

claimed to restrain the respondents and its agent from taking the actual possession of the land in dispute covered by the said notifications.

2. We have heard Sri Ravi Kant, learned Senior Advocate assisted by Sri Imran Saeed for the petitioner, learned Advocate General assisted by Sri Ramesh Upadhyay, learned Chief Standing Counsel and Dr.Y.K.Srivastava, learned Standing Counsel for the State respondents.

3. Facts of the case, in short, necessary for the purpose of the dispute are as under :

4. Petitioners claim to be the 'bhumidhar' of different parcel of land situate in two villages namely; Uravar Hashtaraf & Aslempur Nagla Kanhar, Tehsil & Pargana Sikohabad, district Firozabad. A notification under Section 4 of the Act was issued for alleged public purpose namely; to construct expressway from Lucknow to Agra in the official gazette of the State of Uttar Pradesh dated 19-10-2013. By the said notification, the land belonging to the petitioners situate in above two mentioned villages were sought to be acquired. The copy of the aforesaid notification was also published in two Hindi daily newspapers 'Dainik Jagran' and 'Hindustran' dated 25-10-2013. Thereafter, notices were issued under Section 5A of the Act to the tenure holders to file their objections. Notice specified 09-12-2013 as the date fixed for hearing of the objection. It has been alleged that some of the petitioners filed their objections, which were more or less similar in nature. Further case set up by the petitioners is that though all the petitioners were present in person on the date fixed but since neither the Additional District Magistrate nor the Special Land Acquisition Officer were present, no hearing took place on the aforesaid date. The declaration under Section 6 was published in the official gazette on 30-10-2014. The substance of the said notification was published in the newspapers on 15-12-2014.

5. First submission advanced by learned counsel for the petitioners is that impugned notification under Section 6 of the Act was published beyond the period of one year from the date of notification under Section 4 of the Act, hence, the same is null and void in view of proviso to Section 6 of the Act. It is also submitted that no publication of the substance of the aforesaid notification was ever made by beat of drum in the locality as mandated by Section 4 of the Act, hence, the acquisition is bad in law.

6. The factual assertion laying down the foundation for the basis of the aforesaid argument are contained in paragraphs 8 to 12 of the writ petition which are quoted hereunder :

"8. That on 19th October, 2013, the State Government published two notifications in U.P. extra-ordinary Gazette proposing to acquire land in Uravar Hashtaraf, Tehsil & Pargana Sikohabad, district Firozabad & Aslempur Nagla Kanhar, Tehsil & Pargana Sikohabad, district Firozabad.

9. That according to the aforesaid notifications, the land was needed for a public purpose, namely, for development of Access Controlled Express Way from Agra to Lucknow. It was further stated that a site-plan of the land may be inspected in the Office of the Collector, Firozabad.

10. That it may be stated here that the aforesaid state of fact contained in the

notifications is absolutely wrong. No site-plans have been prepared so far.

11. That a copy of the aforesaid notification was published in two newspapers on 25th October, 2013. they were published in Dainik Jagran and Dainik Hindusthan of the aforesaid date.

12. That it may be further stated here that no publication by beat of drums was ever made on the substance of the aforesaid notifications in the locality, as mandated by Section 4 of the Land Acquisition Act, 1894 ("the Act" for short).

7. An affidavit has been filed on behalf of the State respondents denying the allegations made in the writ petition. It may be relevant to quote the following paragraphs of the affidavit filed on behalf of the State :

"7. That, the notification under Section 4(1) of the Act, 1894 was issued for acquiring the land of village Uravar Hashtaraf and village Aslempur Nagla Kanhar, Tehsil & Pargana Sikohabad, district Firozabad for the development and construction of Access Controlled Expressway (Green Field) Project. The notification under Section 4(1) of the Act, 1894 was issued by the Collector, Firozabad on 07.10.2013. The notification dated 07.10.2013 was published in the official gazette of the government of U.P. on 19.10.2013.

8. That, after publication of the official gazette of the Government dated 19.10.2013, the notification was further published in two daily newspapers, namely "Dainik Jagran" and "Hindustan" on 25.10.2013. Both the daily newspapers are published from Agra and has a wide circulation within the adjoining district of Agra, which are included in the Agra Division.

9. That, after publication of the notification in the two daily newspapers having wide circulation, further steps were taken for issuing general public notice/Munadi on 30.10.2013. By public notice/Munadi dated 30.10.2013 it was directed to be served on the village Pradhan of the concerned village, which was done actually on 07.11.2013. It was published and pasted on the notice board of the Tehsildar Office of Tehsil Shikohabad and for the office of Block Development Officer, Shikohabad. It was further directed that the notice be served and pasted on the Panchayat Bhawan of the village/Vidyalaya Bhawan, Block and Tehsil including the Nazarat of the Collector and the notice be pasted on the notice board of the office of such places. The notice on the official notice board of the Block Development Officer, Firozabad was served and pasted on the notice board on his office on 01.11.2013. Similarly, the notice was received in the office of Tehsildar, Shikohabad on 01.11.2013, and it was pasted on the notice board of the Tehsil on 01.11.2013. The Munadikarta, Ramesh, Chaukidar of the village put his signature after Munadi on 07.11.2013 and has also obtained the signatures of villagers as witnesses of the public notice/Munadi. The Process Server, Saurabh Kumar and Rajendra Babu, filed their report dated 07.11.2013 before the Additional Collector (Land Acquisition), agra stating therein that the Munadi has been done on 07.11.2013 in the village Uravar Hashtaraf and similar public notice/Munadi was done in respect of village Aslaimpur Nagla Kanhar on 07.11.2013. In respect of village Aslaimpur Nagla Kanhar, the Block Development Officer and the Tehsildar

were served with the notice to be put up and pasted on the notice board on their office on 01.11.2013 and the Munadi/notice was served on the Village Pradhan, Kusma Devi on 07.11.2013 in the presence of villagers as witness.

10. That, as stated hereinabove, the notification in the official gazette under Section 4(1) of the Act, 1894 was done on 19.10.2013 and it was published in the two daily newspapers on 25.10.2013 with a further publication by public notice/Munadi in the village concerned on 07.11.2013 including the publication by pasting on the notice board of the office of Block Development Officer, Tehsildar Shikohabad, Vidyalaya Bhawan and the Panchayat Bhawan of the village.

11. That, the notification under Section 6(1) of the Act, 1894, which has been made on 30th October, 2014 and was published in the official gazette on 30th October, 2014, is well within the period of one year from the last date of publication of public notice. The last date of publication in the present case is to be taken as on 07.11.2013, on which date the public notice was given to the villagers by Munadi and service on the village Pradhan and other persons and was pasted on the Vidyalaya Bhawan, Panchayat Bhawan. For this purpose a reference may be made to Section 4 of the Land Acquisition Act, 1894, which provides that "the last date of such publication and the giving of such public notice, being hereinafter referred to as the last date of publication of the notification". Thus it is clear that the last date of publication of the public notice is 07.11.2013. In view of the aforesaid factual position, the one year from the last date of publication of the public notice would be 07.11.2014. Notification under Section 6(1) of the Act, 1894 published in the official gazette on 30.10.2014 is well within a period of one year. By no stretch of imagination it can be said that the notification under Section 6(1) of the Act, 1894 has been issued after lapse of one year. Thus the submission and contention of the petitioners is misconceived and not based on correct facts.

12. That, after receiving the public notice in the village by way of Munadi, the villagers filed their respective objections before the Additional District Magistrate (Land Acquisition), Agra.

13. That, the petitioners have made effort before this Hon'ble Court in the writ petition to influence the Hon'ble Court by saying that the notification under Section 6(1) of the Act, 1894 has been done after the lapse of one year of the notification issued under Section 4(1) of the Act, 1894.

14. That, in the notification published under Section 6(1)/16 of the Act, 1894 issued on 30th October, 2014, it has specifically been mentioned that the notification was issued by the Collector, Firozabad on 07.10.2013, which was notified in the official gazette on 19.10.2013 and thereafter, Munadi was done on the spot on 07.11.2013.

15. That, thus it is clear that it is established from the record that last notification under Section 4(1) of the Act, 1894 was done on 07.11.2013 and notification under Section 6(1) of the Act, 1894 was done on 30.10.2014, which is well within the period of one year. The original records are available with the respondent authorities, which may be perused by the Hon'ble Court, if necessary."

8. Before proceeding to consider the submission, it may be relevant to quote Section 4(1) of the Act which reads as under :

"4. (1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette, and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality."

9. It may also be relevant to quote Section 6 of the Act which reads as under :

"6. Declaration that land is required for a public purpose.--(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A sub-section (2), that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Section 4 sub-section (1), irrespective of whether one report or different reports has or have been made (wherever required) under Section 5-A sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under Section 4 sub-section (1),--

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967, but before the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, wholly or partly out of public revenues or some fund controlled or managed by a local authority.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

10. A plain reading of the aforesaid provisions of the Act goes to show that whenever the appropriate Government feels necessity of need of a land for any public purpose, it is under an obligation to publish the notification in the official

gazette and in two daily newspapers having circulation in the locality out of which one newspaper should be in regional language and also to give public notice of substance of such notification at convenient place in the locality. After complying the mandate of Section 5A of the Act and upon receipt of the report of the Collector, the Government is required to proceed under Section 6(1) of the Act. Clause (ii) of Section 6(1) of the Act provides that no declaration in respect of any land covered by notification under Section 4(1) after enforcement of the Amendment Act, 1984 can be made after expiry of one year from the date of publication of notification. The Amendment Act, 1984 was enforced on 24-09-2004. Thus after 24-09-2004 no declaration under Section 6 of the Act can be made after expiry of period of one year from the date of publication of notification under Section 4(1) of the Act.

11. In other words, a declaration is required to be made under Section 6(1) of the Act within one year from the date of publication of notification under Section 4(1) of the Act. The submissions of learned counsel for the petitioners that notification was published beyond the period of one year is based on the allegation that no publication by beat of drums was made and thus in accordance with the Section 4(1) of the Act, the last date of publication is 19-10-2013 and that under Section 6(1) of the Act was published in newspapers on 15-12-2014 and thus was beyond the period of one year.

12. A plain reading of Section 4 and 6 of the Act suggests that under Section 4 a notification is required to be published in the manner laid down in the Section itself. However, under Section 6 a declaration has to be first made and the same is to be published in the manner provided under Section 6(2) of the Act. The first proviso to Section 6(1) lays down time limit of one year within which declaration is to be made. It is significant to note that there is no time limit prescribed for publication of the declaration so made since the first proviso to Section 6(1) only provides time limit for declaration and not for publication. The Apex Court in the case of Sriniwas Ramnath Khatod v. State of Maharashtra, 2002(1) SCC 689, after considering the provisions of Section 4 & 6 and 11A of the Act has drawn a distinction between the words 'Declaration' and 'Publication' used in Section 4 and 6 of the Act and 11-A of the Act. It has been observed in paragraph 12 as under :

12. In our view the wordings of Sections 4, 6 and 11-A leave no room for doubt that the Land Acquisition Act made a distinction between a "declaration" and "publication". To be noted that under Section 4 the notification has to be published. Again under Section 11-A the period of two years has to be computed from the date of "publication of the declaration". As distinct from this under the first proviso to Section 6 (1) a "declaration" cannot be made after the expiry of one year from the date of "publication of the notification under Section 4". The word "published" in clauses (i) and (ii) of the first proviso to Section 6(1) refers to the publication of notification under Section 4. A plain reading of Section 6 shows that a distinction is made between a "declaration" and a "publication". Viewed from this angle the wording of the first proviso to Section 6 (1) becomes important. The proviso lays down that no declaration (under Section 6) shall be

made after expiry of three years [under clause (i)] where the notification under Section 4 is published before the commencement of the Land Acquisition (Amendment) Act, 1984 and after expiry of one year [under clause (ii) where notification under Section 4 was published after commencement of the Land Acquisition (Amendment) Act, 1984. Thus the proviso clearly talks of "publication" in respect of notification under Section 4 and then provides a time for "making of declaration" under Section 6. The legislature is purposely omitting to use the words "publication of declaration" in the proviso to Section 6."

13. It may also be relevant to quote the following observations made by the Hon'ble Apex Court in the case of Eugenio Misquita and others vs. State of Goa and others, (1997) 8 SCC 47 :

"7. It is now well settled that the last of the dates in the series of the publications made under Section 4(1) of the Act is the relevant date to reckon the starting point of limitation for the purpose of proviso to Section 6(1)(ii). Now, the question is which is the relevant date to reckon the last date for the purpose of clause (ii) of the first proviso to Section 6(1). In other words, whether the modes of publication prescribed under Section 6(2) obviously for the purpose of reckoning limitation under Section 11-A of the Act have any part to play in the matter of computing the period prescribed under clause (ii) of the first proviso to Section 6(1).

8. According to the learned counsel, the limitation prescribed under clause (ii) of the first proviso to Section 6(1) has to be construed with reference to the different dates / modes of publication prescribed under Section 6(2) of the Act. In support of this submission, learned counsel refers to the judgments of this Court rendered on Section 4(1) of the Act holding that the last of the dates of such publication in the series is the relevant date for computing the period of limitation under clause (ii) of the first proviso to Section 6(1).

9. Let us examine whether the learned counsel is right in his submission. As seen from the above extracts of relevant provisions, while Section 4(1) commands publication of notification under that Section. Section 6 speaks of the declaration being made to the effect that any particular land is needed for public purpose or for a company. There are judicial decisions that have interpreted the word `made' to mean `published' for the reasons stated in those decisions. Therefore, strictly speaking, but for those judicial decisions the date of making of the declaration under Section 6(1) will be the relevant date for reckoning the period of limitation. However, in the interest of general public, the courts have taken the view that the declaration made will stand accomplished only when it is published. This publication has, therefore, nothing to do with the publication referred to in Section 6(2) of the Act which is for a different purpose, inter alia, for reckoning the limitation prescribed under Section 11-A of the Act. This construction is supported by the language employed in Section 6(2) of the Act. In particular, the word "hereinafter" used in Section 6(2) will amply prove that the last of the series of the publication referred to under Section 6(2) is relevant for the purposes coming thereafter, namely, for making award under Section 11-A. The language employed in second proviso to Section 6 (1) also supports this construction. Therefore, the contention of learned counsel cannot be accepted.

10. This is also the view taken by this Court in Krishi Utpadan Mandi Samiti's case. The learned Judges framed the question thus: (SCC p. 499, para 4)

"4. The question, therefore, is that which date of the publications in three steps i.e. publication in the Gazette, two newspapers and local publication to be the last date for the purpose of computing three years limitation prescribed in clause (i) of the proviso to Section 6(1) of the Act."

11. It may be noted that this Court in that case was considering a case which arose before the coming into force of the Amending Act 68 of 1984. The case on hand has arisen after the Amending Act 68 of 1984. The case on hand has arisen after the Amending Act 68 of 1984. The only difference is the period of limitation: for the cases arising before the Amending Act it was three years and one year for the cases arising after the Amending Act. Otherwise, the principle is the same. The learned Judges after referring to the relevant provisions observed thus: (SCC pp. 499-500, paras 4 and 5)

"The question, therefore, is that which date of the publications in three steps i.e. publication in the Gazette, two newspapers and local publication to be the last date for the purpose of computing three years limitation prescribed in Clause (i) of the proviso to Section 6(1) of the Act. Prima facie, it gives an impression that the last of any of the three steps puts in motion, the running of limitation of three years.

* * * *

So it is necessary to understand the scheme and policy of the Act to get the crux of the question.

* * * *

It would be seen that the purpose of notification under Section 4(1) is an intimation to the owner or person having an interest in the land that Government exercised the power of eminent domain in relation to his land and for public purpose his land is needed or likely to be needed: puts an embargo on his freedom to deal with the land as an unencumbered land and also pegs the price of the land prevailing as on that date. It also is a caveat to the Collector to make the award under Section 11 as well as to determine the market value prevailing as on the last of the dates to be the date and the award should be made within a period prescribed by Section 11-A, lest the entire acquisition shall stand lapsed. The word `hereinafter' is for such purposes as well as for the purpose of determination of the compensation under Chapter III of the Act as well. Therefore, the word hereinafter referred to as the last date of the publication of the notification is the date from which the prevailing prices of the land is to be computed etc."

* * * *

The last date under Section 6(2) shall be the date for the purposes "hereinafter referred to" would be not for computing the period of three years prescribed in clause (i) of the proviso to Section 6(1) of the Act as it was already done, but purposes to be followed hereinafter. Otherwise language would have been "hereinbefore done". Sub-section (2) as such did not prescribe any limitation within which the declaration under Section 6(1) or other steps hereinafter to be taken, in other words, the steps to be taken thereafter in making the award

under Section 11 or in computation of the period prescribed in Section 11-A. The publication of the declaration in two daily newspapers having circulation in the locality one of which is in the regional language and the publication of the substance of the declaration in the locality are ministerial acts and is a procedural part. It appears that these publications are required to be done to make the declaration published in the manner, to be conclusive evidence of the public purpose under Section 6(1) and also to provide limitation to make the award under Section 11- A is for the purpose of making the award and if the Collector fails to do so, the entire proceeds under Sections 4(1) and 6(1) shall stand lapsed. If this consistent policy of the Act is understood giving teeth to the operational efficacy to the scheme of the Act and public purpose the Act seeks to serve, we are of the considered view that publication in the Official Gazette already made under clause (i) of proviso to sub-section (1) of Section 6 is complete, as soon as the declaration under Section 6(1) was published in the Official Gazette. That will be the date for the purpose of computation of three years period from the last of the dates of the publication of the notification under Section 4(1). The procedural ministerial acts prescribed under sub-section (2) are only for the purpose of the procedure to be followed `hereinafter', in other words, the steps to be taken subsequent to the publication of the declaration under Section 6(1) of the Act. We cannot agree with Shri Rana, the learned Senior Counsel, that the date of making the declaration by the Secretary to the Government or the authorised officer is the date for computing period of three years. Equally, we cannot agree with the learned counsel for the respondents, Shri Upadhyay, that publication of the substance being the last date from which the period of three years needs to be computed. Acceptance of either contention would easily defeat the public policy under the Act by skillful manner of management with the lower level officials."

14. Thereafter, the Court proceeded to analyze the scheme and policy of the Act as under :

"16. The above view of this Court lends support to the view that for the purpose of calculating the limitation prescribed under clause (ii) of the first proviso to Section 6(1), it is not the last of the publication in the series that should be taken into account, but the publication that was made in the first instance under Section 6.

17. In the light of the law laid down by this Court, we have no hesitation to hold that the declaration published under Section 6 of the Act was well within one year and the challenge to the same has been rightly rejected by the High Court. However, the view taken in the judgment of the High Court under appeal that the relevant date for reckoning the period of limitation will be the date of making of the declaration under Section 6, may not be correct. As held in Krishi Utpadan Mandi Samiti's case, mere making of declaration is not enough. The making of declaration under Section 6 is complete for the purpose of clauses (i) and (ii) of the first proviso to Section 6(1) when it is published in the official gazette."

15. It may also be relevant to quote the ratio of the decision of the Hon'ble Apex Court in the case of General Manager, Department of

Telecommunications,Thiruvananthapuram v. Jacob son of Kochuvarkey Kalliath (Dead) by LRS. and others, (2003) 9 SCCC 662 :

"We have carefully considered the submissions of the learned counsel on either side. The Division Bench seems to have committed a patent error, despite the decision of this Court reported in Eugenio Misquita v. State of Goa (which does not appear to have been brought to its notice) on a literal construction of Section 11-A of the Act, by proceeding on a hypothesis that if the Collector who was obligated to make an award under Section 11 within a period of two years from the date of the publication of the declaration, the entire proceedings for the acquisition of the land shall lapse, completely overlooking the mandate contained in sub-section (2) of Section 6 that of the various modes of publications envisaged therein, the last of any of the three modes in the series should be taken to be the date of publication and consequently taken into account for purposes of making the award as laid down in Section 11-A. While applying the ratio in Krishi Utpadan Mandi Samiti v. Markand Singh this Court in Eugenio Misquita observed at SCC p.52, para 9 as hereunder:

"This publication has, therefore, nothing to do with the publication referred to in Section 6(2) of the Act which is for a different purpose, inter alia, for reckoning the limitation prescribed under Section 11-A of the Act. This construction is supported by the language employed in Section 6(2) of the Act. In particular, the word 'hereinafter' used in Section 6(2) will amply prove that the last of the series of the publication referred to under Section 6(2) is relevant for the purposes coming thereafter, namely, for making award under Section 11-A. The language employed in second proviso to Section 6(1) also supports this construction.

That apart, the words "the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration" leave no room for any assumptions to the contrary. Thus, the view taken by the High Court in this case not only runs counter to the mandate of law enacted by Parliament , but is opposed to the dicta of this Court and consequently does not merit our acceptance."

16. The law as enunciated by the Hon'ble Apex Court quoted hereinabove clearly lays down that the declaration must be made within one year from the date of publication of the notification under Section 4 and for the purpose of calculating the limitation prescribed under clause (ii) of proviso to Section 6(1) of the Act, it is not the last in the publication of the series which should be taken into account but the declaration that was made in the first instance under Section 6.

17. The next question which immediately arises for consideration is staring point of limitation of one year prescribed by clause (ii) of proviso to Section 6. Section 4(1) of the Act has already been quoted above. It prescribes three modes of publication of the intent of the Government viz. (i) official gazette, (ii) two daily newspapers having circulation in the locality, one of which should be in regional language; (iii) public notice of the substance of such notification at convenient place in locality. By Amending Act No. 68 of 1984 it was provided that last of the dates of the publication and public notice shall

be referred to as the date of publication of the notification. Thus the Statute has itself prescribed that out of the three prescribed modes of publication the last of the dates of such publication and the giving of public notice shall be taken as the date of publication of notification under Section 4(1) of the Act.

18. Hon'ble Apex Court in the case of Eugenio Misquita (Supra), has answered the issue by observing in paragraph 7 (quoted above) that it is the last date in the series of publication made under Section 4(1) which is the starting of limitation for the purpose of proviso (ii) to Section 6(1) of the Act. Same view has been taken by a Division Bench of this Court in the case of M/s. Sahara India commercial Corporation Limited & others v. State of U.P. and others, [2010(8) ADJ 498(DB)] by observing in paragraph 96 of the reports as under :

"The proviso (ii) of sub section (1) provides that no declaration, in respect of any particular land covered by a notification under sub section (1) of Section 4, shall be published after the commencement of the Land Acquisition (Amendment) Act, 1984, after the expiry of one year from the date of publication of the notification. The date of publication of notification is provided by the same amendment of 1984, to section 4 (1) to be the last of the dates of the publication under sub section (1) of Section 4, and the giving of such public notice. Sub section (1) of Section 4 provides for three different methods of publication. The notification has to be published in the Official Gazette and in two daily newspapers circulated in the locality of which at least one shall be in the regional language. Further, the Collector is required to cause public notice of the substance of such notification to be given at convenient places in the said locality. By Act No. 68 of 1984, it was provided that the last of the dates of such publication, and giving of such public notice, is to be referred to as the date of publication of the notification. The last of the dates of the publication in the present case being the date on which the notice was published in the locality on 6.11.2004, by beat of drums is thus to be treated as the last of the dates of publication for the purposes of counting limitation under the proviso (ii) to Section 6 (1) of the Act. "

19. Now coming to the facts of the present case, according to the petitioners, there was no publication by beat of drums in the locality and the last date of publication under Section 4 was 25-10-2013 when it was published in two local Hindi daily newspaper. However, the affidavit filed by the respondents clearly asserts that publication by beat of drums in the village took place on 07-11-2013. The State respondents along with their counter affidavit have filed documents certifying that Munadi was done. The documents contains the signature of Gram Pradhan and as also that of the 'Munadi Karta' and also of two witnesses. The document certifies that notices were served on the interested persons and were pasted on the Panchayat Bhawan, Tehsil Officer and the Collectorate and also a 'Public Munadi' was done. The document is counter signed by Additional District Magistrate (Land Acquisition). The allegations of 'public notice/Munadi' are contained in paragraph 10 of the affidavit of the State. In the rejoinder affidavit, there is no specific denial of the allegations. Denial of the same in the rejoinder affidavit is vague and evasive and what has been stated is that the contents are not admitted and the

correct facts have already been stated in the foregoing paragraph of this affidavit. In the foregoing paragraph of the rejoinder affidavit though the contents of the certificate have been tried to be denied on various grounds but they do not inspire much confidence.

20. In view of the allegations made in the pleadings of the parties, we are of the considered opinion that public notice was given and 'Munadi' by beat of drums was effected in the locality on 07-11-2013 which is to be taken as the last date of publication of notification under Section 4 of the Act. Undisputedly, the publication of declaration under Section 6 in the official gazette is dated 30-10-2014.

21. In view of above facts and discussions, we are constrained to hold that publication under Section 6 was made well within one year from the date of notification under Section 4 of the Act and the arguments advanced by learned counsel for the petitioners in this regard are devoid of merits and have no force.

22. The second argument advanced on behalf of the petitioners is that notice under Section 5A was never served upon the landholders and no hearing took place under Section 5A of the Act inasmuch as on the date fixed neither the Additional District Magistrate nor the Special Land Acquisition Officer were present and thus the so called report sent by the Collector based upon which the State Government made a declaration vitiates the sanctity of publication.

23. Section 5-A of the Act reads as under :

"5-A. Hearing of objections. - (1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be."

24. Section 5-A empowers the interested persons to object to the acquisition of the land. However, there is limitation of 30 days prescribed from the date of issuance of the notification of filing objection.

25. In the case of Munshi Singh v. Union of India (1973) 2 SCC 337, the Hon'ble Apex Court emphasised upon the importance of Section 5-A and observed in paragraph 7 as under :

"7. .....Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A."

26. Again in State of Punjab v. Gurdial Singh (1980) 2 SCC 471, the Hon'ble Apex Court observed as under :

"it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

27. In a recent decision in the case of Raghbir Singh Sehrawat v. State of Haryana, (2012) 1 SCC 792, the Hon'ble Apex Court after referring to its earlier decisions on the issue observed in paragraphs 39 & 40 as under:

"39. In this context, it is necessary to remember that the rules of natural justice have been ingrained in the scheme of Section 5-A with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that the land proposed to be acquired is not suitable for the purpose specified in the notification issued under Section 4(1). Not only this, he can produce evidence to show that another piece of land is available and the same can be utilised for execution of the particular project or scheme.

40. Though it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons.

28. It is thus clear that proceedings under the Land Acquisition Act are bsed on the principle of eminent domain of the State and Section 5-A is the only protection and remedy available to that person whose land is sought to be acquired. It is a minimal safeguard afforded to him by the Statute to protect himself by pointing out to the authority concerned that not only the acquisition is arbitrary but namely, 'public purpose' for which the land is being acquired is absent or the acquisition is malafide. Hearing contemplated under Section 5-A is necessary to enable the Collector to deal effectively with the objections against the proposed acquisition and make a report

which forms the basis for the Government to take a final decision on the objection and only thereafter a declaration under Section 6 can be made. Section 5-A(2) which represents statutory embodiment of the rule of audi alteram partem gives an opportunity to the person whose land is sought to be acquired, to make an endeavour to convince the Collector that his land is not required for public purpose as specified in the notification under Section 4 or that there are other valid reasons for not acquiring the same. Thus a proper hearing to the objector assumes significant importance.

29. In the case in hand, the petitioners themselves have alleged in paragraph 16 that after receiving notices under Section 4 of the Act, some of the petitioners filed written objection and they all were present on 09-12-2013, the date fixed for hearing. The allegations made by the petitioners that all of them were present at the time of hearing is sufficient to establish that they had full notice. The allegations made in the writ petition that no hearing was given has been denied in the affidavit filed on behalf of the State respondents. It has been categorically mentioned in paragraph 18, 19 & 20 that the petitioners appeared and participated in the hearing. It may be pertinent to quote the above paragraphs which read as under :

"18. That, it is relevant to point out here that at the time of hearing though the petitioners appeared before the Additional District Magistrate (Land Acquisition) and participated in the hearing, but did not adduce any evidence in support of their claim. The Additional District Magistrate (Land Acquisition) proceeded with the matter and after hearing the contention of the parties, decided the matter/objections on the basis of record.

19. That, the hearing took place in respect of both the villages and the petitioners, including other objectors, participated in the hearing. In the village Aslaimpur Nagla Kanhar only three objections were received by the respondent authorities, which were also disposed of.

20. That, the contention of the petitioners that they were not heard while deciding the objections under Section 5-A of the Act, 1894, is wrong and misconceived.

30. Though in paragraph 15 of the counter affidavit the averments are denied but again the denial is evasive and does not inspire much confidence. From an overall assessment of fact, the picture that emerges out is that all the petitioners were present on the date fixed for hearing and participated in the proceedings.

31. Further a perusal of the objection filed by the petitioners and the report dated 10-12-2013 which has been brought on record along with the affidavit of the State respondents clearly goes to show that the objections which were raised were appropriately dealt with and report was made after due application of mind. A perusal of the report made on 10.12.2013 goes to show that the objections raised in respect of the acquisition on the allegation that there are 'abadi' standing thereon, there are borings and the land was irrigated have been duly taken note of by the Additional District Magistrate (Land Acquisition) while considering the objections. It is pertinent to mention here that most of the objections did not contain any ground or reason to point out why the acquisition was bad, unwanted or arbitrary or there was no public purpose. The objections mainly pertained to valuation of

the land which was in the domain of objections to be filed under Section 9 of the Act. The report indicates that the petitioners were given opportunity but they did not adduce any evidence.

32. It has been stated in the report that keeping in view the public purpose of constructing the expressway it was not desirable to exempt the land from acquisition proceedings and quantum of compensation to be paid will be determined after obtaining the valuation report in accordance with the law and the provisions of the Act.

33. While considering the objection under Section 5-A the Collector is not required to arrive at any decision like a court. He has only to submit the case for decision of the appropriate Government together with the record of the proceedings held by him and a report containing his recommendation on the objections, relying upon which the Government takes its decision under Section 6 of the Act. It is true that for making the report the Collector is required to follow the procedure prescribed under Section 5-A of the Act and to give the objector an opportunity, and after hearing all such objections and making such further inquiry, as he thinks necessary to make a report of his recommendation on the objections.

34. In such view of the matter, the report on the objections along with recommendation satisfies the test. All the petitioners were present in person on the date of hearing. A perusal of the report goes to show that objections of the petitioners were properly dealt with, heard and the report along with the recommendation was made after due application of mind. We are satisfied that the report dated 10.12.2013 was made in full compliance of mandatory directions of Section 5-A of the Act. Thus the second submission advanced on behalf of the petitioners also does not merit consideration.

35. No other ground has been raised or pressed before us.

36. In view of above facts and discussions, we find no merit in the writ petition and the same accordingly stands dismissed.

37. However, in the facts and circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.04.2015

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Writ-B No. 6783 of 2015

Ram Kishore & Anr. ...Petitioners
Versus
Member Judicial Board of Revenue, & Ors. ...Respondents

Counsel for the Petitioners:
A.K. Rai, Vishnu Kr. Singh

Counsel for the Respondents:
C.S.C., Brij Kumar Yadav, Shivam Yadav

U.P. Z.A. & L.R. Act-122-B(4-F)-Benefit when available?-possession must be unauthorized-damage caused to Gaon Sabha Land-plaintiff/petitioner granted lease for plantation-which has been done-such possession-not unauthorized-nor any loss/damage caused by petitioner-none of ingredients of Section 122-B attracted accordingly-benefit of subsection (4-F)-not available-findings

recorded by Board-justified-require no interference.

Held: Para-14, 15 & 16

14. In the instant case, it is admitted that the plaintiff petitioner entered into possession on the basis of a lease granted in his favour for planting trees and for this reason alone it must be held that the possession of the petitioner, if any, was not unauthorised or contrary to law. Admittedly, the lease had been granted to the petitioner or their predecessor in interest and therefore, their possession was permissive and not unauthorised or contrary to law or contrary to the provisions of the Act.

15. Secondly, the lease had been granted for planting trees which has admittedly been done by the petitioners as also their predecessors in interest. The property in question having been used for the purpose for which the lease had been granted the same cannot be termed as misappropriation or causing damage to the land in question.

16. It is therefore clear, that none of the necessary ingredients provided in sub section 1 of Section 122-B exists and therefore, in my considered opinion the Section 122-B as a whole is not attracted and therefore reliance upon sub section 4 F is not tenable. The petitioner would be entitled to seek benefit of sub section 4 F only in case they were in unauthorised occupation and had caused damage or had misappropriated the land.

Case Law discussed:

2002 (93) RD 393; 1991 (3) SCC 410; 2005 (98) RD 454

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

1. Heard Sri V.K. Singh learned counsel for the petitioners , Sri Brij Kumar Yadav for the respondent no. 6 Gaon Sabha and Sri Shivam Yadav for Kanpur Development Authority (respondent no. 4) and also learned Standing Counsel for the State respondents.

2. This writ petition arises out of suit under Section 229-B of the U.P. Zamindari Abolition & Land Reforms Act filed by the petitioner seeking to be declared Bhumidhar of Plot no. 2611 area 0.993 hectare situated in village Sarsaul, Pargana and District Kanpur Nagar.

3. The case of the plaintiff petitioner in the suit was that he had been granted a plantation lease for planting trees over the plot in question belonging to the Gaon Sabha. He had therefore, planted several trees thereon and had also started cultivating the land. Since he belonged to the scheduled caste and was in continuous possession of the land of the Gaon Sabha recorded as Naveen Parti, since 11.08.1974, he was entitled to the benefit of Section 122-B (4F) of the Act.

4. The Trial Court by its judgment dated 27.01.1998, decreed the suit on the finding that the petitioner plaintiff was in possession over the land in dispute from before 30.06.1975, prior to its transfer to the Kanpur Development Authority.

5. Aggrieved by the judgment and decree of the Trial Court, the Kanpur Development Authority preferred an appeal which was dismissed by the Additional Commissioner, Kanpur Division, Kanpur by the judgment and order dated 25.05.2000. The Kanpur Development Authority preferred a second appeal no. 65 of 1999-00. This second appeal has been allowed by the judgment and decree dated 17.11.2014, the judgments and decrees of the two courts below have been set aside and the suit of the plaintiff petitioner has

been dismissed. It is this judgment passed by the Board of Revenue which is impugned in the writ petition.

6. It has been submitted by learned counsel for the petitioner that the plaintiff was in possession of the land in question recorded as Naveen Parti since prior to the cut off date and was therefore fully entitled to the benefit of sub section 4F of Section 122-B as he belonged to the scheduled caste. The Trial Court as also the Appellate Court had rightly held in favour of the petitioner but the Board of Revenue has committed a manifest illegality in reversing such judgments. He has also submitted that the petitioner had perfected his rights as a bhumidhar with non transferable rights on the basis of his long standing possession, long before the land was transferred to the Kanpur Development Authority.

7. Learned counsel for the respondents have refuted the submissions made by learned counsel for the petitioners. Their primary contention is that the possession of the petitioner is legal and therefore the petitioners were not entitled to the benefit of sub section 4 F of Section 122-B. Merely, by planting some trees over land belonging to the Gaon Sabha, the petitioner could not become the owner of the said land.

8. Sri Shivam Yadav has additionally submitted that the benefit of sub section 4 F of the Act is available only against the Gaon Sabha. Since admittedly, the land now vests in the Kanpur Development Authority, the petitioner cannot get any benefit of the said sub-section.

9. I have considered the submissions made by learned counsel for the parties and have perused the record.

10. The sole point that arises for consideration in the instant case is as to whether a person who has been granted a plantation lease of land belonging to the Gaon Sabha for the purpose of planting trees thereupon and who has planted such trees in pursuance of the lease, is entitled to the benefit provided by Section 122-B (4F) of the U.P. Zamindari Abolition & Land Reforms Act. It therefore appears appropriate to notice the relevant provision which is extracted below:-

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

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

(3) If the person to whom a notice has been issued under Sub-section (2) fails to show cause within the time specified in the notice or within such extended time not exceeding three months from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

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

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

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

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

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

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

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

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

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

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

(5).....

11. Section 122-B of the Act provides the mode and the procedure for taking action where property vested in the Gaon Sabha is damaged or misappropriated and the various sub sections provided the procedure and the remedy as regards the action and therefore the entire provision has to be read as a whole. Sub Section 1 provides that where property

vested in the Gaon Sabha is damaged or misappropriated and such land is 'occupied otherwise than in accordance with the provisions of this Act', the Assistant Collector concerned is required to be informed of such damage, misappropriation or occupation otherwise than in accordance with the provisions of the Act.

12. It is therefore, clear that for the provisions of Section 122-B to be attracted the following ingredients must exist:-

(i) there must be damage or misappropriation of property vested in the Gaon Sabha or local authority,

(ii) the land must be occupied except in accordance with the provisions of the Act or the Gaon Sabha or local authority is entitled to take and retain possession thereof under the Act,

13. It therefore logically follows that the provisions of this section will come into play only when the aforesaid two conditions are fulfilled.

14. In the instant case, it is admitted that the plaintiff petitioner entered into possession on the basis of a lease granted in his favour for planting trees and for this reason alone it must be held that the possession of the petitioner, if any, was not unauthorised or contrary to law. Admittedly, the lease had been granted to the petitioner or their predecessor in interest and therefore, their possession was permissive and not unauthorised or contrary to law or contrary to the provisions of the Act.

15. Secondly, the lease had been granted for planting trees which has admittedly been done by the petitioners as also their predecessors in interest. The property in question having been used for the purpose for which the lease had been granted the same cannot be termed as misappropriation or causing damage to the land in question.

16. It is therefore clear, that none of the necessary ingredients provided in sub section 1 of Section 122-B exists and therefore, in my considered opinion the Section 122-B as a whole is not attracted and therefore reliance upon sub section 4 F is not tenable. The petitioner would be entitled to seek benefit of sub section 4 F only in case they were in unauthorised occupation and had caused damage or had misappropriated the land.

17. The same view has been taken by this court in the case of Brahmi Vs District Magistrate/D.D.C., Muzaffarnagar and others.1 In paragraph 13 of this judgment it has been held that where possession of a person is not unauthorised, there is no question of applicability of Section 122-B (4 F). This has been so held relying upon the judgment of the Apex Court in Kalawatibai Vs Soiryabai and others2 wherein the Apex Court while interpreting the provisions contained in Section 122-B and it sub sections held "that a section has to be read in its entirety as one composite unit without bifurcating it or ignoring any part of it. Viewed from this perspective the section, undoubtedly, comprises two parts, one descriptive, specifying the essential requirements for applicability of the section, other consequences arising out of it. One cannot operate without the other. Neither can be read in isolation. Both are integral parts of the section....."

18. In the case of Sanjay Kumar vs Collector/ District Magistrate, Kanpur

Dehat and others3 this court had held that the benefit under Section 4 F is liable to be given only to those members of the scheduled caste whose possession is entered in the revenue records prior to the cut off date or eviction proceedings are pending against them since before the

said date. This is not the position in the case at hard. The land in question is admittedly recorded as Naveen Parti and therefore also the petitioners are not entitled to the benefit of sub section 4 F.

19. The Board of Revenue in the impugned order has recorded that the plaintiff petitioner had title only to the trees and the entries of title over the trees will not give any substantive right to the petitioner over the land. It was further observed, that no documentary proof has been furnished by the plaintiff petitioner and only the trees are recorded in the Khasra 1401 Fasli. A specific finding has also been recorded that the petitioners' possession is not recorded in any document available on record.

20. In view of the above discussion, I see no illegality in the impugned order. It is inconsonance with the view taken by this court in the case of Sanjay Kumar and specially in Brahmi (supra), which in turn is based on the judgment of the Apex Court in the case of Kalawatibai Vs Soiryabai and others.

21. The writ petition therefore lacks substance and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.04.2015

BEFORE
THE HON'BLE MANOJ MISRA, J.

Application U/S 482 No. 7359 of 2015

Bhagwan Das ...Applicant
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Bharat Singh

Counsel for the Opp.Parties:
Govt. Advocate

Cr.P.C.-Section 482-against order rejecting application to recall of witness-for cross examination-held-suffers from legal infirmity-set-a-side-as right to cross examine the prosecution witness-a valuable right of accused-can not be casually forfeited.

Held: Para-7
Having considered the submissions of the learned counsel for the parties, this Court is of the view that right to cross-examine the prosecution witnesses is a very valuable right of an accused and should not mechanically or casually be forfeited unless there are compelling reasons justifying the same. Where the accused is languishing in jail and is not being represented by a counsel or though a counsel has put in appearance but fails to appear to provide any assistance to the accused, it is the duty of the Court to appoint an amicus curiae to represent the accused unless the accused in clear and unambiguous words refuses to take his service and chooses to defend himself personally.

(Delivered by Hon'ble Manoj Misra, J.)

1. Heard learned counsel for the applicant; the learned A.G.A. for the State and perused the record.

2. The instant application has been filed by an accused facing trial for offences punishable under sections 363, 366 and 376 IPC for quashing of an order

dated 04.02.2015 passed by the Additional Sessions Judge (Fast Track Court), Budaun in Session Trial No. 523 of 2012 (State v. Bhagwan Das) by which the application of the applicant for recall of the witnesses (P.W.1 to P.W.6) for cross-examination, has been rejected.

3. The case of the applicant is that in connection with the aforesaid offences he was arrested and bailed out, but, thereafter, he was again arrested in another case and had to remain in jail from 25.09.2012 to 15.11.2014 in which period the trial proceeded and prosecution witnesses i.e. PW1 to PW6 were examined whereas no counsel appeared on his behalf to cross examine them, as a result, the prosecution evidence was closed. It his case that though, earlier, counsels were engaged by him but no one appeared on his behalf to cross examine the witnesses because the applicant having been languishing in jail was unable to pay their fees and there was no one available to do pairvi on his behalf as his father had already died. It was thus prayed that as the applicant has now been bailed out and is in a position to engage counsel, the witnesses be recalled and the applicant be allowed to cross examine them.

4. The court below rejected the application by observing that there were counsels who had filed their power (vakalatnama) on behalf of the applicant but they did not appear to cross examine; and as no prayer was made by the applicant to appoint an amicus curiae, it cannot be said that sufficient opportunity was not given to him to cross examine the witnesses and, as such, the plea to recall the witnesses is only to delay the conclusion of the trial, therefore was worthy of rejection. The trial court, however, neither recorded any finding that at the time when the trial proceeded and witnesses were examined, the accused was not languishing in jail nor it observed that services of an amicus curiae was offered by the Court to the applicant which he consciously refused to avail.

5. Challenging the order passed by the court below, the learned counsel for the applicant submitted that every accused has a right to be represented by a lawyer at the commencement of the trial and during the course of the trial and it is the constitutional duty of the Court to provide him with a lawyer. It has been submitted that as the counsel engaged by the applicant had not appeared to conduct cross-examination and the applicant had not waived his right to be represented by a lawyer, the trial court was under an obligation to appoint an amicus curiae to represent the applicant to cross examine the witnesses. It has been submitted that mere not asking for being represented by a lawyer would not absolve the Court from its constitutional duty of appointing an amicus curiae to represent the accused unless the accused consciously refuses to be represented and takes upon himself the mantle of a cross examiner. In support of his submission, the learned counsel for the applicant has cited before the Court a landmark judgment of the Apex Court in the case of Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharastra, reported in 2012 (9) SCC 1 where, in paragraphs 474 and 477 of the report, the Apex Court had observed as follows:-

"474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be

defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see Suk Das v. UT of Arunachal Pradesh 97)."

6. The learned AGA though sought to support the lower court order but could not point out any binding legal precedent holding to the contrary than what has been cited by the learned counsel for the applicant.

7. Having considered the submissions of the learned counsel for the parties, this Court is of the view that right to cross-examine the prosecution witnesses is a very valuable right of an accused and should not mechanically or casually be forfeited unless there are compelling reasons justifying the same. Where the accused is languishing in jail and is not being represented by a counsel or though a counsel has put in appearance but fails to appear to provide any assistance to the accused, it is the duty of the Court to appoint an amicus curiae to represent the accused unless the accused in clear and unambiguous words refuses to take his service and chooses to defend himself personally.

8. In the instant case, admittedly all the prosecution witnesses have gone without cross examination. The Court also finds that there is nothing in the order impugned to suggest that the counsel engaged by the applicant to appear on his behalf was present at the time of examination in chief but had consciously refused to cross examine the witness. There is also nothing in the order impugned to suggest that services of an amicus curiae was offered to the applicant by the Court which he consciously refused to avail. It is also not in dispute that the applicant was languishing in jail at the time when the witnesses were examined. Under the circumstances, this court is of the view that the order rejecting the application for recall of the prosecution witnesses suffers from legal infirmity and is liable to be set aside. The impugned order dated 04.02.2015 is set aside. The matter is remitted back to

the court concerned to pass a fresh order on the application of the applicant for recall of the witnesses keeping in mind the observations made herein above.

9. The application stands allowed to the extent indicated above.

10. Office is directed to send a copy of this order to the court concerned, within two weeks, for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE ARVIND KUMAR MISHRA-I, J.

Criminal Misc. Writ Petition No. 7438 of 2015

Narsingh Tiwari ..Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
A.M. Tripathi
Counsel for the Respondents:
Govt. Advocate

Constitution of India,Art.-226-Quashing FIR-by informant-allegations of kidnapping of minor girl-held-subject to recourse final report by investigation officer-under Section 157, 158 or 173 (2) Cr.P.C.-statement of minor girl be recorded under Section 164 Cr.P.C.-with liberty to court below to pass appropriate order-petition disposed of.

Held: Para-8
In the aforesaid circumstances, the petitioner appears to have moved an application before the Senior Superintendent of Police. Learned A.G.A. therefore is right in his submissions that it is now for the Investigating Officer to submit his report keeping in view the provisions of Section 157 read with Section 158 Cr.P.C. coupled with the report which might be submitted finally under Section 173(2) Cr.P.C. The contention, therefore, is that if the closure of the case is warranted in the background aforesaid, the same has to be attempted through the aforesaid agency and the procedure prescribed in law.

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

1. Heard learned counsel for the petitioner and Sri A.K. Sand, learned A.G.A. for the respondents no.1, 2 and 3.

2. This is a peculiar case where the father of the victim, who is the complainant, has come forward with a prayer to quash the FIR and an alternative prayer for a mandamus to the respondent no.3 not to interrogate the petitioner or subject the petitioner's daughter to any further investigation that may amount to harassment. In effect, the prayer is that the petitioner no longer wants to prosecute the accused at his instance.

3. The FIR was lodged where allegations were made of kidnapping of the girl who, according to the version in the FIR, had not attained the age of majority of 18 years and was also mentally of a lower level.

4. The accused are alleged to have enticed her away, hence the FIR which is more than almost five months old.

5. Learned counsel for the petitioner submits that in the background that the girl has already been recovered and she is in the custody of the petitioner, the petitioner does not want to take any further action in the matter keeping in view the future of his daughter.

6. Learned A.G.A. takes an objection to this prayer being made by the informant himself for quashing of the FIR on the ground that if the allegations in the FIR are found to be false, then there is a likelihood of the petitioner himself being prosecuted and this action or process can be undertaken by the court upon a police report being filed in the matter and not before that. In the aforesaid circumstances, he contends that the petitioner, who is the informant, has no locus to get the FIR quashed in the aforesaid background and even otherwise it is the responsibility of the State now to find out through its Investigating Agency as to whether any cognizable offence has been committed or not which is liable to be dealt with and punishment awarded in terms of the provisions of the Code of Criminal Procedure as well as the Indian Penal Code.

7. We have given our thoughtful consideration to this peculiar circumstance and it prima facie appears that the petitioner is now praying to save the honour of his family after this incidence has taken place as well as protect the future of his daughter.

8. In the aforesaid circumstances, the petitioner appears to have moved an application before the Senior Superintendent of Police. Learned A.G.A. therefore is right in his submissions that it is now for the Investigating Officer to submit his report keeping in view the provisions of Section 157 read with Section 158 Cr.P.C. coupled with the report which might be submitted finally under Section 173(2) Cr.P.C. The contention, therefore, is that if the closure of the case is warranted in the background aforesaid, the same has to be attempted through the aforesaid agency and the procedure prescribed in law.

9. Apart from this, we also find it necessary that since a report has been alleged disclosing a cognizable offence then before any such report is submitted or accepted by the court concerned, it would be appropriate that the statement of the victim is also recorded under Section 164 Cr.P.C.

10. We, therefore, direct that the statement of the victim should be recorded before the court below under Section 164 Cr.P.C. and thereafter it will be open to the court concerned to pass appropriate orders in the background aforesaid, if warranted on the facts of the present case for closure.

11. Disposed of with the said observations.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 30.04.2015

BEFORE
THE HON'BLE RAMESH SINHA, J.

Bail No. 8441 of 2014

Ali Mohammad ...Applicant
Versus
The State of U.P. ...Opp. Party

Counsel for the Applicant:
Ran Vijay Singh

Counsel for the Opp. Party:
Govt. Advocate

Cr.P.C.-Section-439-Bail-offence under Section 498-a/304-B IPC-applicant being father-in-law of deceased considering general allegation-no dying declarations-entitled for conditional bail.

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

1. Heard Sri Ran Vijay Singh, learned counsel for the applicant and Sri

Alok Mohan Upadhyay, learned A.G.A. appearing for the State.

2. It has been contended by the learned counsel for the applicant that the applicant is the father-in-law of the deceased. The marriage between the deceased and applicant's son, namely, Akbar Ali was solemnized in the year 2013. Only general allegation has been levelled against the applicant. There is no dying declaration against the applicant. The husband of the deceased is in jail. The applicant has no other reported criminal antecedent. The applicant is in jail.

3. Learned A.G.A. opposed the prayer for bail.

4. Without expressing any opinion on the merits of the case and considering the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence, reasonable apprehension of tempering of the witnesses and prima facie satisfaction of the Court in support of the charge, the applicant is entitled to be released on bail in this case.

5. Let the applicant Ali Mohammad involved in Case Crime No. 686 of 2013 under Sections 498-A/304-B I.P.C., police station Kotwali Sadar, District Unnao be released on bail on his furnishing a personal bond with two sureties each in the like amount to the satisfaction of the court concerned with the following conditions.

(i) The applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.

(ii) The applicant shall remain present before the trial court on each date fixed, either personally or through his counsel. In case of his absence, without sufficient cause, the trial court may proceed against him under Section 229-A of the Indian Penal Code.

(iii) In case, the applicant misuses the liberty of bail during trial and in order to secure his presence proclamation under Section 82 Cr.P.C. is issued and the applicant fails to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against him, in accordance with law, under Section 174-A of the Indian Penal Code.

(iv) The applicant shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against him in accordance with law.

6. The case of the applicant is distinguishable from co-accused Akbar Ali.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.04.2015

BEFORE
THE HON'BLE MANOJ MISRA, J.

Application U/S 482 No. 11323 of 2015

Santosh Sharma ...Applicant
Versus
State of U.P. & Anr. ..Opp. Parties

Counsel for the Applicant:
Sri Janardan Yadav

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

Cr.P.C. Section 482-Right of an accused-cross -examination the prosecution witness-when statement recorded-due to strike of advocates-cross examination not done-rejection the prayer of cross-examination on ground that-if allowed would encourage to strike-held-illegal-valuable rights of an accused can not be forfeited-evidence can be disclosed-if accused refuse to accept service of amicus curiae-not otherwise-order quashed.

Held: Para-8
In the instant case, admittedly, on the date when those prosecution witnesses were examined, the lawyers were on strike and the counsel for the applicant could not appear to cross-examine the witnesses therefore, either the Court should have deferred the cross-examination to another date or should have offered services of an amicus curiae to assist the applicant for such purpose. Only when the applicant had refused to avail of the services or had consciously chosen not to cross-examine those witnesses, then the right to cross-examine those witnesses could have been forfeited.

Case Law discussed:
2012 (9) SCC 1

(Delivered by Hon'ble Manoj Misra, J.)

1. Heard learned counsel for the applicant; the learned A.G.A. for the State and perused the record.

2. The instant application has been filed seeking quashing of an order dated 16.04.2015 passed by the Additional Session Judge, Court No.8, Azamgarh in S.T. No. 461 of 2013 by which the application No. 26 Kha to enable the counsel for the applicant to cross-examine Seema Sharma and Vikas Sharma (the prosecution witnesses), whose statements were recorded while the counsels were on strike, has been rejected.

3. The submission of the learned counsel for the applicant is that on 11.03.2015 when the examination-in-chief of the aforesaid two witnesses was recorded, the lawyers were on strike and therefore no one had appeared to cross-examine the said witnesses and the right to cross-examination was closed, therefore, in the interest of justice application 26 Kha was moved by the applicant to summon those witnesses for allowing their cross-examination, which has been wrongly rejected by the court below on the ground that if such application is allowed then it would encourage the lawyers to be on strike.

4. It has been submitted that the reason for rejection of the application is not legally justified since cross-examination is a valuable right of an accused, of which he should not be deprived on fault of the lawyers.

5. Learned A.G.A. though sought to support the lower court order but could not point out anything material on record which may go to show that the applicant was at fault in not cross-examining the witnesses, who were examined by the Court.

6. In the case of Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharastra, reported in 2012 (9) SCC 1 in paragraphs 474 and 477 of the report, the Apex Court had observed as follows:-

"474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal

practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial.Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see Suk Das v. UT of Arunachal Pradesh 97)."

7. Having considered the observations of the apex court, this Court is of the view that service of a lawyer is of paramount importance to an accused. If, for some reason, the counsel for the accused fails to appear, then the court must offer service of an amicus curiae to the accused. It is very difficult to imagine as to how, in ordinary circumstances, an accused could cross-examine a witness to discredit his evidence. The right to cross-examine the prosecution witnesses is a very valuable right of an accused and should not mechanically or casually be forfeited unless there are compelling reasons justifying the same. Of course, the court may forfeit the right to cross examine where, for no cogent reason, either the counsel or the accused refuses to cross-examine the witness offered for cross-examination.

8. In the instant case, admittedly, on the date when those prosecution witnesses were examined, the lawyers were on strike and the counsel for the applicant could not appear to cross-examine the witnesses therefore, either the Court should have deferred the cross-examination to another date or should have offered services of an amicus curiae to assist the applicant for such purpose. Only when the applicant had refused to avail of the services or had consciously chosen not to cross-examine those witnesses, then the right to cross-examine those witnesses could have been forfeited.

9. Accordingly, the order passed by the court below is unsustainable in law and is hereby set aside. The court below is directed to pass a fresh order on the application of the applicant for recall of the witnesses keeping in mind the observations made herein above.

10. The application stands allowed to the extent indicated above.

ORIGINAL JURISDICTION

CIVIL SIDE
DATED: ALLAHABAD 18.07.2014

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

Writ-A No. 13628 of 2014

Mahesh Chandra Ex-LnK/CI ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Sri Birendra Pratap Singh

Counsel for the Respondents:
A.S.G.I., Sri R.B. Singhal, Sri Satish Kumar Rai, Sri Aditya Bhushan Singhal

(A)Constitution of India, Art. 32, 226,227- Power of superintendence-against final order by Army Tribunal-in spite of statutory remedy to appeal-subject to leave granted by Tribunal under Section 30 of Act-held-Power of judicial review-a constitutional provision-can not be taken away on special enactments.

Held: Para-73(ii)
The power of judicial review of the Supreme Court and of the High Courts is firmly entrenched as a basic feature of the Constitution which lies beyond the amending power. Even more so, ordinary legislation cannot abrogate the constitutional power of judicial review that is vested in the Supreme Court under Article 32 and in the High Courts under Article 226;

(B) Armed Force Tribunal Act 2007- Jurisdiction-to decide the vires of parent statute-exclusively vests with High Court-Tribunal can entertain and decide other cases relating to services of member of Arm force.

Held: Para-33
The Tribunals shall not entertain any question regarding the vires of their parent statutes following the well settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court could be approached directly. Consequently, in all other cases, the Tribunals will continue as the only courts of first instance in respect of the areas of law for which they have been constituted:

Case Law discussed:
2012 (3) ADJ 655; (1997) 3 SCC 261; (1982) 3 SCC 140; (1973) 4 SCC 225; (1993) 4 SCC 119; (1987) 1 SCC 124; (1993) 21 An. WR 484:(1994) 1 APLJ 1 (FB); (1998) 5 SCC 468; (2003) 6 SCC 581; (2010) 4 SCC 554; (2010) 11 SCC 1; (2011) 14 SCC 337; (2012) 4 SCC 761; (2012) 11 SCC 224; (2013) 1 SCC 745; [ILR (2011) IV Delhi]; [2013 (2) MPLJ 212]; (2007) 2 SCC 1; (2012) 8 SCC 524.

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

The Reference

1. A final order of the Armed Forces Tribunal at its Lucknow Bench has been challenged in this petition under Article 226 of the Constitution. A preliminary objection was raised before the Division Bench to the maintainability of the petition founded on a judgment of a Division Bench of this Court in Surendra Bahadur Singh Vs. Armed Forces Tribunal, Regional Bench, Lucknow & Ors.1 that (i) no writ would lie before the High Court against a final order of the Armed Forces Tribunal, since an appeal lies to the Supreme Court under Section 31 (1) of the Armed Forces Tribunal Act, 2007; and (ii) since a statutory remedy of an appeal under Sections 30 and 31 is available against a final order of the Tribunal made in exercise of powers

under Section 14, this Court ought not to entertain the petition. The Division Bench found itself unable to agree with the earlier decision in Surendra Bahadur Singh (supra).

2. The following questions have been referred for consideration of a larger Bench2:

"(a) Whether the jurisdiction of the High Court to entertain a writ petition under Article 226 of the Constitution of India against the final order of the Tribunal made under Section 14 can be said to have been taken away by any stretch of interpretation of the statutory provisions of the Armed Forces Tribunal Act, 2007. The necessary corollary being that can an act of Parliament whittle down any of the constitutional remedies made available under Article 226 of the Constitution of India, which is one of the basic features of the Constitution of India as laid down in the case of L. Chandra Kumar Vs Union of India.

(b) Whether the remedy of judicial review under Article 226 of the Constitution of India can be denied by the High Court to a litigant on the ground that he has a statutory remedy available before the Apex Court by way of an appeal under Section 30/31 of AFT Act, 2007, thereby he loses his constitutional right of judicial review, under Article 226 of the Constitution of India specially in the circumstance when the order of the High Court under Article 226 of the Constitution of India itself can be subjected to challenge before the Apex Court by way of Special Leave to Appeal under Article 136 of the Constitution of India.

(c) Whether the High Court may refuse to entertain a writ petition under Article 226 of the Constitution of India, because of availability of statutory alternative remedy only in cases where after exhaustion of such statutory remedy his right to seek judicial review under Article 226 of the Constitution of India is not lost."

3. In Surendra Bahadur Singh (supra), the conclusion which was arrived at by the Division Bench was as follows:

"Conclusion

43. On the aforesaid discussion, we are of the view that the AFT Act, 2007 does not take away or violate the right of judicial review under Art. 226/227 and Art.32 of the Constitution of India. The writ petitions under Art. 226 of the Constitution of India would be maintainable, where:-

(a) it pertains to challenge against the constitutional validity of any of the provisions of the AFT Act, 2007;

(b) in the matters relating to armed forces excepted from the jurisdiction of the AFT under Section 3 (o) of the AFT Act, 2007;

(c) in the matters of interlocutory orders passed by the AFT;

However, no writ will lie in the High Court:-

(a) in contempt matters, where statutory appeal is provided to the Supreme Court under Section 30 (2) of AFT Act, 2007;

(b) against final orders of the AFT, in which an appeal lies to Supreme Court under Section 31 (1) of AFT Act, 2007;

(c) under Art. 227 of the Constitution of India.

44. In the writ petitions before us, the petitioners have challenged the final orders passed by the AFT, without filing an application for leave to appeal to the

Supreme Court under Section 31 (1) of the AFT Act, 2007.

45. All the writ petitions are consequently dismissed."

4. While differing with the view taken in Surendra Bahadur Singh, the Division Bench has observed that the principle of law which was laid down by a Constitution Bench of the Supreme Court in L. Chandra Kumar Vs. Union of India & Ors.3 is that judicial review under Article 226 of the Constitution is a constitutional remedy and is one of the basic features of the Constitution. Hence, in the view of the Division Bench, a constitutional remedy which forms part of the basic features of the Constitution cannot be whittled down by an Act of Parliament. The Division Bench observed that the High Court, in its discretion, may not entertain a writ petition if a suitable statutory alternative remedy is available but that is distinct from holding that the petition is not maintainable. This conflict of views has given rise to the reference before the Full Bench.

Background to the enactment of Armed Forces Tribunal Act, 2007

Article 33 of the Constitution provides thus:

"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.- Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to, -

(a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

5. The fundamental rights conferred by Part III of the Constitution may be restricted or abrogated in their application to members of the armed forces or the forces charged with the maintenance of public order to the extent so determined by Parliament by law to ensure the proper discharge of duties and the maintenance of discipline among them.

6. Entry 2 of the Union List to the Seventh Schedule of the Constitution covers naval, military and air forces and any other armed forces of the Union. Entry 95 of the Union List to the Seventh Schedule of the Constitution provides for the jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters contained in the Union List. Parliament, by virtue of Article 246 of the Constitution, has the exclusive jurisdiction to legislate on these heads of legislative power.

7. In Lt. Col. Prithi Pal Singh Bedi Vs. Union of India & Ors.4, a Bench of three learned Judges of the Supreme Court, held, following the decision of the Constitution Bench in Ram Sarup Vs. Union of India5 that:

"...every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III,

shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act..."

8. However, the Supreme Court emphasised that:

"While investigating and precisely ascertaining the limits of inroads or encroachments made by legislation enacted in exercise of power conferred by Article 33, on the guaranteed fundamental rights to all citizens of this country without distinction, in respect of armed personnel, the court should be vigilant to hold the balance between two conflicting public interests; namely necessity of discipline in armed personnel to preserve national security at any cost, because that itself would ensure enjoyment of fundamental rights by others, and the denial to those responsible for national security of these very fundamental rights which are inseparable adjuncts of civilised life."

9. The Supreme Court, however, observed that there was a necessity to provide a fair, just and reasonable procedure under which judicial review of law and facts should be available to members of the armed forces who had been subjected to the military discipline of a court-martial to a body composed of non-military or civilian personnel. The Court observed that by enlisting in the armed forces, a person does not cease to be a citizen, to be wholly deprived of constitutional rights and though Parliament, in its wisdom, has been empowered to restrict or abrogate their fundamental rights, this process should not be carried so far as to create a class of citizens not entitled to the benefits of the liberal spirit of the Constitution. In the concluding part of the decision, the Supreme Court expressed the hope and belief that the changes which had taken place in the English speaking democracies would awaken Parliament to the changed value system. Cognisant of the expanding horizons of fairness under Article 14 and of personal liberty under Article 21 of the Constitution, Parliament eventually enacted the Armed Forces Tribunal Act, 2007.

The Armed Forces Tribunal Act, 2007

The Act has been enacted to provide for:

"...the adjudication or trial by Armed Forces Tribunal of disputes and complaints with respect to commission, appointments, enrolment and conditions of service in respect of persons subject to the Army Act, 1950, the Navy Act, 1957 and the Air Force Act, 1950 and also to provide for appeals arising out of orders, findings or sentences of courts-martial held under the said Acts and for matters connected therewith or incidental thereto."

10. Section 3(o) of the Armed Forces Tribunal Act, 2007 defines the expression "service matters" as follows:

"service matters", in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), means all matters relating to the conditions of their service and shall include -

(i) remuneration (including allowances), pension and other retirement benefits;

(ii) tenure, including commission, appointment, enrolment, probation, confirmation, seniority, training, promotion,

reversion, premature retirement, superannuation, termination of service and penal deductions;

(iii) summary disposal and trials where the punishment of dismissal is awarded;

(iv) any other matter, whatsoever,

but shall not include matters relating to -

(i) orders issued under Section 18 of the Army Act, 1950 (46 of 1950), sub-section (1) of Section 15 of the Navy Act, 1957 (62 of 1957) and Section 18 of the Air Force Act, 1950 (45 of 1950); and

(ii) transfers and postings including the change of place or unit on posting whether individually or as a part of unit, formation or ship in relation to the persons subject to the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957) and the Air Force Act, 1950 (45 of 1950)

(iii) leave of any kind;

(iv) Summary Court Martial except where the punishment is of dismissal or imprisonment for more than three months;"

11. Section 4 empowers the Central Government to establish the Armed Forces Tribunal to exercise the jurisdiction, powers and authority conferred by or under the Act. Under Section 5 (1), the Tribunal consists of a Chairperson and Judicial and Administrative Members. A Chairperson under Section 6(1) has to be either a retired Judge of the Supreme Court or a retired Chief Justice of a High Court. The qualification for appointment as a Judicial Member under Section 6(2) is that a person is or has been a Judge of the High Court. An Administrative Member under Section 6(3) must have (i) held the rank of Major General or higher, for at least three years in the Army or an equivalent rank in the Navy or under the Air Force; and (ii) should have served for not less than one year as Judge Advocate-General in the Army, Navy or Air Force and should not be below the rank of Major General, Commodore and Air Commodore respectively.

12. Chapter III of the Act deals with the jurisdiction, power and authority of the Tribunal. Section 14, insofar as is relevant, is to the following effect:

"14. Jurisdiction, powers and authority in service matters.- (1) Save as otherwise expressly provided in this Act, the Tribunal shall, exercise, on and from the appointed day, all the jurisdiction, powers and authority, exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to all service matters.

(2) Subject to the other provisions of this Act, a person aggrieved by an order pertaining to any service matter may make an application to the Tribunal in such form and accompanied by such documents or other evidence and on payment of such fee as may be prescribed.

(3) On receipt of an application relating to service matters, the Tribunal shall, if satisfied after due inquiry, as it may deem necessary, that it is fit for adjudication by it, admit such application; but where the Tribunal is not so satisfied, it may dismiss the application after recording its reasons in writing."

13. Under sub-section (1) of Section 15, the Tribunal exercises, save as otherwise expressly provided, all the jurisdiction, powers and the authority exercisable under the Act in relation to an appeal against any order, decision, finding or sentence passed by a court-martial or any other matter connected

therewith or incidental thereto. Chapter V of the Act provides for appeal. Under Section 30 (1), an appeal lies to the Supreme Court against a final decision or order of the Tribunal (other than an order passed under Section 19):

"30. Appeal to the Supreme Court. - (1) Subject to the provisions of section 31, an appeal shall lie to the Supreme Court against the final decision or order of the Tribunal (other than an order passed under section 19):

Provided that such appeal is preferred within a period of ninety days of the said decision or order:

Provided further that there shall be no appeal against an interlocutory order of the Tribunal."

14. Under sub-section (2) of Section 30, an appeal lies to the Supreme Court as of right from any decision or order of the Tribunal in the exercise of its jurisdiction to punish for contempt. Section 31(1) of the Act is to the following effect:

"31. Leave to appeal.- (1) An appeal to the Supreme Court shall lie with the leave of the Tribunal; and such leave shall not be granted unless it is certified by the Tribunal that a point of law of general public importance is involved in the decision, or it appears to the Supreme Court that the point is one which ought to be considered by that Court."

5. Hence, an appeal lies to the Supreme Court with the leave of the Tribunal only on a certification that a point of law of general public importance is involved or where it appears to the Supreme Court that the point is one which ought to be considered by that Court.

16. Section 33 of the Act provides for the exclusion of the jurisdiction of the Civil Court and is to the following effect:

"33. Exclusion of jurisdiction of civil courts. - On and from the date from which any jurisdiction, powers and authority becomes exercisable by the Tribunal in relation to service matters under this Act, no Civil Court shall have, or be entitled to exercise, such jurisdiction, power or authority in relation to those service matters."

SUBMISSIONS

17. On behalf of the Union of India, it has been urged that :

(i) The Armed Forces Tribunal Act, 2007 was enacted by Parliament under Article 246 read with Entry 2 of the Union List to the Seventh Schedule of the Constitution;

(ii) The Act provides for an appeal to the Supreme Court under Section 30 and Section 31;

(iii) The jurisdiction of the High Court is not excluded (a) in matters not covered by the definition of 'service matters' under Section 3(o); (b) in challenges against interlocutory orders where no appeal lies under the proviso to Section 30; and (c) in matters pertaining to a challenge to the constitutional validity of a provision of the Act;

(iv) The Statement of Object and Reasons accompanying the introduction of the Bill in Parliament would indicate that against the final orders of the Tribunal, an appeal is the only alternative efficacious and suitable remedy under Sections 30 and 31;

(v) The constitution, composition and selection of the Administrative Tribunals is distinct from the Armed Forces Tribunal and, hence, the decision of the Supreme Court in L. Chandra Kumar (supra) would not govern;

(vi) Under Entry 95 of the Union List to the Seventh Schedule, Parliament has the power to exclude the jurisdiction of all courts except the Supreme Court. The Constitution has conferred upon the armed forces a special status under Article 33 which empowers Parliament to restrict or abrogate the fundamental rights in their application to the armed forces by conferring exclusive power upon Parliament under Article 35 to make laws with respect to a matter falling under Article 33;

(vii) Under Article 136 (2), the power of judicial review of the Supreme Court is abrogated in relation to a judgment, determination, sentence or order of a Court or Tribunal constituted under any law relating to the armed forces; Article 227 (4) excludes judicial review in respect of the superintendence of the High Court over a Court or Tribunal constituted by a law relating to the armed forces;

(viii) If an order passed by the Armed Forces Tribunal is subjected to the jurisdiction of the High Court under Article 226, that jurisdiction not being supervisory, the order of the Tribunal would not merge with the order of the High Court and, hence, a remedy under Article 136 would not be available;

(ix) To determine what constitutes the basic structure of the Constitution and whether an Act is in violation of the basic structure, every case has to be independently viewed. In several other enactments, appeals are directly provided to the Supreme Court leading to the exclusion of judicial review under Articles 226 or 227 of the Constitution;

(x) A workable solution to maintain the jurisdiction of the High Court under Article 226 would be that :

(a) the validity of the Armed Forces Act, 2007 is open to challenge under Article 226;

(b) all matters which have been excluded under Section 3(o) are susceptible of challenge under Article 226;

(c) all interlocutory orders and other matters for which a provision has not been made in the Armed Forces Tribunal Act, 2007 can be subject to judicial review under Article 226. Since the High Court would be exercising original jurisdiction, a Special Leave Petition would be maintainable under Article 136 of the Constitution. In all other cases, judicial review under Article 226 stands excluded.

Decisions prior to L. Chandra Kumar

18. Following the judgment of 13 Judges in Kesavananda Bharati & Ors. Vs. State of Kerala & Anr.6, several decisions of the Supreme Court elaborated upon the doctrine of basic structure particularly in the context of judicial review. These include:

(1) Indira Nehru Gandhi Vs. Raj Narain & Anr.7

(2) Minerva Mills Ltd. & Ors. Vs. Union of India & Ors.8

(3) Fertilizer Corporation Kamgar Union & Ors. Vs. Union of India & Ors.9

(4) Kihoto Hollohan v. Zachillhu & Ors.10

19. In Indira Nehru Gandhi (supra), the constitutional validity of the 39th amendment to the Constitution was challenged on the ground that it offended the basic features of the Constitution. Chief Justice A.N. Ray held:

"Judicial review in India is not founded on any article similar to that in the American Constitution or the Australian Constitution; judicial review in many matters under statute had been

excluded; judicial review in election disputes was not a compulsion; judicial review in election disputes may be entrusted by law to a tribunal; similarly, Article 33 excluded judicial review in matters relating to armed forces; Article 262(2) excluded jurisdiction of courts in border disputes; the amending body had excluded judicial review in Articles 31A, 31B and 31C; hence, the Constitution permitted by amendment exclusion of judicial review of a matter if it was necessary to give effect to Directive Principles of State Policy; a similar power may be available when such exclusion was needed in the larger interest of the security of the State11.

20. Justice H.R. Khanna held that:

"...It is not necessary in a democratic set-up that disputes relating to the validity of elections must be settled by courts of law; there were many countries like France, Japan and the United States of America where consistently with the democratic set-up the determination of such controversies was by the legislature or by authorities other than the courts..12. (emphasis supplied)

Justice K.K. Mathew held that:

"...Nobody can deny that by passing a law within its competence, Parliament can vest judicial power in any authority for deciding a dispute or vest a part of that power in itself for resolving a controversy, as there is no exclusive vesting of judicial power in courts by the Constitution. The doctrine of separation of powers which is directed against the concentration of the whole or substantial part of the judicial power in the Legislature or the Executive would not be a bar to the vesting of such a power in itself..13." (emphasis supplied)

Justice M.H. Beg held that:

"...Courts, however, have to test the legality of laws, whether they purport to be ordinary or constitutional, by the norms laid down in the Constitution; separation of powers and supremacy of the Constitution are parts of the "basic structure' of the Constitution14. (emphasis supplied).

21. While dealing with the submission that judicial review is a part of the basic structure of the Constitution, Justice Y V Chandrachud noted that the fundamental premise of the argument was too broadly stated because the Constitution, as originally enacted, expressly excluded judicial review in a large variety of important matters. Many among them were Articles 31(4), 31(6), 136(2), 227(4), 262(2) and 329(a). Moreover, by Article 103(1), the Constitution bestowed jurisdiction on the President to determine any question arising under Article 102 regarding disqualification of a Member of Parliament. Judicial review was held not to form part of the basic structure in relation to elections to the legislatures. Hence, the judgment evaluated the position of judicial review in the case of electoral disputes and held that in those disputes, exclusion did not offend the basic feature. In that context, it was held as follows:

"...For determining whether a particular feature of the Constitution is a part of its basic structure, one has perforce to examine in each individual case the place of the particular feature in the scheme of our Constitution, its object and purpose, and the consequences of its

denial on the integrity of the Constitution as a fundamental instrument of country's governance. ..

Judicial review, according to Shri Shanti Bhushan, is a part of the basic structure of the Constitution and since the Thirty-ninth Amendment by Article 329A (4) and (5) deprives the courts, including the Supreme Court, of their power to adjudicate upon the disputed election, the amendment is unconstitutional. The fundamental premise of this argument is too broadly stated because the Constitution, as originally enacted, expressly excluded judicial review in a large variety of important matters. Articles 31(4), 31(6), 136(2), 227(4), 262(2) and 329(a) are some of the instances in point. True, that each of these provisions has a purpose behind it but these provisions show that the Constitution did not regard judicial review as an indispensable measure of the legality or propriety of every determination. Article 136(2) expressly took away the power of the Supreme Court to grant special leave to appeal from the decisions of any court or tribunal constituted by a law relating to the armed forces. Article 262(2) authorized the Parliament to make a law providing that the Supreme Court or any other court shall have no jurisdiction over certain river disputes. But what is even more to the point are the provisions contained in Articles 103(1) and 329(b). Article 102 prescribes disqualifications for membership of the Parliament. By Article 103(1), any question arising under Article 102 as to whether a Member of the Parliament has become subject to any disqualification has to be referred to the President whose decisions is final. The President is required by Article 103(2) to obtain the opinion of the Election Commission and act according to its opinion. Thus, in a vital matter pertaining to the election for membership of the Parliament, the framers of the Constitution had left the decision to the judgment of the Executive. Articles 327 and 328 give power to the Parliament and the State Legislatures to provide by law for all matters relating to elections to the respective Legislatures, including the preparation of electoral rolls and the delimitation of constituencies. By Article 329(a), the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies cannot be called in question in any court.

...Since the Constitution, as originally enacted, did not consider that judicial power must intervene in the interests of purity of elections, judicial review cannot be considered to be a part of the basic structure insofar as legislative elections are concerned. The theory of basic structure had to be considered in each individual case, not in the abstract, but in the context of the concrete problem. The problem here is whether under our Constitution, judicial review was considered as an indispensible concomitant of elections to country's Legislatures. The answer, plainly, is not."15 (emphasis supplied)

22. In Minerva Mills Ltd. (supra), the question for consideration was whether Sections 4 and 55 of the Constitution (Forty-second Amendment) Act, 1976 exceeded the limitation on the amending power of Parliament under Article 368. In other words, whether the amendments to Article 31C and Article 368 amended the basic structure of the Constitution. The majority view was that clauses (4) and (5) of Article 368 which were inserted into the Constitution by Section 55 were unconstitutional as they exceeded the amending power of Parliament. Section 4 was held to be unconstitutional on the ground that it offended the balance between the

fundamental rights and directive principles. The leading judgment of the majority held as follows:

"The newly introduced clause (4) of Article 368 must suffer the same fate as clause (5) because the two clauses are inter-linked. Clause (5) purports to remove all limitations on the amending power while clause (4) deprives the courts of their power to call in question any amendment of the Constitution. Our Constitution is founded on a nice balance of power among the three wings of the State, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Article 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to us a transparent case of transgression of the limitations on the amending power.

If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down. Article 13 of the Constitution will then become a dead letter because even ordinary laws will escape the scrutiny of the courts on the ground that they are passed on the strength of a constitutional amendment which is not open to challenge16. (emphasis supplied).

23. Justice Bhagwati was in agreement with the majority on the issue of the validity of clauses (4) and (5) of Article 368. However, insofar as the validity of Article 31C was concerned, unlike the majority, His Lordship held that the amended Article was constitutionally valid. In regard to the power of judicial review, Justice Bhagwati held as follows:

"...The judiciary is the interpreter of the Constitution and to the judiciary is assigned the delicate task to determine what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for the judiciary to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law, which inter alia requires that "the exercise of powers by the government whether it be the legislature or the executive or any other authority, be conditioned by the Constitution and the law". The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative

institutional mechanisms or arrangements for judicial review cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution...17." (emphasis supplied).

24. In Fertilizer Corporation Kamgar Union (supra), the Constitution Bench of the Supreme Court decided whether the workmen of a public enterprise had the locus standi to challenge the sale of the plant and machinery of an enterprise on the ground that it deprived the workmen of the fundamental right under Article 19(1)(g) of the Constitution and on the ground that the sale violated Article 14. On the issue of judicial review, the Supreme Court held as follows:

"11. The jurisdiction conferred on the Supreme Court by Article 32 is an important and integral part of the basic structure of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement, if and when they are violated. A right without a remedy is a legal conundrum of a most grotesque kind. While the draft Article 25, which corresponds to Article 32, was being discussed in the Constituent Assembly, Dr Ambedkar made a meaningful observation by saying:

"If I was asked to name any particular article in this Constitution as the most important - an article without which this Constitution would be a nullity - I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance18."

But though the right guaranteed by Article 32 is one of the highly cherished rights conferred by the Constitution, the purpose for which that right can be enforced is stated in the very Article which confers that right. The violation of a fundamental right is the sine qua non of the exercise of the right conferred by Article 32." (emphasis supplied).

25. In Kihoto Hollohan (supra), a Constitution Bench of the Supreme Court considered a challenge to the constitutional validity of the Tenth Schedule to the Constitution. The majority, while upholding the constitutional validity of the amendment incorporating the Tenth Schedule, held that paragraph 7 which, in effect, conferred an absolute power on the Speaker as a sole and final arbiter of a dispute as to disqualification, vitiated the basic structure of the Constitution. The minority view was that the entirety of the amendment was constitutionally invalid including paragraph 7. The majority view held as follows:

"181.The Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a Member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes. Rule of law has in it firmly entrenched, natural justice, of which, rule against bias is a necessary concomitant; and basic postulates of rule against bias are: nemo judex in causa sua - "A Judge is disqualified from determining any case in which he may be, or may fairly be suspected to be, biased'; and "it is of fundamental importance that justice should not only be done, but

should manifestly and undoubtedly be seen to be done...'

182. In the Tenth Schedule, the Speaker is made not only the sole but the final arbiter of such dispute with no provision for any appeal or revision against the Speaker's decision to any independent outside authority. This departure in the Tenth Schedule is a reverse trend and violates a basic feature of the Constitution since the Speaker cannot be treated as an authority contemplated for being entrusted with this function by the basic postulates of the Constitution, notwithstanding the great dignity attaching to that office with the attribute of impartiality."

26. In R.K. Jain Vs. Union of India & Ors.19, the Supreme Court held that judicial review is a basic and essential feature of the constitutional scheme:

"70. In a democracy governed by rule of law surely the only acceptable repository of absolute discretion should be the courts. Judicial review is the basic and essential feature of the Indian constitutional scheme entrusted to the judiciary. It cannot be dispensed with by creating a Tribunal under Articles 323A and 323B of the Constitution. Any institutional mechanism or authority in negation of judicial review is destructive of the basic structure. So long as the alternative institutional mechanism or authority set up by an Act is not less effective than the High Court, it is consistent with the constitutional scheme. The faith of the people is the bedrock on which the edifice of judicial review and efficacy of the adjudication are founded. The alternative arrangement must, therefore, be effective and efficient for inspiring confidence and trust in the litigant public. They must have an assurance that the person deciding their causes is totally and completely free from the influence or pressure from the Government. To maintain independence and imperativity, it is necessary that the personnel should have at least modicum of legal training, learning and experience. Selection of competent and proper people instils people' faith and trust in the office and helps to build up the reputation and acceptability. Judicial independence which is essential and imperative is secured and independent and impartial administration of justice is assured. Absence thereof only may get both law and procedure wronged and wrong-headed views of the facts and is likely to give rise to nursing grievances of injustice. Therefore, functional fitness, experience at the Bar and aptitudinal approach are fundamental for efficient judicial adjudication. Then only as a repository of the confidence, as its duty, the tribunal would properly and efficiently interpret the law and apply the law to the given set of facts. Absence thereof would be repugnant or derogatory to the constitution."

27. The three learned Judges of the Hon'ble Supreme Court in R.K. Jain, while discussing the decision of the Constitution Bench in in S.P. Sampath Kumar Vs. Union of India & Ors.20 observed that the Court did not appear to have meant the Tribunal to be a substitute of the High Court under Articles 226 and 227 of the Constitution. In that context, the Supreme Court observed as follows:

"67. The tribunals set up under Articles 323A and 323B of the Constitution or under an Act of legislature are creatures of the statute and in no case claim the status as Judges of the High Court or parity or as substitutes. However, the personnel appointed to hold those offices under the

State are called upon to discharge judicial or quasi-judicial powers. So they must have judicial approach and also knowledge and expertise in that particular branch of constitutional, administrative and tax laws. The legal input would undeniably be more important and sacrificing the legal input and not giving it sufficient weightage and teeth would definitely impair the efficacy and effectiveness of the judicial adjudication. It is, therefore, necessary that those who adjudicate upon these matters should have legal expertise, judicial experience and modicum of legal training as on many an occasion different and complex questions of law which baffle the minds of even trained Judges in the High Court and Supreme Court would arise for discussion and decision."

Decision in L Chandra Kumar

28. In L Chandra Kumar Vs. Union of India & Ors.21, the reference before a Bench of seven learned Judges was necessitated in order to consider the decision of the Constitution Bench in Sampath Kumar (supra). Among the matters before the Supreme Court was an appeal which arose from a decision of a Full Bench of the Andhra Pradesh High Court in Sakinala Hari Nath Vs. State of Andhra Pradesh22 in which Articles 323A(2)(d)23 and 323B(3)(d)24 of the Constitution had been declared to be unconstitutional to the extent that they empowered Parliament to exclude the jurisdiction of the High Courts under Article 226. Additionally, Section 28 of the Administrative Tribunals Act, 1985 had been held to be unconstitutional to the extent to which it divested the High Courts' jurisdiction in service matters. Three issues came up for determination by the Supreme Court:

(i) whether the power of judicial review of the Supreme Court under Article 32 and of the High Courts under Articles 226 and 227 of the Constitution could be excluded by statutes enacted in pursuance of Article 323A or 323B of the Constitution;

(ii) whether Tribunals, constituted under Article 323A or 323B of the Constitution, possess the competence to decide constitutional issues; and

(iii) whether Tribunals are effective substitutes for the High Courts in discharging the power of judicial review.

29. For convenience of exposition, the ruling of the Supreme Court on the three issues is now summarised:

Issue No.1 - Whether the power of judicial review of the Supreme Court under Article 32 and of the High Courts under Articles 226 and 227 of the Constitution could be excluded by statutes enacted in pursuance of Article 323A or 323B of the Constitution.

30. The Supreme Court held that the power of judicial review of the Supreme Court under Article 32 and of the High Courts under Articles 226/227 cannot be excluded as they form part of the inviolable basic structure of the Constitution. The first ingredient of this principle is that the power of the High Courts and of the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded. The power of judicial review over legislative action which is vested in the High Court under Article 226 of the Constitution and of the Supreme Court under Article 32 is part of the basic and essential features of the Constitution:

"...The Judges of the superior courts have been entrusted with the task of

upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations. It is equally their duty to oversee that the judicial decisions rendered by those who man the subordinate courts and tribunals do not fall foul of strict standards of legal correctness and judicial independence. The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or to those who man Tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded."25

31. The second ingredient of this principle is that the power which is vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals also constitutes a part of the basic structure of the Constitution:

"We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all Courts and Tribunals within their respective jurisdictions is also part of the basic structure of the Constitution. This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided26."

32. The Supreme Court held that clause 2(d) of Article 323A and clause 3(d) of Article 323B, to the extent they exclude the jurisdiction of the High Courts and of the Supreme Court under Articles 226/227 and 32 of the Constitution, are unconstitutional27. Consequently, Section 28 of the Administrative Tribunals Act, 1985 and the exclusionary clauses under other legislation enacted under Articles 323A and 323B would, to the same extent, be unconstitutional. Hence, no appeal from a decision of a Tribunal would lie to the Supreme Court under Article 136 of the Constitution and an aggrieved party would be entitled to move the High Court under Articles 226/227 of the Constitution. Against the decision of the Division Bench of the High Court under Articles 226/227, the aggrieved party could move the Supreme Court under Article 13628.

Issue No.2 - Whether the Tribunals, constituted under Article 323A or 323B of the Constitution, possess the competence to decide constitutional issues.

33. On this issue, the Supreme Court held that a question involving the interpretation of a statutory provision or a rule in relation to the Constitution would be adjudicated upon by a Bench of the Tribunal consisting of at least two members, one of whom must be a Judicial Member. The Supreme Court rejected the

broad contention that Tribunal should not be allowed to adjudicate upon matters where the vires of legislation is questioned. In the view of the Supreme Court, if such a view were to be adopted, it would be open for litigants to raise constitutional issues, many of which may be frivolous, thereby directly approaching the High Courts and, thus, subverting the jurisdiction of the Tribunal. Moreover, in special branches of law, some areas do involve a consideration of constitutional questions on a regular basis; for instance, in service law cases, a large majority of cases involve an interpretation of Articles 14, 15 and 16. However, while the Tribunals would have the jurisdiction to determine the vires of statutory provisions, they would be subject to the jurisdiction of the High Courts under Articles 226/227 of the Constitution29. This power of the Tribunals to test the validity of legislation or the vires of subordinate legislation was made subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the well settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court could be approached directly. Consequently, in all other cases, the Tribunals will continue as the only courts of first instance in respect of the areas of law for which they have been constituted:

"The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal30.

Issue No.3 - Whether the Tribunals are effective substitutes for the High Courts in discharging the power of judicial review.

34. On this aspect, the Supreme Court held that the Tribunals cannot substitute the High Courts in discharging the function of constitutional interpretation. The constitutional safeguards which ensure the independence of the Judges of the

superior judiciary are not available to those who man Tribunals created by ordinary legislation and consequently the Judges of the Tribunal can never be considered to be full and effective substitutes for the Judges of the superior judiciary. On the issue of administrative supervision, the Supreme Court observed that all Tribunals should, as far as possible, be administered by a wholly independent agency and until such a body is set up, they shall be administered by the Ministry of Law.

The balance between the need for tribunals and judicial review

35. The first important principle underlying the establishment of Tribunals is to ensure specialised and efficacious administration of justice. Mounting arrears of litigation before High Courts constitutes an important consideration underlying the setting up of Tribunals. The specialised knowledge or domain expertise of the Judges constituting the Tribunal would enable the Tribunal to effectively administer justice. This, in turn, would facilitate expeditious rendering of justice. The second important principle is the need to preserve the power of judicial review of the Supreme Court under Article 32 and of the High Courts under Articles 226 and 227 which are essential to the sustenance of the rule of law. The power of judicial review of the High Courts and of the Supreme Court having been held to be a basic feature of the Constitution, any legislation which would abrogate or exclude judicial review would be unconstitutional.

36. The balance which was brought about by the Supreme Court in L. Chandra Kumar was by assigning to the Tribunals a supplementary role as distinct from a substitutive role. The Tribunals would supplement the power of judicial review. Assigning to the Tribunals a supplementary role would not constitute an infraction of the constitutional scheme. In holding that there was no constitutional prohibition against Tribunals "performing a supplemental - as opposed to substitutional - role", there would be no risk of a constitutional violation31. In fact, Article 32(3) which is described as the 'heart and soul' of the Constitution, contemplates that Parliament, without prejudice to the powers which have been conferred on the Supreme Court, may empower any other Court to exercise the powers which are exercisable by the Supreme Court under clause (2) of Article 32. If the power of the Supreme Court under Article 32(2) could also be conferred upon any other Court, there was no reason why the same position could not apply in respect of the jurisdiction under Articles 226/227. Parliament possesses legislative competence to effect changes in the original jurisdiction of the Supreme Court under Entries 77, 78, 79 and 95 of the Union List. The State Legislatures have similar powers in respect of the High Courts under Entry 65 of the State List, while Entry 46 of the Concurrent List can be availed of both by Parliament and the State Legislatures.

37. In this background, the balance which has been drawn by the Supreme Court is that the Tribunals would, in a supplementary role, have the power to adjudicate upon issues involving the constitutional validity of statutes and rules with the exception that a Tribunal cannot rule upon the constitutionality of the statute under which it is constituted. At the same time, the power of judicial review of the High Courts under Articles

226/227 would not be ousted. But the Tribunals shall act as courts of first instance in respect of areas for which they are constituted and it would not be open to a litigant to directly approach the High Court by overlooking jurisdiction of the Tribunal. Even where the vires of a statutory provision or a rule is challenged, it would not be open to a litigant to directly approach the High Court and it is only where the validity of a parent statute establishing the Tribunal is challenged, that the High Court can be moved in the first instance. The decision of the Tribunal would be subject to the scrutiny of a Division Bench of the High Court within whose jurisdiction the Tribunal falls. Against the judgment of the Division Bench, a Special Leave Petition would lie under Article 136 of the Constitution before the Supreme Court. By assigning to the Tribunals a supplemental as distinct from a substitutive role, the Supreme Court took notice of the rationale for the constitution of the Tribunals, namely the need to have specialization and expedition in areas of domain expertise where the Tribunals have been constituted. This principle was fostered by the principle that though the Tribunals are supplemental to the High Court and not substitutes, they would be a forum of first instance. The High Court should not be approached directly except where the validity of the legislation constituting the Tribunal itself is challenged. By allowing Tribunals to rule on constitutional issues, the Supreme Court ensured that the High Courts would have the benefit of a reasoned decision of a Tribunal.

38. The fundamental principle which emerges from the decision in L. Chandra Kumar is that Articles 32 and 226 of the Constitution constitute a part of the basic features of the Constitution. The power of judicial review of the Supreme Court and of the High Courts under these provisions cannot wholly be excluded but those powers can additionally be conferred on other Courts or Tribunals which would act as courts of first instance. The Supreme Court noted that since independence ' the quantity of litigation before the High Courts has exploded in an unprecedented manner'32 and there were 'pressing reasons' to preserve the conferment of jurisdiction upon the Tribunals. At the same time, the functioning of not all the Tribunals had inspired confidence in terms of their competence, objectivity and judicial approach or in regard to their constitution, powers and appointment of personnel. The decision in L. Chandra Kumar has drawn a fine balance by which, while on the one hand the basic reason for the creation of specialized Tribunals is acknowledged and their jurisdiction as courts of first instance emphasized, a proliferation of Tribunals does not take place at the cost of abrogating the power of judicial review of the superior courts which is part of the basic features of the Constitution.

Decisions subsequent to L. Chandra Kumar

39. In State of Andhra Pradesh & Ors. Vs. K. Mohanlal & Anr.33, the Supreme Court while deciding upon the constitutional validity of Special Courts under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982, held as follows:

"10. If this is so, then the observations in the case of S.P. Sampath Kumar [(1987) 1 SCC 124 : (1987) 2 ATC 82] to which our attention was drawn, will not now apply. Undoubtedly it is highly desirable that Administrative Tribunals enjoy the same degree of

independence as judicial bodies, if the independence of the judiciary is not to be diluted by creation of tribunals that do not enjoy the same degree of independence. Nevertheless, the power of judicial review granted under the Constitution to the higher judiciary under Articles 226, 227 and 32 of the Constitution is an important check on the malfunctioning of tribunals. In this context, in L. Chandra Kumar case [(1997) 3 SCC 261 : 1997 SCC (L&S) 577], this Court has expressly observed: (SCC para 78)

"The constitutional safeguards which ensure the independence of the Judges of the superior judiciary, are not available to the Judges of the subordinate judiciary or with those who man tribunals created by ordinary legislations. Consequently, Judges of the latter category can never be considered full and effective substitutes for the superior judiciary in discharging the function of constitutional interpretation. We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure."

11. In the perspective of these observations, it would not be correct to hold that because the members of the Special Court, in the present case, can be appointed by the Government without consulting the Chief Justice of the State, the Special Court is an unconstitutional court, since its members do not enjoy the same degree of independence as the members of the higher judiciary, especially when the Chairman's appointment is in consultation with the Chief Justice of the State. Also, the remedy under Articles 226 and 227 is available against the orders of the Special Court." (emphasis supplied).

40. In T.K. Rangarajan Vs. Government of T.N. & Ors.34, the Supreme Court, while entertaining a writ petition challenging the termination by the State Government of the services of all employees who had resorted to a strike, observed as follows:

"10. There cannot be any doubt that the aforesaid judgment of larger Bench is binding on this Court and we respectfully agree with the same. However, in a case like this, if thousands of employees are directed to approach the Administrative Tribunal, the Tribunal would not be in a position to render justice to the cause. Hence, as stated earlier, because of very very exceptional circumstance that arose in the present case, there was no justifiable reason for the High Court not to entertain the petitions on the ground of alternative remedy provided under the statute."

41. In Rajeev Kumar & Anr. Vs. Hemraj Singh Chauhan & Ors.35, the Supreme Court considered whether the appellants had the locus standi to seek impleadment to the writ proceedings before the High Court challenging an order of the Central Administrative Tribunal to which they were not parties. The Supreme Court held as follows:

"14. The grievances of the appellants in this appeal are that they were not made parties in proceedings before the Tribunal. But in the impleadment application filed before the High Court it was not averred by them that they were not aware of the pendency of the proceedings before the Tribunal. Rather from the averments made in the impleadment petition it appears that they were aware of the pendency of the proceedings before the

Tribunal. It was therefore, open for them to approach the Tribunal with their grievances. Not having done so, they cannot, in view of the clear law laid down by the Constitution Bench of this Court in L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577], approach the High Court and treat it as the court of first instance in respect of their grievances by "overlooking the jurisdiction of the Tribunal". CAT also has the jurisdiction of review under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. So, it cannot be said that the appellants were without any remedy.

15. As the appellants cannot approach the High Court by treating it as a court of first instance, their special leave petition before this Court is also incompetent and not maintainable.

16. The principles laid down in L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] virtually embody a rule of law and in view of Article 141 of the Constitution the same is binding on the High Court. The High Court fell into an error by allowing the appellants to approach it in clear violation of the Constitution Bench judgment of this Court in L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577]."

42. In Union of India Vs. R. Gandhi, President, Madras Bar Association36, the Constitution Bench of the Supreme Court considered the constitutional validity of the National Company Law Tribunal and the National Company Law Appellate Tribunal. On the issue as to whether the Government can transfer judicial functions traditionally performed by the Courts to Tribunals, the Supreme Court observed as follows:

"87. The Constitution contemplates judicial power being exercised by both courts and tribunals. Except the powers and jurisdictions vested in superior courts by the Constitution, powers and jurisdiction of courts are controlled and regulated by legislative enactments. The High Courts are vested with the jurisdiction to entertain and hear appeals, revisions and references in pursuance of provisions contained in several specific legislative enactments. If jurisdiction of the High Courts can be created by providing for appeals, revisions and references to be heard by the High Courts, jurisdiction can also be taken away by deleting the provisions for appeals, revisions or references. It also follows that the legislature has the power to create tribunals with reference to specific enactments and confer jurisdiction on them to decide disputes in regard to matters arising from such special enactments. Therefore it cannot be said that legislature has no power to transfer judicial functions traditionally performed by courts to tribunals.

..."9037 But when we say that the legislature has the competence to make laws, providing which disputes will be decided by courts, and which disputes will be decided by tribunals, it is subject to constitutional limitations, without encroaching upon the independence of the judiciary and keeping in view the principles of the rule of law and separation of powers. If tribunals are to be vested with judicial power hitherto vested in or exercised by courts, such tribunals should possess the independence, security and capacity associated with courts. If the tribunals are intended to serve an area which requires specialised knowledge or expertise, no doubt there can be technical members in addition to judicial members. Where however jurisdiction to try certain category of cases are transferred from

courts to tribunals only to expedite the hearing and disposal or relieve from the rigours of the Evidence Act and procedural laws, there is obviously no need to have any non-judicial technical member. In respect of such tribunals, only members of the judiciary should be the Presiding Officers/Members. Typical examples of such special tribunals are Rent Tribunals, Motor Accidents Claims Tribunals and Special Courts under several enactments. Therefore, when transferring the jurisdiction exercised by courts to tribunals, which does not involve any specialised knowledge or expertise in any field and expediting the disposal and relaxing the procedure is the only object, a provision for technical members in addition to or in substitution of judicial members would clearly be a case of dilution of and encroachment upon the independence of the judiciary and the rule of law and would be unconstitutional." (emphasis supplied)

43. In Nivedita Sharma Vs. Cellular Operators Association of India38, the Supreme Court held that availability of an alternative remedy under Section 19 of the Consumer Protection Act, 1986 was not a bar to the maintainability of a writ petition under Articles 226/227. The Supreme Court observed as follows:

"11. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation--L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] . However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

44. In R. Mohajan & Ors. Vs. Shefali Sengupta & Ors.39, the Supreme Court while deciding the maintainability of an appeal against a decision of the Administrative Tribunal, other than contempt proceedings, observed thus:

"15. It is clear from the above dictum in L. Chandra Kumar [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] that no appeal from the decision of the Tribunal will directly lie before this Court under Article 136 of the Constitution of India, but instead, the aggrieved party has to move the High Court under Articles 226/227 of the Constitution and thereafter from the decision of the Division Bench of the High Court, the aggrieved parties are free to approach this Court."

45. In Columbia Sportswear Company Vs. Director of Income Tax, Bangalore40, a Bench of three learned Judges of the Supreme Court considered whether an advance ruling pronounced by

the Authority for Advance Rulings can be challenged under Article 226/227 before the High Court or under Article 136 before the Supreme Court. In that context, it was held as follows:

"16. The fact that sub-section (1) of Section 245-S makes the advance ruling pronounced by the Authority binding on the applicant, in respect of the transaction and on the Commissioner and the income tax authorities subordinate to him in respect of the applicant and the transaction would not affect the jurisdiction of either this Court under Article 136 of the Constitution or of the High Courts under Articles 226 and 227 of the Constitution to entertain a challenge to the advance rulings pronounced by the Authority. The reason for this view is that Articles 136, 226 and 227 of the Constitution are constitutional provisions vesting jurisdiction on this Court and the High Courts and a provision of an Act of legislature making the decision of the Authority final or binding could not come in the way of this Court or the High Courts to exercise jurisdiction vested under the Constitution. ...

17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the legislature

46. In Namit Sharma Vs. Union of India41, the Supreme Court while deciding upon the constitutional validity of certain provisions of the Right to Information Act, 2005, observed as follows:

"33. Every authority/department is required to designate the Public Information Officers and to appoint the Central Information Commission and the State Information Commissions in accordance with the provisions of Sections 12 and 15 of the Act of 2005. It may be noticed that under the scheme of this Act, the Public Information Officers at the Centre and the State levels are expected to receive the requests/applications for providing the information. Appeal against decision of such Public Information Officer would lie to his senior in rank in terms of Section 19(1) within a period of 30 days. Such first appellate authority may admit the appeal after the expiry of this statutory period subject to satisfactory reasons for the delay being established. A second appeal lies to the Central or the State Information Commission, as the case may be, in terms of Section 19(3) within a period of 90 days. The decision of the Commission shall be final and binding as per Section 19(7). Section 19 is an exhaustive provision and the Act of 2005 on its cumulative reading is a complete code in itself. However, nothing in the Act of 2005 can take away the powers vested in the High Court under Article 226 of the Constitution and of this Court under Article 32. The finality indicated in Sections 19(6) and 19(7) cannot be construed to oust the jurisdiction of higher courts, despite the bar created under Section 23 of the Act. It always has to be read and construed subject to the powers of the High Court under Article 226 of the Constitution. Reference in this regard can be made to the decision of a Constitution Bench of this Court in L. Chandra Kumar v. Union of India [(1997) 3 SCC 261 : 1997 SCC (L&S) 577].

77. .. An order passed by the Commission is final and binding and can only be questioned before the High court

or the Supreme Court in exercise of the Court's jurisdiction under Article 226 and/or Article 32 of the Constitution, respectively.

80. Further, Section 23 is a provision relating to exclusion of jurisdiction of the courts. In terms of this section, no court shall entertain any suit, application or other proceedings in respect of any order made under this Act and no such order shall be called in question otherwise than by way of an appeal provided for under this Act. In other words, the jurisdiction of the court has been ousted by express language. Nevertheless, it is a settled principle of law that despite such excluding provision, the extraordinary jurisdiction of the High Court and the Supreme Court, in terms of Articles 226 and 32 of the Constitution respectively, cannot be divested. It is a jurisdiction incapable of being eroded or taken away by exercise of legislative power, being an important facet of the basic structure of the Constitution..." (emphasis supplied)

Decisions of High Courts

47. At this stage, it would be appropriate to refer to two decisions of the Delhi and Madhya Pradesh High Courts which have applied the law laid down in L. Chandra Kumar in the context of the Armed Forces Tribunal Act, 2007:

Colonel A.D. Nargolkar Vs. Union of India & Ors.42

Ravindra Nath Tripathi Vs. Union of India & Ors.43

48. In Colonel A.D. Nargolkar (supra), a Division Bench of the Delhi High Court held that a writ petition under Article 226 of the Constitution against an order passed by the Armed Forces Tribunal was maintainable:

"89. To summarize, the position would be that the Armed Forces Tribunal, being manned by personnel appointed by the Executive, albeit in consultation with the Chief Justice of India cannot be said to be truly a judicial review forum as a substitute to High Courts which are constitutional courts and the power of judicial review, being a basic feature of the Constitution, under Article 226 and Article 227 of the Constitution of India is unaffected by the constitution of the Armed Forces Tribunal. Further, Article 227(4) of the Constitution of India takes away only the administrative supervisory jurisdiction over the Armed Forces Tribunal. Thus, decisions by the Armed Forces Tribunal would be amenable to judicial review by High Court under Article 226 as also Article 227 of the Constitution of India."

49. In Ravindra Nath Tripathi (supra), Hon'ble Mr. Justice S.A. Bobde (as His Lordship then was), speaking for a Division Bench of the Madhya Pradesh High Court held that Section 14 of the Armed Forces Tribunal Act, 2007 empowers the Tribunal to exercise jurisdiction, power and authority exercisable by all Courts except that of the Supreme Court or by a High Court under Articles 226/227 and that the provisions must be read strictly. In that context, the learned Judge held as follows:

"9. In the circumstances, we find that there is no exclusion of the jurisdiction of this Court under Article 226/227 of the Constitution in relation to subject-matter, but on the contrary what is conferred on the Tribunal is the jurisdiction, powers and authority exercisable by all Courts except the powers and authority of the

Supreme Court and the High Court under Articles 226 and 227 of the Constitution of India. L. Chandra Kumar's case (supra) cannot be treated as authority for the proposition as contended by Shri Tiwari that every Tribunal established under Articles 323-A and 323-B of the Constitution alone has jurisdiction to decide upon the matters involving the constitutional validity of the statutes. Undoubtedly, Clause 2(b) of Article 323-A and Clause 3(d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and the Supreme Court under Articles 226/227 and 32 of the Constitution have been held to be unconstitutional, but that is clearly on the ground that the jurisdiction conferred upon the High Court under Article 226/227 of the Constitution of India and upon the Supreme Court under Article 32 of the Constitution of India is a part of the inviolable basic structure of our Constitution. Thus, the point can be viewed from two aspects; one, what powers have conferred on the Tribunal under the AFT Act and two, correspondingly, whether there is any exclusion of the jurisdiction of the High Courts. This can be done only by considering the plain meaning of the parliamentary legislation by which jurisdiction has been conferred on the Tribunal. As noted earlier the plain words of Section 14 of the AFT Act only confers the jurisdiction, power and authority exercisable by all Courts and in the same breath carves out an exception in relation to the powers of the Supreme Court or the High Court exercising jurisdiction under Articles 226/227 of the Constitution. Considering the matter from the point of view of exclusion of jurisdiction of the High Court, Parliament has left no doubt in expressing its intention to retain the jurisdiction of the High Court under Article 226/227 of the Constitution in relation to the service matters governed by the AFT Act."

I.R. Coelho

50. The Supreme Court in I.R. Coelho Vs. State of Tamil Nadu44, considered whether on and after 24 April 1973 when the judgment in Kesavanand Bharati was delivered, is it permissible for Parliament under Article 31B to immunise legislation from the fundamental rights by inserting it into the Ninth Schedule and, if so, what would be the effect on the power of judicial review of the Supreme Court. Chief Justice Sabharwal observed that 'the real crux of the problem is, as to the extent and nature of immunity that Article 31B can validly provide. .." Hence, the essential question was whether the basic structure test includes judicial review of Ninth Schedule laws on the touchstone of the fundamental rights. The conclusion, which was arrived at by the Supreme Court, was as follows:-

""151. In conclusion, we hold that:

(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of the law, whether by amendment of any article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.

(ii) The majority judgment in Kesavananda Bharati case [(1973) 4 SCC 225] read with Indira Gandhi case [1975 Supp SCC 1] requires the validity of each new constitutional amendment to be

judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.

(iii) All amendments to the Constitution made on or after 24-4-1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.

(iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by constitutional amendments shall be a matter of constitutional adjudication by examining the nature and extent of infraction of a fundamental right by a statute, sought to be constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the articles in Part III as held in Indira Gandhi case [1975 Supp SCC 1] . Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such law(s) will not get the protection of the Ninth Schedule.

This is our answer to the question referred to us vide order dated 14-9-1999 in I.R. Coelho v. State of T.N. [(1999) 7 SCC 580]."

51. In regard to the power of judicial review, the observations made in the decision in I.R. Coelho are as follows:

"129. Equality, rule of law, judicial review and separation of powers form parts of the basic structure of the Constitution. Each of these concepts are intimately connected. There can be no rule of law, if there is no equality before the law. These would be meaningless if the violation was not subject to the judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. Therefore, the duty to decide whether the limits have been transgressed has been placed on the judiciary.

130. Realising that it is necessary to secure the enforcement of the fundamental rights, power for such enforcement has been vested by the Constitution in the Supreme Court and the High Courts. Judicial review is an essential feature of the Constitution. It gives practical content to the objectives of the Constitution embodied in Part III and other parts of the Constitution. It may be noted that the mere fact that equality, which is a part of the basic structure, can be excluded for a limited purpose, to protect certain kinds of laws, does not prevent it from being part of the basic structure. Therefore, it follows that in considering whether any particular feature of the Constitution is part of the basic structure--rule of law, separation of powers--the fact that limited exceptions are made for limited purposes, to protect certain kind of laws, does not mean that it is not part of the basic structure."

52. In conclusion, it was held thus:

147...The point to be noted is that the application of a standard is an important

exercise required to be undertaken by the court in applying the basic structure doctrine and that has also to be done by the Courts and not by the Prescribed Authorities under Article 368. The existence of the power of Parliament to amend the Constitution at will with requisite voting strength, so as to make any kind of laws that excludes Part III including power of judicial review under Article 32 is incompatible with the basic structure doctrine. Therefore, such an exercise if challenged, has to be tested on the touchstone of basic structure as reflected in Article 21 read with Article 14 and Article 19, Article 15 and the principles thereunder."

The constitutional position.

53. The evolution of constitutional doctrine in India has led to judicial review under Articles 32 and 226 of the Constitution being recognised as an integral and basic feature of the Constitution. Basic features of the Constitution lie outside the purview of the amending power. The constitutional entitlement to seek judicial review cannot be abrogated by legislative enactment. But our constitutional jurisprudence recognizes that Tribunals in various aspects of regulatory governance have become an unavoidable necessity in India as in other jurisdictions founded on the common law doctrine of the rule of law. Tribunals are intended to fulfill a felt necessity of ensuring specialized justice : specialized in the sense of being manned by adjudicatory personnel whose qualifications and experience bring capabilities required to handle the specialized nature of dispute resolution in a particular area. This element, in our country, is coupled with the enormous litigative burden upon the High Courts which has been noticed by the Law Commission. The creation of Tribunals was envisaged to provide an expeditious resolution of disputes by reducing the burden of the backlog from the High Courts. But the preservation of judicial independence is a concern. The source and manner of recruitment, qualifications of personnel, insulation guarantees for judges and the mode of administrative control affect the independence of a Tribunal. The legislature which has the legislative competence to create and define the jurisdiction of Courts is entitled to legislate to form a Tribunal. Tribunals, however, perform a supplementary as opposed to a substitutive role. Legislation, which confers jurisdiction on a Tribunal, is answerable to constitutional norms. The legislation, in order to meet the test of constitutionality, cannot abrogate recourse to Article 226 of the Constitution to the High Courts and to Article 32 which provides access to the Supreme Court for the enforcement of rights conferred by Part III of the Constitution. The exclusion of Article 32 and of Article 226 by legislation is not constitutionally permissible because that would offend a basic and integral feature of the Constitution. Equally, for Tribunals to perform their function as viable adjudicatory bodies, constitutional doctrine recognizes that a Tribunal, such as an Administrative Tribunal, constituted under the Administrative Tribunals Act, 1985 will act as the only court of first instance in the areas of law for which it has been constituted. Consequently, it would not be open to a litigant to directly approach the High Court even in a case where the vires of legislation or subordinate legislation is challenged, except in a case where the validity of the legislation constituting the Tribunal itself is challenged.

54. The provisions of the Armed Forces Tribunal Act, 2007 indicate that Parliament, while enacting the legislation, was conscious of the constitutional status ascribed to the power of judicial review of the Supreme Court and of the High Court. Section 14(1) contains a stipulation that from the appointed day, the Tribunal shall exercise all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court or a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to all service matters. The exception must be given its plain meaning and effect. By it, Parliament has evinced a legislative intent that the jurisdiction, powers and authority which have to be exercised by the Tribunal in relation to all service matters is such as was exercisable by all courts before the appointed date, except for the Supreme Court and High Courts under Articles 226 and 277 of the Constitution. Section 30(1) provides an appeal to the Supreme Court, subject to Section 31, against a final decision or order of the Tribunal while sub-section (2) provides for an appeal, as a matter of right, from an order or decision in the exercise of the jurisdiction of the Tribunal to punish for its contempt. Section 33 excludes the jurisdiction of the civil court to exercise such jurisdiction, power or authority which becomes exercisable by the Tribunal in relation to those service matters. Section 34 has provided for transfer of existing proceedings and suits including those pending before a High Court at the establishment of the Tribunal. The legislature has, therefore, consciously and carefully preserved the power of judicial review of the High Court and of the Supreme Court. Judicial review under Article 226 and Article 32 has not been abrogated. It could not have been wholly excluded, being a basic feature of the Constitution.

55. At the same time, the High Court must be cognizant of the principle that the Tribunal is a forum of first instance which has been constituted and created by the legislation. Consequently, the High Court would ordinarily defer to the existence of the Tribunal as a forum of first instance which has been created by the legislation. The exercise of jurisdiction under Article 226 of the Constitution is itself subject to self-imposed restraints under which the constitutional jurisdiction is not ordinarily exercised where an efficacious, and in this case a specialized, statutory alternative remedy has been created.

56. This perspective can be further emphasized by considering the provisions of Section 15 under which the Tribunal is to exercise from the appointed day all the jurisdiction, powers and authority exercisable under the Act in relation to an appeal against any order, decision finding or sentence passed by a court-martial or a matter which is connected or incidental. Sub-section (2) of Section 15 provides an appeal to the Tribunal to a person aggrieved by an order, decision, finding or sentence passed by a court-martial. Sub-section (3) empowers the Tribunal to enlarge a person, accused of an offence and in military custody, on bail unless there is reasonable ground for believing that he is guilty of an offence punishable with death or imprisonment for life. Sub-section (4) empowers the Tribunal to allow an appeal against a conviction by a court-martial where (i) the finding is not legally sustainable; (ii) the finding involves a wrong decision on a question of law; or (iii) a miscarriage of justice has resulted as a result of a material irregularity in the course of trial by the

Tribunal. Sub-section (6) of Section 15 confers extensive powers upon the Tribunal to substitute for the findings of the court-martial, a finding of guilt for any other offence for which the offender could have been lawfully found guilty by the court-martial and to pass a sentence afresh. If the sentence is found to be excessive, illegal or unjust, the Tribunal may remit the whole or any part of the sentence, mitigate the punishment, commute it to any lesser punishment or enhance the sentence awarded by the court-martial. The Tribunal has the power to release an appellant on parole, suspend the sentence of an imprisonment and to pass any other order as it may think appropriate. This wide power, which has been conferred upon the Tribunal in relation to an appeal against an order, decision, finding or sentence of a court-martial, is an additional reason for the High Court to approach the invocation of its jurisdiction under Article 226 of the Constitution with a high degree of restraint. Equally, the remedy of an appeal which is provided against a final decision or order of the Tribunal to the Supreme Court is a circumstance which must have an important bearing on the circumspection and restraint with which the power under Article 226 of the Constitution should be exercised.

57. But, it is trite law that there is a fundamental difference between the exclusion of judicial review on the one hand and the principle on the other hand, that though the power of judicial review by the superior courts cannot be abrogated, it has to be exercised with a degree of restraint. The exercise of restraint is a self-imposed norm which Judges of the High Court follow in the exercise of the jurisdiction under Article 226 of the Constitution. Self-restraint is a limitation on the exercise of the power and is not a denial of the existence of the power.

58. Consequently, judicial review by the High Court under Article 226 of the Constitution does not stand excluded by the provisions of the Armed Forces Tribunal Act, 2007. Judicial review under Article 226 of the Constitution could not have been excluded, being a basic and integral feature of the Constitution. On a plain textual interpretation of the legislative provisions contained in the Act, it has not been excluded. Equally, we emphasize the need for restraint and circumspection in exercising that power particularly where the Tribunal is constituted as a court of first instance in service matters under Section 14 and a forum of appeal in matters pertaining to court-martials under Section 15. Moreover, as the Supreme Court emphasized in its judgment in Cicily Kallarackal Vs. Vehicle Factory45, while interpreting the provisions of the Consumer Protection Act, 1986, it is not appropriate for the High Court to entertain a writ petition under Article 226 of the Constitution where a statutory remedy is provided and lies to the Supreme Court under the provisions of the Act.

59. The Armed Forces Tribunal, under Section 14(1) has been vested with the exercise of jurisdiction, powers and authority in relation to all service matters. The definition of 'service matters' in Section 3(o) excludes certain categories. Similarly, under the proviso to sub-section (1) of Section 30, no appeal is envisaged against an interlocutory order of the Tribunal to the Supreme Court. Where a particular matter does not fulfill the description of service matters within the meaning of Section 3(o), the original

jurisdiction of the Tribunal as a forum of first instance would not be available. Similarly, where an interlocutory order of the Tribunal is sought to be challenged, an appellate remedy is not provided before the Supreme Court under Section 30. But it would not be possible to accept the submission of the respondents that apart from a challenge to the constitutional validity of the provisions of the Act, the only two other instances where the jurisdiction of the High Court under Article 226 can be invoked is in the case of a matter which does not fulfill the description of a service matter under Section 3(o) and where an interlocutory order has been passed by the Tribunal which is not subject to an appeal under Section 30. Where a matter is not a service matter under Section 3(o), the power of judicial review under Article 226 of the Constitution is a fortiori available as it is available similarly to challenge an interlocutory order of the Tribunal which is not amenable to the appellate jurisdiction of the Supreme Court under Section 30. But these provisions do not exclude, either expressly or by necessary implication, the fundamental power of judicial review under Article 226 which is vested in the High Court and is recognised to be a basic and integral feature of the Constitution.

Article 136 (2) and Article 227(4)

60. Article 136 (2) of the Constitution provides as follows:

" (2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces."

61. In similar terms, are the provisions of Article 227(4):

"(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces."

62. The Constituent Assembly Debates provide a meaningful source for analysing the reasons which led to the adoption of Article 136 (2) and Article 227 (4) in its present form.

(a) Background

63. The Draft Constitution, which was originally prepared by the Constitutional Advisor in October 1947 and the subsequent Draft Constitution which was prepared by the Drafting Committee, as submitted to the President of the Constituent Assembly on 21 February 1948, did not contain a provision analogous to Article 136 (2) or Article 227 (4) in its present form. Article 112 of the Draft Constitution of 1948 was the forerunner of the present day Article 136 (1) while clauses (1), (2) and (3) of Article 203 of the Draft Constitution of 1948 were similar to clauses (1), (2) and (3) of Article 227 of the Constitution.

64. Article 112 of the Draft Constitution provided as follows:

"112. The Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree or final order in any cause or matter, passed or made by any court or tribunal in the territory of India except the States for the time being specified in Part III of the First Schedule, in cases where the provisions of article 110 or article 111 of this Constitution do no apply."

65. Article 203 of the Draft Constitution read as follows:

"203. (1) Every High Court shall have superintendence over all courts throughout the territories in relation to which it exercises jurisdiction.

(2) The High Court may-

(a) call for returns from such courts;

(b) direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction, or withdraw such suit or appeal from any such court to itself;

(c) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts; and

(d) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts.

(3) The High Court may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practicing therein;

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) of this article shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor."

(b) Constituent Assembly proceedings

66. During the course of the proceedings of the Constituent Assembly on 16 October 1949, Shri T T Krishnamachari moved amendments for the addition of clause (2) to Article 112 and clause (4) to Article 203 in the following terms:

"(2) Nothing in clause (1) of this article shall apply to any judgment, determination, sentence, or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces.

(4) Nothing in this article shall be deemed to extend the powers of superintendence of a High Court over any court or tribunal constituted by or under any law relating to the Armed Forces."46

67. Both amendments were debated together. Members of the Constituent Assembly, as their speeches would indicate, conceived that both the amendments had a common purpose. While moving the amendments on 16 October 1949, Shri T T Krishnamachari stated as follows:

"... I understand that this follows the practice that now obtains in the U.K. where courts do not interfere with the decisions of the court-martial. I would at once confess that this matter, which escaped our attention at the time this article was framed and put before the House, has now been brought to our notice by the Defence Department, who have convinced us that a provision of this nature which obtains currency in other countries should also find a place in our Constitution."47

68. Among the objections to the amendment, there were two which would necessitate mention here:

(i) Prof Shibban Lal Saksena submitted that persons sentenced to death by court-martial should be able to appeal to the Supreme Court and the Supreme Court should have jurisdiction to entertain an appeal against any order made by a court-martial48;

(ii) Shri R K Sidhwa and Pandit Thakur Das Bhargava submitted that a sizeable number of disputes relating to

army personnel also involve civilians and they should not be deprived of the jurisdiction of the Supreme Court.

(c) Dr B R Ambedkar's speech

69. Dr B R Ambedkar justified the proposed amendments on the ground of the need to maintain military discipline. Significantly, Dr Ambedkar assured the critics that the addition of clauses (2) and (4) respectively to Articles 112 and 203 did not provide a complete immunity for army courts and tribunals from the judicial and adjudicatory authority of the Supreme Court and the High Courts. Dr Ambedkar stated that though civil courts of superior authority did possess, in theory, the jurisdiction to modify or set aside an order made by a military court or tribunal, in practice in Britain, they had refrained from exercising that power. Judicial restraint was important for strengthening institutions of the armed forces. In other words, in Dr Ambedkar's perspective, the issue was critical for maintaining military discipline. However, Dr Ambedkar postulated that clause (2) of Article 112 and clause (4) of Article 203 did not altogether take away the powers of the Supreme Court or of the High Courts and there should be exceptional cases for the exercise of judicial review from and for the purpose of interference with an order of a military court or tribunal. Those cases were: (i) where the issue was whether the exercise of jurisdiction is within the ambit of the law which creates and constitutes such a court or tribunal; and (ii) where the issue was whether there was any evidence at all in support of a particular finding. Dr. Ambedkar stated that courts could issue prerogative writs "in order to examine whether the proceedings of the court martial against 'a member of the armed forces' are carried on under any particular law made by Parliament or they were arbitrary in character."

70. These remarks in the debates of the Constituent Assembly by Dr B R Ambedkar are of critical significance, and are extracted herein below:

"The Honourable Dr. B.R. Ambedkar:

Mr. President Sir, in view of the observations made by my honourable Friend, Prof. Shibban Lal Saksena, it has become incumbent upon me to say something in relation to the proposed article moved by my honourable Friend, Mr. T.T. Krishnamachari. It is quite true that on the occasion when we considered article 112 and the amendment moved by my honourable Friend, Prof. Shibban Lal Saksena, I did say that under article 112 there would be jurisdiction in the Supreme Court to entertain an appeal against any order made by a Court-martial. Theoretically that proposition is still correct and there is no doubt about it in my mind, but what I forgot to say is this: That according to the rulings of our High Courts as well as the rulings of the British courts including those of the Privy Council, it has been a well recognised principle that civil courts, although they have jurisdiction under the statute will not exercise that jurisdiction in order to disturb any finding or decision given or order made by the Court-martial. I do not wish to go into the reason why the civil courts of superior authority, which notwithstanding the fact that they have this jurisdiction have said that they will not exercise that jurisdiction; but the fact is there and I should have thought that if our courts in India follow the same

decision which has been given by British courts - the House of Lords, the King's Bench Division as well as the Privy Council and if I may say so also the decision given by our Federal Court in two or three cases which were adjudicated upon by them - there would be no necessity for clause (2); but unfortunately the Defence Ministry feels that such an important matter ought not be left in a condition of doubt and that there should be a statutory provision declaring that none of the superior civil courts whether it is a High Court or the Supreme Court shall exercise such jurisdiction as against a court or tribunal constituted under any law relating to the Armed Forces.

This question is not merely a theoretical question but is a question of great practical moment because it involves the discipline of Armed Forces. If there is anything with regard to the armed forces, it is the necessity of maintaining discipline. The Defence Ministry feels that if a member of the Armed Forces can look up either to the Supreme Court or to the High Court for redress against any decision which has been taken by a court or tribunal constituted for the purpose of maintaining discipline in the armed forces, discipline would vanish. I must say that that is an argument against which there is no reply. That is why clause (2) has been added in Article 112 by this particular amendment and a similar provision is made in the provisions relating to the powers of superintendence of High Courts. That is my justification why it is now proposed to put in clause (2) of article 112.

I should, however, like to say this that clause (2) does not altogether take away the powers of the Supreme Court or the High Court. The law does not leave any member of armed forces entirely to the mercy of the tribunal constituted under the particular law. For, notwithstanding clause (2) of the article 112, it would still be open to the Supreme Court or to the High Court to exercise jurisdiction, if the court martial has exceeded the jurisdiction which has been given to it or the power conferred upon it by the law relating to armed forces. It will be open to the Supreme Court as well as the High Court to examine the question whether the exercise of jurisdiction is within the ambit of the law which creates and constitutes this court or tribunal. Secondly, if the court-martial were to give a finding without any evidence, then, again, it will be open to the Supreme Court as well as the High Court to entertain an appeal in order to find out whether there is evidence. Of course, it would not be open to High Court or the Supreme Court to consider whether there has been enough evidence. That is a matter which is outside the jurisdiction of either of these Courts. Whether there is evidence or not, that is a matter which they could entertain. Similarly, if I may say so, it would be open for a member of the armed forces to appeal to the courts for the purpose of issuing prerogative writs in order to examine whether the proceedings of the court martial against him are carried on under any particular law made by Parliament or whether they were arbitrary in character. Therefore, in my opinion, this article, having regard to the difficulties raised by the Defence Ministry is a necessary article. It really does not do anything more but give a statutory recognition to a rule that is already prevalent and which is recognised by all superior courts."49 (emphasis supplied).

71. The motions for amending the two provisions were subsequently adopted by the Constituent Assembly and clause (2) to Article 112 and clause (4) of Article

103 were added. Article 112 of the Draft constitution of 1948 was renumbered as Article 136 and Article 203 was renumbered as Article 227 in the Draft Constitution as revised by the Drafting Committee and submitted to the President of the Constituent Assembly on 3 November 1949. The revised Draft of 1949 was later adopted in the Constitution of India on 26 November 1949.

72. The debates of the Constituent Assembly would indicate that, in theory, civil courts of superior authority could, in the U.K., entertain complaints against and review the decisions of military courts or tribunals. However, it was a well-established judicial practice that superior courts in recognition of the need to preserve military discipline, exercised that jurisdiction sparingly. The additions in the Draft Constitution of clause (2) to Article 112 and clause (4) to Article 203 afforded a statutory recognition to a prevalent judicial practice. Significantly, those clauses were not construed to mean a complete immunity for courts or tribunals constituted under armed forces legislation from judicial review, nor did those provisions mean an ouster or abrogation of the power of judicial review which was vested in the High Courts and in the Supreme Court. Dr Ambedkar enunciated cases where the superior courts could exercise the power of judicial review against decisions of the courts and tribunals constituted under legislation relating to the armed forces and also issue prerogative writs. The Constituent Assembly, while it adopted those two clauses, did so in the backdrop of the two precepts which Dr Ambedkar enunciated. The first was the need to maintain discipline among the armed forces. The need to ensure discipline meant that judicial review should be exercised sparingly. Secondly, judicial review was not abrogated nor was there a conferment of an absolute immunity to the courts and tribunals constituted under legislation for the armed forces from judicial review.

73. Conclusion

(i) Our jurisprudence in over six decades since the adoption of the Constitution has evolved a clear, categoric and unambiguous recognition of the importance of judicial review by the Supreme Court under Article 32 and by the High Courts under Article 226. Judicial review is an indispensable safeguard to the preservation of liberty, freedom and to the realization of rights founded on the rule of law. Without constitutionally entrenched remedies, the realisation of fundamental constitutional rights would be illusory or, as Dr B R Ambedkar described it, a mere 'pious declaration':

"It is the remedy that makes a right real. If there is no remedy, there is no right of all, and I am therefore not prepared to burden the Constitution with a number of pious declarations which may sound as glittering generalities but for which the Constitution makes no provision by way of a remedy. It is much better to be limited in the scope of our rights and to make them real by enunciating remedies than to have a lot of pious wishes embodied in the Constitution. I am very glad that this House has seen that the remedies that we have provided constitute a fundamental part of this Constitution..."50

(ii) The power of judicial review of the Supreme Court and of the High Courts is firmly entrenched as a basic feature of the Constitution which lies beyond the amending power. Even more so, ordinary

legislation cannot abrogate the constitutional power of judicial review that is vested in the Supreme Court under Article 32 and in the High Courts under Article 226;

(iii) The Armed Forces Tribunal Act, 2007 does not contain, either expressly or by necessary implication, any exclusion of the power of judicial review that is conferred upon the Supreme Court under Article 32 or upon the High Courts under Article 226. The legislation in fact contains a statutory recognition in Section 14 that the jurisdiction which is conferred upon the Armed Forces Tribunal is a jurisdiction in relation to service matters as defined in Section 3(o) as was exercisable by all courts and tribunals immediately before the appointed day, save and except the jurisdiction exercisable by the Supreme Court and the High Courts;

(iv) Having said this, it needs to be emphasised that the existence of jurisdiction and the nature of its exercise have distinct connotations in constitutional law. The Armed Forces Tribunal is constituted by legislation which provides for a specialized and efficacious administration of justice in matters falling within its jurisdiction under the provisions of the Act. This is coupled with the need to maintain discipline in the Armed Forces;

(v) The Armed Forces Tribunal is a court of first instance and ordinarily, matters which fall within the purview of its jurisdiction have to proceed for adjudication before the Tribunal and the Tribunal alone. Against the decision of the Tribunal, there is a statutory remedy of an appeal which is provided under Sections 30 and 31 to the Supreme Court;

(vi) Since a statutory remedy of an appeal is provided, the principles which are well established for the exercise of the jurisdiction under Article 226, would warrant that the High Court should be circumspect and careful while determining as to whether any case for the exercise of jurisdiction under Article 226 of the Constitution is made out;

(vii) The jurisdiction under Article 226 has not been abrogated as it could not have been, being a basic and essential feature of the Constitution.

74. In the circumstances, the questions of law which have been framed are answered in the aforesaid terms. The reference to the Full Bench shall accordingly stand disposed of. The writ petition shall now be placed before the Division Bench for disposal in the light of this judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.04.2015

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

C.M.W.P. (PIL) No. 15255 of 2015

L.K. Khurana ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shams Uz Zaman

Counsel for the Respondents:
C.S.C., Sri B. Dayal, Sri Tabish Sheikh

Constitution of India, Art.-226-Public Interest Litigation-Proposal by development authority-converting the park into multilevel car parking complex-open space being lungs of urban area-local authorities to protect the right of citizens-not to violate-against the

statutory provisions-authorities to find out alternative space for parking facility-petition disposed of.

Held: Para-6

In our view, the efforts on part the part of the Meerut Development Authority as well as the Nagar Nigam to convert an open space which is used for recreation including by morning walkers into a multi level car parking facility, cannot be countenanced. These areas are the lungs of the urban areas. The counter affidavit filed by the Nagar Nigam seems to take a casual view of the urbanisation of the city of Meerut. What the Commissioner of the Nagar Nigam has clearly ignored, is the duty of the Nagar Nigam to ensure that the right to life of the citizens of the city, which is protected by Article 21 of the Constitution, is not violated by depriving the citizens of the use of open spaces. Constructing a multi level car parking facility and expecting citizens to use the terrace of a concrete structure as a play ground and as a park would be travesty of urban planning. A citizen has every right to utilise a park in its conventional form. As regards open spaces, the right of a citizen to use them, cannot be abrogated by expecting all citizens, irrespective of age or disabilities to utilise the top floor or terrace of a constructed building, as recreation. This simply cannot be acceptable. Walking on the terrace of a multi storeyed building is no substitute for being rooted to the earth. We express the deep concern of the Court about the manner in which public authorities are eying the few remaining open spaces in urban areas for commercial development. The need of citizens to a holistic pattern of life in the urban areas cannot be sacrificed at the altar of human avarice and greed. Rapacious urban sprawls will destroy the remaining green areas, if unchecked.

Case Law discussed:

AIR 1991 (SC) 1902; AIR 1996 SC 253; AIR 1999 SC 2468.

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

1. In the city of Meerut, there is an area called the Town Hall and Gandhi Park; the area is used by morning walkers and it is not in dispute that it is the only open area available in the vicinity. A Committee consisting of the Chief Engineer of the Meerut Development Authority, Meerut, the Chief Engineer of the Nagar Nigam, Meerut and a member of the Development Authority resolved on 23 January, 2015 to construct a multi level parking facility in the area of the park and to develop a park on the roof top of the parking facility. The existing park is also known as Gandhi Park as a statue of the Father of the Nation, Mahatma Gandhi, is installed in it. The statue of Mahatma Gandhi is sought to be re-located towards the park near the main gate of the Town Hall, in the process of redeveloping the area into a multi level car parking facility. The petition, which has been filed in public interest, calls into question the legality of the proposed re-development.

2. Two counter affidavits have been filed in response to the petition. The Vice Chairperson of the Meerut Development Authority has stated in his counter that there was an acute shortage of parking space for vehicles and hence, a decision was taken to select the present location for the construction of a multi level car parking facility. The counter states that on the top floor of the multi level car parking facility, a park and play ground would be developed and two heavy lifts would be provided for transporting people to the top floor of the multi level car parking facility. However, the affidavit fairly states that in the event, this Court holds that it would not be proper to construct a multi level car parking facility, having due regard to the environmental needs of

the area, the Committee would find out some other place for the construction of a multi level car parking facility.

3. A counter affidavit has been filed by the Commissioner of the Nagar Nigam. According to the counter, the area of the Town Hall, which ad-measures 7200 square meters, is not recorded as a park in the revenue records, but the land is being used as open area for the Town Hall. The counter admits that the land adjacent to the Town Hall is being used in the interest of the general public. The submission of the Nagar Nigam is that a decision has been taken to construct a multi level car parking facility at the Town Hall, since it is situated in the centre of the city and is of "great interest to the public at large".

4. From the affidavits filed in the present proceedings, it is clear that the area is recorded as a Town Hall in the revenue record. What is also not in dispute is the existence of the park adjoining the statue of Mahatma Gandhi. Again, what is not in dispute before the Court, is that the area is an open space and is being used as such by the general public as a recreation space including by morning walkers. There is no dispute about the factual position that there is no other open area in the vicinity, which would subserve the purpose.

5. The Supreme Court has in a line of authority, beginning with the decision in Bangalore Medical Trust v. B.S. Muddappa1 taken a serious view of the violation of urban planning norms resulting in a diversion of public parks and open spaces for alien purposes. In Bangalore Medical Trust, a nursing home was sought to be situated on a public park. Holding that this was impermissible, the Supreme Court observed as follows:

"(23). The scheme is meant for the reasonable accomplishment of the statutory object which is to promote the orderly development of the city of Bangalore and adjoining areas and to preserve open spaces by reserving public parks and playgrounds with a view to protecting the residents from the ill-effects of urbanisation. It was meant for the development of the city in a way that maximum space is provided for the benefit of the public at large for recreation, enjoyment, 'ventilation' and fresh air. This is clear from the Act itself as it originally stood. The amendments inserting Sections 16(1)(d), 38A and other provisions are clarificatory of this object. The very purpose of the BDA, as a statutory authority, is to promote the healthy growth and development of the city of Bangalore and the area adjacent thereto. The legislative intent has always been the promotion and enhancement of the quality of life by preservation of the character and desirable aesthetic features of the city. The subsequent amendments are not a deviation from or alteration of the original legislative intent, but only an elucidation or affirmation of the same.

(24). Protection of the environment, open spaces for recreation and fresh air, playgrounds for children, promenade for the residents, and other conveniences or amenities are matters of great public concern and of vital interest to be taken care of in a development scheme. It is that public interest which is sought to be promoted by the Act by establishing the BDA. The public interest in the reservation and preservation of open spaces for parks and playgrounds cannot

be sacrificed by leasing or selling such sites to private persons for conversion to some other user. Any such act would be contrary to the legislative intent and inconsistent with the statutory requirements. Furthermore, it would be in direct conflict with the constitutional mandate to ensure that any State action is inspired by the basic values of individual freedom and dignity and addressed to the attainment of a quality of life which makes the guaranteed rights a reality for all the citizens".

Again, the Supreme Court observed as follows:

"(37).....Free and healthy air in beautiful surroundings was privilege of few. But now it is a, `gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentiality a commercial venture, a profit oriented industry. Service may be its moto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare a blue print without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town planning or development acts of different States require even private house-owners to leave open space in front and back for lawn and fresh air. In 1984 the BD Act itself provided for reservation of not less than fifteen per cent of the total area of the lay out in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 38A of the Act. Absence of open space and public park, in present day when urbanisation is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home. To say, therefore, that by conversion of a site reserved for low lying into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their utility."

A similar view was taken in another decision of the Supreme Court in G.N. Khajuria v. Delhi Development Authority2. While holding that the diversion of a space meant for a park into a nursery school is impermissible, the Supreme Court observed as follows:

"(8). We, therefore, hold that the land which was allotted to respondent No.2 was part of a park. We further hold that it was not open to the DDA to carve out any space meant for park for a nursery school. We are of the considered view that the allotment in favour of respondent No.2 was misuse of power, for reasons which need not be adverted. It is, therefore, a fit case, according to us, where the allotment in favour of respondent No.2 should be cancelled and we order accordingly. The fact that respondent No.2. has put up up some structure stated to be permanent by his counsel is not relevant, as the same has been done on a plot of land allotted to it in contravention of law. As to the submission that dislocation from the present site would cause difficulty to the tiny tots, we would observe that the same

has been advanced only to get sympathy from the Court inasmuch as children, for whom the nursery school is meant, would travel to any other nearby place where such a school would be set up either by respondent No.2 or by any other body."

In M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu3 a decision had been taken by the Lucknow Nagar Mahapalika, permitting a builder to construct an underground shopping complex in the Jhandewala Park situated in Aminabad market, Lucknow. A learned Single Judge of this Court held the decision to be unlawful and a mandamus was issued to the Lucknow Nagar Mahapalika to restore back the park to its original position. While considering the matter, the Supreme Court observed as follows:

"51. Jhandewala Park, the park in question, has been in existence for a great number of years. It is situated in the heart of Aminabad, a bustling commercial-cum-residential locality in the city of Lucknow. The park is of historical importance. Because of the construction of underground shopping complex and parking it may still have the appearance of a park with grass grown and path laid but it has lost the ingredients of a park inasmuch as no plantation now can be grown. Trees cannot be planted and rather while making underground construction many trees have been cut. Now it is more like a terrace park. Qualitatively it may still be a park but it is certainly a park of different nature. By construction of underground shopping complex irreversible changes have been made. It was submitted that the park was acquired by the State Government in the year 1913 and was given to the Mahapalika for its management. This has not been controverted. Under Section 114 of the Act it is the obligatory duty of the Mahapalika to maintain public places, parks and plant trees. By allowing underground construction Mahapalika has deprived itself of its obligatory duties to maintain the park which cannot be permitted. But then one of the obligatory functions of the Mahapalika under Section 114 is also to construct and maintain parking lots. To that extent some area of the park could be used for the purpose of constructing underground parking lot. But that can only be done after proper study has been made of the locality, including density of the population living in the area, the floating population and other certain relevant considerations. This study was never done. Mahapalika is the trustee for the proper management of the park. When true nature of the park, as it existed, is destroyed it would be violative of the doctrine of public trust as expounded by this Court in Span Resort Case (1997 (1) SCC 388). Public Trust doctrine is part of Indian law. In that case the respondent who had constructed a motel located at the bank of river Beas interfered with the natural flow of the river. This Court said that the issue presented in that case illustrated "the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change".

6. In our view, the efforts on part the part of the Meerut Development

Authority as well as the Nagar Nigam to convert an open space which is used for recreation including by morning walkers into a multi level car parking facility, cannot be countenanced. These areas are the lungs of the urban areas. The counter affidavit filed by the Nagar Nigam seems to take a casual view of the urbanisation of the city of Meerut. What the Commissioner of the Nagar Nigam has clearly ignored, is the duty of the Nagar Nigam to ensure that the right to life of the citizens of the city, which is protected by Article 21 of the Constitution, is not violated by depriving the citizens of the use of open spaces. Constructing a multi level car parking facility and expecting citizens to use the terrace of a concrete structure as a play ground and as a park would be travesty of urban planning. A citizen has every right to utilise a park in its conventional form. As regards open spaces, the right of a citizen to use them, cannot be abrogated by expecting all citizens, irrespective of age or disabilities to utilise the top floor or terrace of a constructed building, as recreation. This simply cannot be acceptable. Walking on the terrace of a multi storeyed building is no substitute for being rooted to the earth. We express the deep concern of the Court about the manner in which public authorities are eying the few remaining open spaces in urban areas for commercial development. The need of citizens to a holistic pattern of life in the urban areas cannot be sacrificed at the altar of human avarice and greed. Rapacious urban sprawls will destroy the remaining green areas, if unchecked.

7. In the circumstances, we hold and declare that the proposal for the re-development of the area of Town Hall and its appurtenant park into a multi level car parking facility is against the intent of the statutory provisions and cannot be approved. The Meerut Development Authority shall in terms of the statement made in the affidavit, be at liberty to pursue any alternative proposal for constructing a multi level car parking facility. The authorities are directed to maintain the area of the park as a park.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2015

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

C.M.W.P. No. 15739 of 2012 alongwith W.P. No. 15740 of 2012; W.P. No. 15741 of 2012

State of U.P. ...Petitioner
Versus
Vijay Prakash & Anr. ...Respondents

Counsel for the Petitioner:
Sri Shekhar Kumar, Dr. Madhu Tandon, S.C.

Counsel for the Respondents:
Sri Jamal Khan

Constitution of India, 'Back Wages'-Time bound appointment-automatically service come to an end-refer after 17 years-award regarding reinstatement with back wages-without discussion of retrenchment notice and gainfully employment during retrenchment period-held-award not sustainable-direction for fresh consideration given.

Held: Para-13
No finding has been recorded in the impugned award either with respect to notice of retrenchment as admitted by the respondent-workmen themselves or on the point of completion of continuous service of 240 days by them in any calender year.

Case Law discussed:
(2005) 3 SCC 193; (1969) 3 SCC 513; AIR 1959 SC 1238; 1967 (66) ITR 462; JT 2010 (2) SC 566; 2011 (269) E.L.T. 433(S.C.)(para 8).

(Delivered by Hon'ble Surya Prakash Kesarwani, J.)

1. Heard Dr. Madhu Tandon, learned counsel for the petitioner and Sri Jamal Khan, learned counsel for the respondent no. 1.

2. Subject matter of all the above three noted writ petitions is the impugned common award and as such these writ petitions are being heard together.

3. After the start of arguments a counter affidavit dated 15.4.2014 has been filed today after about a year of its swearing and without disclosing that why the counter affidavit is being filed so belatedly.

4. The respondent-workmen raised industrial dispute after about 17 years of their alleged disengagement, before the respondent no. 2 who passed the impugned award dated 26.4.2011 in Adjudication Case No. 8 of 2009, Adjudication Case No.9 of 2009 and Adjudication Case No. 10 of 2009 as under : -

''8. मैने उभयपक्षों के विद्वान अधिकृत प्रतिनिधियों की बहस विस्तार पूर्वक सुनी और पत्रावली का सम्पूर्ण अवलोकन किया।

9. मै इस निष्कर्ष पर पहुॅचा हूॅ कि वादी श्रमिकों की सेवायें दिनांक 25.5.1992 से समाप्त किया जाना अनुचित एवं अवैधानिक है। श्रमिकों की सेवा समाप्ति के दिनांक 25.5.1992 से स्थायी रूप से सेवा में बहाल किया जाता है और बैठकी अवधि का सम्पूर्ण वेतन पाने का अधिकारी है। यही मेरा निर्णय है।

श्रमिकों को सेवायोजकों द्वारा वाद व्यय के रूप में प्रत्येक श्रमिक को रू0 500 अदा करें।

यह अभिनिर्णय विवाद तदानुसार निस्तारित किया जाता है।''

5. Before the respondent no. 2 the petitioners have clearly stated that the respondent no.1 was engaged temporarily for a fixed period between 26th January, 1991 to 25th May, 1992 and after expiry of the said period the engagement of the respondent-workmen automatically came to an end. The industrial dispute was raised after about 17 years. The respondent-workmen stated before the Labour Court that they were retrenched after giving notice. By the oral evidence also the petitioner tried to establish that the respondent-workmen were engaged on daily wage basis to get done the miscellaneous work in the event of need. However, Presiding Officer, Labour Court passed the impugned award abruptly recording conclusion as aforequoted that the retrenchment of the respondent-workmen on 25.5.1992 is illegal and , therefore, they are reinstated in service with full back wages. Thus, the impugned award being without reasons for the conclusions reached, can not be sustained. Consequently order for payment of back wages can also not be sustained.

6. Apart from above, the respondent-workmen have not stated that what are the size of their family, how they sustained their family and themselves for such long period of about 20 years without any employment and what were the means of their livelihood. The respondent-workmen have not even stated or led any evidence that they were not engaged in any gainful employment during the long period of about 20 years. These are the relevant factors which should be considered for determination of quantum of back wages to a daily wager in case of

his retrenchment in breach of the provisions of Section 6N of the U.P. Industrial Act Dispute, 1947, if he is found to be entitled for back wages. Presiding Officer, Labour Court granted full back wages without recording any finding or discussion on the relevant factors in the impugned award. Under the circumstances, the grant of back wages by the impugned award is wholly arbitrary and illegal.

7. There can be no quarrel with the argument of learned counsel for the respondent no.1 that the scope of interference under Article 226 of the Constitution of India against an award is limited and the Court cannot go into the questions of fact decided by the labour court or the Tribunal, which is the final fact finding authority / court. Interference can be made only if a finding of fact is perverse or if the same is not based on legal evidence. In the case of Management of Madurantakam Co-operative Sugar Mills Vs. S. Vishwanathan, (2005) 3 SCC 193, Hon'ble Supreme Court held in para 12 as under :

"12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon. A consideration of the impugned order of the learned Single Judge shows that nowhere he has come to the conclusion that the finding of the Labour Court is either perverse or based on no evidence or based on evidence which is not legally acceptable. Learned Single Judge proceeded as if he was sitting in a court of appeal on facts and item after item of evidence recorded in the domestic enquiry as well as before the Labour Court was reconsidered and findings given by the Labour Court were reversed. We find no justification for such an approach by the learned Single Judge which only amounts to substitution of his subjective satisfaction in the place of such satisfaction of the Labour Court."

8. In the case of M/s. Hindustan Steels Ltd. Rourkela Vs. A.K. Roy and others, (1969) 3 SCC 513, Hon'ble Supreme Court held in para 16 as under :-

"12. On a consideration of all the circumstances, the present case, in our view, was one such case. The Tribunal exercised its discretion mechanically without weighing the circumstances of the case. That was no exercise of discretion - at all. There is ample authority to the effect that if a statutory tribunal exercises its discretion on the basis of irrelevant considerations or without regard to relevant considerations, certiorari may properly issue to quash its order. [See S.A. de Smith, Judicial Review of Administrative Action, (2nd ed.) 324-325]. One such relevant consideration, the disregard of which would render its order amenable to interference, would be the well- settled principles laid down in decisions binding on the tribunal to whom

the discretion is entrusted. The refusal by the High Court to interfere was equally mechanical and amounted to refusal to exercise, its jurisdiction. Its order, therefore, becomes liable to interference."

(Emphasis supplied by me)

9. In the case of Omar Salay Mohd. Sait Vs. Commissioner of Income Tax, Madras, AIR 1959 SC 1238, Hon'ble Supreme Court held in para 42 as under :-

"42. We are aware that the Income-tax Appellate Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were was the reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

10. In the case of Udhav Das Kewat Ram Vs. CIT 1967 (66) ITR 462, Hon'ble Supreme Court held that Tribunal must consider with due care all material facts and record its findings on all contentions raised before it and the relevant law.

11. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. Highlighting this rule, Hon'ble Supreme Court held in the case of The Secretary & Curator, Victoria Memorial v. Howrah Ganatantrik Nagrik Samity and ors., JT 2010(2)SC 566 para 31 to 33 as under :

"31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice - delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind. " [Vide State of Orissa Vs. Dhaniram Luhar (JT 2004(2) SC 172 and State of Rajasthan Vs. Sohan Lal & Ors. JT 2004 (5) SCC 338:2004 (5) SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. [Vide Raj Kishore Jha Vs. State of Bihar & Ors. AIR 2003 SC 4664; Vishnu Dev Sharma Vs. State of Uttar Pradesh & Ors. (2008) 3 SCC 172; Steel Authority of India Ltd. Vs. Sales Tax Officer, Rourkela I Circle & Ors. (2008) 9 SCC 407; State of Uttaranchal & Anr. Vs. Sunil Kumar Singh Negi AIR 2008 SC 2026; U.P.S.R.T.C. Vs. Jagdish Prasad Gupta AIR 2009 SC 2328; Ram Phal Vs. State of Haryana & Ors. (2009) 3 SCC 258; Mohammed Yusuf Vs. Faij Mohammad & Ors. (2009) 3 SCC 513; and State of Himachal Pradesh Vs. Sada Ram & Anr. (2009) 4 SCC 422].

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person 23 who is adversely affected may know, as why his application has been rejected.

(Emphasis supplied by me)

12 Non recording of reasons, non consideration of admissible evidence or consideration of inadmissible evidence renders the order to be unsustainable. Hon'ble Supreme Court in the case of Chandana Impex Pvt. Ltd. Vs. Commissioner of Customs, New Delhi , 2011(269)E.L.T. 433 (S.C.)(para 8) held as under :

"8. Having bestowed our anxious consideration on the facts at hand, we are of the opinion that there is some merit in the submission of learned counsel for the appellant that while dealing with an appeal under Section 130 of the Act, the High Court should have examined each question formulated in the appeal with reference to the material taken into consideration by the Tribunal in support of its finding thereon and given its reasons for holding that question is not a substantial question of law. It needs to be emphasised that every litigant, who approaches the court for relief is entitled to know the reason for acceptance or rejection of his prayer, particularly when either of the parties to the lis has a right of further appeal. Unless the litigant is made aware of the reasons which weighed with the court in denying him the relief prayed for, the remedy of appeal will not be meaningful. It is that reasoning, which can be subjected to examination at the higher forums. In State of Orissa Vs. Dhaniram Luhar2 this Court, while reiterating that reason is the heart beat of every conclusion and without the same, it becomes lifeless, observed thus :

"8.....Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;....."

(Emphasis supplied by me)

13. No finding has been recorded in the impugned award either with respect to notice of retrenchment as admitted by the respondent-workmen themselves or on the

point of completion of continuous service of 240 days by them in any calender year.

14. In view of the above discussions, the impugned award cannot be sustained and is, therefore, set aside.

15. In result, writ petitions succeed and are hereby allowed. The impugned award dated 26.4.2011 passed by the Presiding Officer, Labour Court, U.P. Firozabad in Adjudication Case No. 08 of 2009, Adjudication Case No. 09 of 2009 and Adjudication Case No. 10 of 2009 are hereby set aside. The matter is remitted back to the concerned Labour Court for decision afresh in accordance with law, as expeditiously as possible, preferably within a period of three months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2015

BEFORE
THE HON'BLE SUNEET KUMAR, J.

C.M.W.P. No. 18049 of 2015

Braham Singh ...Petitioner
Versus
A.D.J. Moradabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Susheel Kumar Tewari, Sri Shah O.P. Agarwal

Counsel for the Respondents:
Sri Pawan Kumar Shukla

Constitution of India, Art.-227-Superintendent power of High Court-scope of interference-explained-no error of law nor jurisdiction error-finding of facts recorded by Court below regarding default in paying rent-petition under Art. 226-not maintainable in view of 'Radhy Shyam' case-not can be interfered by exercising supervisory power also.

Held: Para-13
In the facts and circumstances of the case in hand, I am of the opinion that the Courts below have not erred in law or committed any jurisdictional error in holding that the petitioner defaulted in payment of rent and had failed to pay the arrears, accordingly, the petitioner is not entitled to avoid decree of eviction on the ground of default in payment of rent under Section 20(4) of the Act, as admittedly the petitioner had acquired another house in the city itself. There is no flaw in decreeing the suit on the ground of default.

Case Law discussed:
Civil Appeal No. 2548 of 2009; (2010) 8 SCC 329.

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

1. Petitioner is a tenant in a portion of the building situated at Mohalla Kanoongoyan, Near Hathiwala Mandir Mandir, Moradabad. The respondent/landlord after determination of tenancy by notice dated 13.12.2007 instituted a suit being Suit No. 2 of 2009 before the Small Causes Court at Moradabad for eviction and on having defaulted in payment of rent since 2005. The parties contested the suit. The petitioner did not dispute that he is the tenant of the premises in question of which the respondent is the landlord.

2. The petitioner contended that the rent for the period 1 March 2005 to 31 July 2013 has been deposited in the Court unconditionally, accordingly, petitioner was entitled to the protection under sub-clause (4) of Section 20 of the U.P. Act No. 13 of 1972, therefore, is not liable for eviction on the ground of default. The Court of first instance decreed the suit on 21 October 2014 holding the petitioner to

be defaulter in payment of rent for a period of more than 4 months. Further, the petitioner had already acquired a house in the name of his wife in Buddhi Vihar, Moradabad which is within the municipal limits of Moradabad, the defence under Section 20(4) of the Act to avoid the decree of eviction would not be available to the petitioner. The judgment and order of the Trial Court has been affirmed by judgment and order dated 2 March 2015 passed by the Revisional Court.

3. The petitioner has impugned both the above judgment and orders by means of this writ petition.

4. The learned counsel for the petitioner has fairly accepted that the petitioner has acquired a house in the name of his wife within the city and, therefore, as per the proviso to sub-section (4) of Section 20 of the Act, the petitioner cannot avoid the decree of eviction, if passed, on the ground of default in payment of rent, even though he may have already deposited the amount of rent and damages together with interest on or before the first date of hearing of the suit.

5. In view of the provisions of Section 20(2) of the Act even if one of the grounds provided therein for eviction of tenant is proved, the tenant would be liable for eviction unless prevented by any law.

6. Section 20(2)(a) of the Act reads as under:

"20.....
(1).....
(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand.

7. The only argument pressed on behalf of the petitioner is that the tenancy of the petitioner was not validly determined by notice dated 13 December 2007.

8. In the instant case, the Courts below have recorded that the tenancy of the petitioner was validly determined by notice dated 13 December 2007, which was returned on 18 December 2007 with an endorsement "refused to accept". The Trial Court on considering the evidence, recorded a finding that the notice was duly served. The petitioner in cross-examination deposed that he is a lawyer practicing in the High Court at Allahabad and the notice was not served at Chamber No. 191 which has been allotted to the petitioner, but the Court below noted that the petitioner was unable to explain that in the affidavit filed in support of the written statement, the petitioner had mentioned Chamber No. 160 as his address at the High Court, thus, holding that the petitioner had made a false statement before the Court, accordingly, it was held that notice was duly served upon the petitioner.

9. The petitioner was a defaulter as the petitioner did not deposit the payment of rent, accordingly by a legal notice the tenancy was terminated. Before the Revisional Court only two points was pressed by the petitioner: "(i) as to whether the defendant/revisionist had been under arrears of rent causing default in payment of rent and being the tenant as

hanging over? (ii) as to whether the burden of proof of payment of rent rested upon the shoulders of tenant-defendant or upon the shoulders of landlord-plaintiff?"

10. The Revisional Court concurred with the finding of the Trial Court that the petitioner had already acquired a residential property in Buddhi Vihar, Moradabad in the name of his wife, further, the petitioner had made a false statement before the Court regarding service of notice at the address provided by the petitioner and had failed to prove that the petitioner was making payment of rent. Petitioner was unable to give the details of the money order and the date on which the rent was paid.

11. The Courts below have returned concurrent finding of fact that the notice was duly served upon the petitioner but the petitioner refused to accept the notice on a false plea that it was sent on a wrong address. The petitioner is not disputing that the notice was sent to the address mentioned in the affidavit filed in support of the written statement. Regarding the payment of rent to the respondent by money order, the petitioner failed to produce any postal receipts of the money orders nor he confirmed any date, month or year of sending money orders. The petitioner is a practicing lawyer at Allahabad which is not being disputed but is retaining the rented premises at Moradabad. It is not disputed that the petitioner has already acquired a premises in Moradabad in the name of his wife.

12. The petition is reported to have been filed under Article 226 of the Constitution, which is not maintainable in view of the decision rendered in Radhey Shyam and another vs. Chhabi Nath and others (Civil Appeal No. 2548 of 2009) decided on 26th February, 2015 however, the learned counsel for the petitioner would submit that the petition has been filed under Article 227 of the Constitution as is reflected from the pleadings and the prayer. The scope for entertaining a petition under Article 227 is limited and the Hon'ble Supreme Court in the case of Shalini Shyam Shetty and another vs. Rajendra Shankar Patil (2010) 8 SCC 329 culled out the following principles that should be considered while deciding a petition under Article 227:

62. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) A petition under Article 226 of the Constitution is different from a petition under Article 227. The mode of exercise of power by High Court under these two Articles is also different.

(b) In any event, a petition under Article 227 cannot be called a writ petition. The history of the conferment of writ jurisdiction on High Courts is substantially different from the history of conferment of the power of Superintendence on the High Courts under Article 227 and have been discussed above.

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an alternative statutory mode of redressal has been provided, that would also operate as a restrain on the exercise of this power by the High Court.

(d) The parameters of interference by High Courts in exercise of its power of superintendence have been repeatedly laid

down by this Court. In this regard the High Court must be guided by the principles laid down by the Constitution Bench of this Court in Waryam Singh (supra) and the principles in Waryam Singh (supra) have been repeatedly followed by subsequent Constitution Benches and various other decisions of this Court.

(e) According to the ratio in Waryam Singh (supra), followed in subsequent cases, the High Court in exercise of its jurisdiction of superintendence can interfere in order only to keep the tribunals and Courts subordinate to it, `within the bounds of their authority'.

(f) In order to ensure that law is followed by such tribunals and Courts by exercising jurisdiction which is vested in them and by not declining to exercise the jurisdiction which is vested in them.

(g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.

(h) In exercise of its power of superintendence High Court cannot interfere to correct mere errors of law or fact or just because another view than the one taken by the tribunals or Courts subordinate to it, is a possible view. In other words the jurisdiction has to be very sparingly exercised.

(i) .....

(j) .....

(k) .....

(l) .....

(m) .....

(n) This reserve and exceptional power of judicial intervention is not to be exercised just for grant of relief in individual cases but should be directed for promotion of public confidence in the administration of justice in the larger public interest whereas Article 226 is meant for protection of individual grievance. Therefore, the power under Article 227 may be unfettered but its exercise is subject to high degree of judicial discipline pointed out above.

(o) An improper and a frequent exercise of this power will be counter-productive and will divest this extraordinary power of its strength and vitality.

13. In the facts and circumstances of the case in hand, I am of the opinion that the Courts below have not erred in law or committed any jurisdictional error in holding that the petitioner defaulted in payment of rent and had failed to pay the arrears, accordingly, the petitioner is not entitled to avoid decree of eviction on the ground of default in payment of rent under Section 20(4) of the Act, as admittedly the petitioner had acquired another house in the city itself. There is no flaw in decreeing the suit on the ground of default.

14. The writ petition is, accordingly, dismissed both on merits and maintainability.

15. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.04.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

C.M.W.P. No. 20050 of 2008

Kamlesh Bahadur Gond ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri L.P. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India-Service law-power of review-once caste certificate issued-except verifying genuineness of certificate-authority has no power of review saying Gond caste does not belong to S.T.-in view of Division Bench judgment-order impugned quashed.

Held: Para-10
Having heard learned counsel for the parties, perusing the relevant material on record and considering the judgments cited at Bar, I find that the petitioner was issued caste certificate of 'Gond' treating him to be a Scheduled Tribe. On the basis of the same caste certificate he obtained appointment. On being enquired by the department from the Tehsidlar about the caste of the petitioner, the Tehsildar submitted report denying the certificate of the petitioner. I find that the judgments cited by the petitioner fully support his case. There was no complaint regarding genuineness of the certificate of the petitioner. The department has only enquired whether such certificate has been issued or not. The Tehsildar had gone beyond the query and submitted another report declaring that the petitioner does not belong to 'Gond' community, which is not a scheduled tribe community. The Tehsildar was required to only verify the issuance of the caste certificate and not its correctness. Once the Tehsildar had verified the issuance of the said certificate, it had no power or jurisdiction to provide for review of the issuance of the said caste certificate or recommend for its cancellation, specially when there was no complaint by any authority or person with regard to the correctness of the same. It is also relevant to mention that by letter dated 24.1.2008 the District Development Officer, Chandauli had only asked from the Tehsildar, Lalganj whether 'Gond' caste is Scheduled Tribe or not. The Tehsildar has overstepped the issue and denied the caste of the petitioner.

Case Law discussed:

W.P. No. 2252 of 2013; Writ-A No. 36990 of 2008; 2014 (8) ADJ 690 (DB).

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

1. Heard learned counsel for the petitioner. Learned Standing Counsel appears for the respondents.

2. By means of the present writ petition the petitioner has prayed for following reliefs:-

"(i) issue a writ of certiorari or writ, order or direction in the nature of certiorari calling for record and quashing the impugned order dated 14.02.2008 and 19.03.2008 Annexure No.21 & 25 passed by respondent no.4 and 5.

(ii) issue a writ of mandamus or writ, order or direction in the nature of mandamus commanding the respondents from enforcing and implementing the impugned orders date 14.02.2008 and 19.03.2008 Annexure No.21 & 25.

(iii) issue a writ of mandamus or writ, order or direction in the nature of mandamus commanding the respondent no.5 to allow the petitioner to join and discharge of duties of Gram Vikas Adhikari and pay the salary admissible in law.

(iii) issue any other writ, order or direction which this Hon'ble Court may deem fit and proper, in the facts and circumstances of the case;

(iv) to award the cost of the writ petition to the petitioner."

3. This Court while entertaining the writ petition passed the following order on 19.04.2008:-

"The contention of the learned counsel for the petitioner is that

previously Gond Caste was notified as a Schedule Caste however, by the S.C. and S.T. Orders (Amendment) Act 2002 Gond Caste was declared as a Scheduled Tribe in U.P. The State Government also in pursuance thereof issued a notification dated 3rd July 2003 and subsequently 30th September 2003 notifying Gond Caste as a Schedule Tribel.

In view of the aforesaid, the petitioner was issued a caste certificate by the Tehsildar, Lalganj, District Azamgarh on 15.4.2005 certifying that the petitioner belongs to Gond Caste which is the Scheduled Tribe. On the basis of the aforesaid certificate, the petitioner applied for appointment as a Gram Vikas Adhikari in the category of ST and he was selected and appointed as such on 25.2.2008. However, by the impugned order dated 19.3.2008 petitioner's aforesaid appointment has been cancelled on the ground that the petitioner is not a candidate belonging to ST.

Learned Standing Counsel prays for and is allowed six weeks time to file counter affidavit. Two weeks thereafter are allowed to the petitioner for filing rejoinder affidavit.

List for admission/ final disposal on the expiry of the above period.

Until further order of this Court the operation of impugned order dated 19.3.2008 (Annexure 25 to the writ petition) shall remain stayed."

4. Learned counsel for the petitioner submits that the petitioner belongs to 'Gond' caste, which is a scheduled tribe. In the parivar register and the educational certificates also the caste of the petitioner is shown as 'Gond'. After the inclusion of the petitioner's caste 'Gond' in Scheduled Tribes by Act No.10 of 2003 the petitioner applied for caste certificate of 'Gond'. After enquiry and verification of his caste, the Scheduled Tribe certificate of 'Gond' dated 15.4.2005 was issued by the Tehsildar Lalganj.

5. The respondent no.5 advertised reserved backlog vacancies of Junior Clerk and Gram Vikas Adhikari in the office. In response thereto the petitioner applied for the post of Gram Vikas Adhikari reserved for Scheduled Tribe. After physical test and interview he was selected for the said post and sent for training. After completing successful training he was given appointment letter dated 25.2.2008. When he reached for joining he was served a show cause notice stating that after verification of the caste certificate the Tehsildar, Lalganj vide letter dated 14.2.2008 informed that he belongs to Backward Caste Kahar, Sub-Caste of Gond and the caste certificate submitted by him is ineffective and explanation was called as to why his appointment be not cancelled. The petitioner submitted his reply dated 7.3.2008 to the show cause notice and stated that he is of 'Gond' caste by birth. He has also been issued certificate of 'Gond' treating him a Scheduled Tribe. The respondents have no authority to change the caste of the petitioner without giving any opportunity to him. It is submitted that a caste certificate issued by an empowered public authority under seal continued to be a valid document till it is cancelled by the said authority or by his superior authority. In the petitioner's case neither the superior authority nor the issuing authority has cancelled the caste certificate issued to the petitioner treating him as Scheduled Tribe. It is stated that before cancelling the certificate there is detailed procedure and that should be followed before cancelling any certificate.

He submits that the entire action taken by the respondents is arbitrary, unreasonable and without giving any opportunity of hearing.

6. On the other hand, learned Standing Counsel submits that the respondents had acted absolutely in accordance with law. When it had come in the notice of the respondents that the petitioner does not belong to Scheduled Tribe community but he belongs to 'Gond' sub-caste of 'Kahar', which is a backward caste, his appointment was cancelled.

7. Learned counsel for the petitioner has placed reliance on a Division Bench decision of this Court passed in Writ Petition No.2252 of 2013 (Bindra Prasad Gond v. State of U.P. & Ors.). He has also placed reliance on a judgment dated 5.8.2014 of this Court in Writ-A No.36990 of 2008 (Bindra Prasad v. State of U.P. & Ors.), in which the Court observed as under:-

"Learned counsel for the petitioner submits that the petitioner has filed another Civil Misc. Writ Petition No. 2252 of 2013 (Bindra Prasad Gond Vs. State of U.P. and others), by which the petitioner has challenged the cancellation of his caste certificate and the decision of the High Power Caste Scrutiny Committee, and the Division Bench vide order dated 06.02.2014 had allowed the writ petition with following observation:-

"We also take note of the fact that the petitioner who is a class IV employee has been made to approach the Court again and again for declaration of his status as Scheduled Tribe. Even after the dictum of the Hon'ble Supreme Court in the case of Kumari Madhuri Patil (supra), which was decided on 02.09.1994, the opposite parties did not adopt the procedure mentioned therein for verifying the social status of the petitioner rather the Tehsildar went on canceling his caste certificate on the pretext or other, with the result, the petitioner had to approach this Court again and again, at least 5 times. Even after passing of the judgment by this Court on 09.04.2010, the authorities did not take any action till the petitioner initiated contempt proceedings against them. The petitioner has suffered mental agony and incurred expenses on account of these litigations. Therefore, it is a fit case where the respondent no.1 deserves to be saddled with appropriate cost.

Considering the long period of litigation, specially, the facts that the report of the Vigilance Cell is not alleged to have been obtained fraudulently, we do not deem it fit to relegate the matter back to the authorities again. Since we are quashing the impugned decision of the Caste Scrutiny Committee, the caste certificate dated 17.01.2004 issued to the petitioner shall stand restored and the petitioner shall be treated as belonging to the Gond caste, a Scheduled Tribe.

For the reasons stated aforesaid, the impugned order of the Caste Scrutiny Committee dated 28.12.20012, cannot be sustained and is quashed.

The writ petition is allowed with cost.

The respondent no.1 will pay a sum of Rs. 25,000/- to the petitioner for this vexatious litigation within four weeks from the date of production of a certified copy of this order."

The Division Bench while allowing the writ petition no. 2252 of 2013 has clearly held that "This is the 5th round of litigation by the petitioner, who is a Driver in the Agriculture department of the Government of Uttar Pradesh, seeking

restoration of his status as a Scheduled Tribe person.

Learned counsel for the petitioner submits that in view of the decision made by the Division Bench in Civil Misc. Writ Petition No. 2252 of 2013 dated 06.02.2014, by which the impugned decision of the High Power Caste Scrutiny Committee, has been quashed and direction has already been issued to the respondents to restore the caste certificate, which was issued to the petitioner on 17.01.2004, treating him as Gond caste (scheduled tribe). The present writ petition is liable to be allowed on the ground that petitioner admittedly belongs to Scheduled Tribes and his caste certificate has been restored.

Therefore, in view of the decision taken by the Division Bench in Civil Misc. Writ Petition No. 2252 of 2013 dated 06.02.2014, the sole reason for passing the impugned order dated 08.02.2008 passed by the respondent no.3 is no more survives specially on the ground that once the Division Bench has already restored the caste certificate of the petitioner as scheduled tribes then the order impugned dated 08.02.2008 is unsustainable and liable to be quashed.

Accordingly, in view of the aforesaid facts and circumstances, I am of the view, that the order dated 08.02.2008 is unsustainable and accordingly quashed.

Accordingly, the writ petition is allowed."

9. Learned counsel for the petitioner has also placed reliance on a Division Bench judgment of this Court in Praveen Kumar v. State of U.P. & Ors. reported in 2014 (8) ADJ 690 (DB), the relevant paragraphs of which are reproduced as under:-

"In the communication of the Tehsildar dated 12.10.2009, it is nowhere mentioned that there was any complaint with regard to the issuance of the caste certificate in favour of the petitioner. By the communication of the Commandant of C.R.P.F dated 3.9.2009, the Tehsildar was required to only verify the issuance of the caste certificate and not its correctness. Once the Tehsildar had verified the issuance of the said certificate, it had no power or jurisdiction to provide for review of the issuance of the said caste certificate or recommend for its cancellation, specially when there was no complaint by any authority or person with regard to the correctness of the same.

If the Tehsildar is allowed to initiate suo motu proceeding for cancellation, without there being any particular material or complaint with regard to issuance of such caste certificate, the same would create unnecessary complication, as any new Tehsildar, who is subsequently posted and is not satisfied with the person or his family in whose favour the certificate has been issued, can initiate proceedings for cancellation of caste certificate which may have been validly issued in favour of a particular person after due investigation.

In the present case, the communication of the Tehsildar clearly shows that he has proceeded on the presumption that the petitioner belongs to the Kamkar/Kahar caste, whereas there was no substantial material or document with Tehsildar in support of the same. Prior to the issuance of the said communication, the Tehsildar had not even given the petitioner any opportunity to show cause as to why the proceedings

for cancellation of his caste certificate was to be initiated against him. As such, very initiation of the proceedings for cancellation of the caste certificate of the petitioner cannot be justified in law."

10. Having heard learned counsel for the parties, perusing the relevant material on record and considering the judgments cited at Bar, I find that the petitioner was issued caste certificate of 'Gond' treating him to be a Scheduled Tribe. On the basis of the same caste certificate he obtained appointment. On being enquired by the department from the Tehsidlar about the caste of the petitioner, the Tehsildar submitted report denying the certificate of the petitioner. I find that the judgments cited by the petitioner fully support his case. There was no complaint regarding genuineness of the certificate of the petitioner. The department has only enquired whether such certificate has been issued or not. The Tehsildar had gone beyond the query and submitted another report declaring that the petitioner does not belong to 'Gond' community, which is not a scheduled tribe community. The Tehsildar was required to only verify the issuance of the caste certificate and not its correctness. Once the Tehsildar had verified the issuance of the said certificate, it had no power or jurisdiction to provide for review of the issuance of the said caste certificate or recommend for its cancellation, specially when there was no complaint by any authority or person with regard to the correctness of the same. It is also relevant to mention that by letter dated 24.1.2008 the District Development Officer, Chandauli had only asked from the Tehsildar, Lalganj whether 'Gond' caste is Scheduled Tribe or not. The Tehsildar has overstepped the issue and denied the caste of the petitioner.

11. In view of the above, the writ petition is allowed. The impugned orders dated 14.2.2008 and 19.3.2008 are hereby quashed. The District Magistrate, Azamgarh is directed to consider the grievance of the petitioner and decide his claim within a period of six weeks from the date a certified copy of this order is produced before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.04.2015

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

C.M.W.P. No. 20101 of 2015

Ramayan Singh & Ors. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri A.P. Paul, Sri B.B. Paul

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holdings Act, 1953-Section 5(2)-Abatement of declaratory suit-on publication of notification u/s 4 of the Act-village in question brought under consolidation scheme-SDO-refused to pass order-even on application by petitioner-in absence of direction of higher authorities-held-no scope of interference by higher authorities in judicial function of Court-SDO-mislead himself-patently illegal and arbitrary-quashed-with fresh direction accordingly.

Held: Para-6
In view of the provisions contained under sub-section (2) of Section 5 of the Act all the proceeding regarding declaration of right etc. shall stand abated after notificaiton under sub-section (2) of Section 4 of the Act after notice to the parties. The Sub Divisional

Officer was exercising power of the court while deciding the petitioners' application. For deciding the cases pending before the court the direction of the authorities is not necessary. The cases have to be decided on the basis of the provisions contained under the Statute for such purpose. There is no scope of interference of the authorities in the judicial functions of the court. The Sub Divisional Officer has mislead himself by observing that unless a direction of the higher authority is given the cases cannot be abated. The view taken by the Sub Divisional Officer is patently illegal and arbitrary. The Sub Divisional Officer is directed to pass a fresh order on the petitioners' application ignoring the earlier order passed by him on 11.3.2015 on the basis of the statutory provisions as mentioned herein above and the arguments advanced by the counsel for the parties.

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

1. Learned counsel for the petitioner is permitted to correct the description of the respondent no.60.

2. Heard Sri B.B.Paul along with Sri A.P.Paul, learned counsel for the petitioners, learned Standing Counsel appearing for the State-respondents and the learned counsel for the Gaon Sabha.

3. This writ petition has been filed with the following prayers:

"1. issue a writ of mandamus in the nature of declaration that upon start of consolidation operation and till closing thereof revenue court has no jurisdiction, order of direction in the nature of mandamus prohibition commanding the respondent no.2 personally arrayed as respondent no.3 not to decide declaratory suit no. 87/211 of 2004 in re: Smt. Ramaraji vs. State of U.P. and others and (2) Suit No. 88/212 of 2014 in re: Smt. Ramraji vs. Ambika Prasad and (3) Suit no. 89/213 in re: Smt. Ramraji vs. State of U.P. and others now bearing composite Case No. 32/37/96/88/212/87/211/89/213 of 2015.

2. issue a writ, order or direction in the nature of mandamus commanding the respondent no. 2 to abate declaratory suits between the parties under section 5(2) of U.P. C.H. Act personally arrayed as respondent no.3 to abate declaratory Suits NO. 87/211 of 2004 in re. Smt. Ramaraji vs. State of U.P.

3. issue ad interim mandamus staying further proceeding of declaratory suits between the parties,being suit no. 87/211 of 2004 in re: Smt. Ramaraji vs. State of U.P. and others and (2) Suit No. 88/212 of 2014 in re: Smt. Ramraji vs. Ambika Prasad and (3) Suit no. 89/213 in re: Smt. Ramraji vs. State of U.P. and others presently bearing Case No. 32/37/96/88/212/87/211/89/213 of 2015 pending before S.D.O. Tehsil Lalganj, district Mirzapur.

4. issue any other suitable writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

5. Award cost of the writ petition in favour of the petitioner."

4. In substance the petitioner appears to be aggrieved by non abatement of the aforesaid suits under sub-section (2) of Section 5 of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act) on account of notification under sub-section (2) of Section 4 of the Act. It is contended by Sri Paul that aforesaid suits are pending since 2004 in which the petitioners are defendants. The land in dispute is situated in village Hateheda, Tehsil Lalganj,

District Mirzapur. The village has been notified in the Gazette Notification dated 26th December, 2013 under sub-section (2) of Section 4 of the Act. It is submitted that the petitioners have filed an application for abatement of the suit under sub-section (2) of Section 5 of the Act but the court concerned has rejected the petitioners' application on the ground that unless some written order from the higher authority is obtained the suits cannot be abated.

5. Sub section (2) of Section 5 of the Act reads under:

"(2) Upon the said publication of notification under sub-section (2) of Section 4, the following further consequences shall ensure in the area to which the notification relates, namely:

(a) every proceeding for the correction of records and every suit and proceeding in respect of declaration of rights or interest in any land lying in the area, or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any Court or authority whether of the first instance or of appeal, reference or revision, shall, on an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending stand abated:

Provided that no such order shall be passed without giving to the parties notice by post or in any other manner and after giving them an opportunity of being heard.

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest indispute in the said suits or proceedings before the appropriate consolidation authorities under and in accordance with the provisions of this act and the rules made thereunder."

6. In view of the provisions contained under sub-section (2) of Section 5 of the Act all the proceeding regarding declaration of right etc. shall stand abated after notificaiton under sub-section (2) of Section 4 of the Act after notice to the parties. The Sub Divisional Officer was exercising power of the court while deciding the petitioners' application. For deciding the cases pending before the court the direction of the authorities is not necessary. The cases have to be decided on the basis of the provisions contained under the Statute for such purpose. There is no scope of interference of the authorities in the judicial functions of the court. The Sub Divisional Officer has mislead himself by observing that unless a direction of the higher authority is given the cases cannot be abated. The view taken by the Sub Divisional Officer is patently illegal and arbitrary. The Sub Divisional Officer is directed to pass a fresh order on the petitioners' application ignoring the earlier order passed by him on 11.3.2015 on the basis of the statutory provisions as mentioned herein above and the arguments advanced by the counsel for the parties.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2015

BEFORE

THE HON'BLE VIVEK KUMAR BIRLA, J.

C.M.W.P. No. 21366 of 2015

Smt. Manorama Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Sheo Ram Singh, Sri Janardan Yadav

Counsel for the Respondents:
C.S.C.

Civil Services Regulation-Regulation 370 (i)-services rendered in work charge-establishment-whether can be counted-as qualifying period of services-for pension purpose?-held-'No'-reasons discussed.

Held: Para-4
Undisputed fact, which is clear from the prayer itself, is that the petitioner wants that her work as work charge employee should be counted towards eligibility period of 10 years for the purpose of grant of pension. This issue was considered in detail by the Hon'ble Division Bench of this Court in Special Appeal No. 23 of 2014, Jai Prakash Vs. State of U.P. and others, decided on 9.1.2014

Case Law discussed:
Spl. Appeal No. 23 of 2014; Spl. Leave to Appeal (C) No. 12648 of 2014

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

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

2. The petitioner was engaged as a daily wager muster roll employee in work charge establishment on 19.11.1984 where she continued to work till 28.12.1993. The services of the petitioner were orally terminated on 28.12.1993 against which she raised an industrial dispute which was allowed by an award dated 27.3.1997 passed by the Labour Court, Varanasi. A writ petition being Writ Petition No. 3473 of 1999 was filed by the State authorities, which was ultimately dismissed. By an order dated 26.12.2001 the petitioner was reinstated on her post as work charge employee. Subsequently, by an office order dated 29.10.2011 issued by the respondent no. 2 the petitioner was regularized as Class IV employee "Beldar". By an order of posting dated 1.11.2011 she was granted pay scale of Rs. 5,200 - 20,200/-, Pay Grade of Rs. 1800/- on the post of regular Beldar. She has retired on 31.1.2015.

3. The petitioner is seeking a writ of mandamus commanding the respondent no. 3 to sanction and pay the regular pension alongwith entire post retiral dues (counting the services rendered in work charge establishment towards the continuous service) as applicable to the regular post of Beldar in the light of the judgment rendered by this Court in Special Appeal No. 445 of 2011 and Writ Petition A - No. 59622 of 2014.

4. Undisputed fact, which is clear from the prayer itself, is that the petitioner wants that her work as work charge employee should be counted towards eligibility period of 10 years for the purpose of grant of pension. This issue was considered in detail by the Hon'ble Division Bench of this Court in Special Appeal No. 23 of 2014, Jai Prakash Vs. State of U.P. and others, decided on 9.1.2014 and it was held by the Hon'ble Division Bench as under:

"It, therefore, follows from the aforesaid judgments of the Supreme Court that the work charged employees constitute a distinct class and they cannot be equated with regular employees and that the work charged employees are not entitled to the service benefits which are

admissible to regular employees under the relevant rules.

We are conscious that in Special Appeal Defective No.842 of 2013 (State of U.P. & Ors. Vs. Panchu) that was decided on 2 December 2013, a Division Bench, after taking notice of the judgment of the Supreme Court in Narata Singh (supra), observed that the rationale which weighed with the Supreme Court should also govern the provisions of the Civil Service Regulations, but what we find from a perusal of the aforesaid judgment of the Division Bench is that the decisions of the Supreme Court in Jagjiwan Ram (supra), Jaswant Singh (supra) and Kunji Raman (supra) as also the Full Bench judgment of this Court in Pavan Kumar Yadav (supra) had not been placed before the Court. These decisions of the Supreme Court and the Full Bench of this Court leave no manner of doubt that in view of the material difference between an employee working in a work charged establishment and an employee working in a regular establishment, the service rendered in a work charged establishment cannot be clubbed with service in a regular establishment unless there is a specific provision to that effect in the relevant Statutes. Article 370(ii) of the Civil Service Regulations specifically, on the contrary, excludes the period of service rendered in a work charged establishment for the purposes of payment of pension and we have in the earlier part of this judgment held that the decision of the Supreme Court in Narata Singh (supra), which relates to Rule 3.17(i) of the Punjab Electricity Rules, does not advance the case of the appellant. In this view of the matter, the appellant is not justified in contending that the period of service rendered from 1 October 1982 to 5 January 1996 as a work charged employee should be added for the purpose of computing the qualifying service for payment of pension."

5. The aforesaid judgment was challenged by the appellant in Special Leave to Appeal (C) No. 12648 of 2014, Jai Prakash Vs. State of U.P. and others, which was dismissed on 5.9.2014 by the Hon'ble Apex Court and the following order was passed:

"There is nothing on the record to suggest that any Rule or Scheme framed by the State to count the work-charge period for the purpose of pension in the regular establishment. In absence of any such Rule or Scheme, we find no merit to interfere with the impugned judgment.

The special leave petition is dismissed."

6. In view of the aforesaid, the rulings relied upon by the learned counsel for the petitioner in the case rendered in Special Appeal No. 445 of 2011, Bhuneshwar Rai Vs. State of U.P. and others is of no help.

7. Learned counsel for the petitioner at this stage prays that the matter relating to payment of any other retiral dues which is still pending be directed to be decided within a time bound period.

8. Accordingly, it is provided that in case any other retiral benefits are still pending to be paid to the petitioner, the same shall be paid, in accordance with law, as expeditiously as possible, preferably within a period of two months from the date of production of a certified copy of this order.

9. With the aforesaid observations/directions, this writ petition stands dismissed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2015

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 23485 of 2014

Arvind Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma, Sri Chandan Sharma

Counsel for the Respondents:
A.G.A.

Constitution of India, Art.-21-Opening History sheet-continuing surveillance-without notice or opportunity-mere pendency of one criminal case-held-contrary to provisions of regulation 228 of Police regulation-in absence of allegations of abatement-order-not sustainable-quashed.

Held: Para-18
The impugned order except for a solitary sentence that merely because the petitioner has been acquitted, the same cannot be a ground to close the history sheet, we find no other valid reason given for the same. There is no indication that the petitioner is a habitual offender and that he forms a class of criminals as defined in Class- A of Regulation 228. It is not the case of the respondents that the petitioner is a criminal of Class-B of Regulation 228 nor is there any such finding to that effect. The impugned order, therefore, is vitiated on this ground as it does not objectively consider the case of the petitioner in terms of the regulations as directed by the High Court in the judgment dated 3.10.2012.

Case Law discussed:
1992 (Suppl) (2) SCC page 84; AIR 1963 SC 1295; AIR 1975 SC page 1378; AIR 1981 SC page 760.

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

1. This petition has been filed for quashing of the impugned order dated 3.2.2014 passed by the Senior Superintendent of Police, Varanasi refusing to close the history sheet of the petitioner on certain grounds. The second prayer made is for quashing of the order dated 24.7.2010 passed by the Deputy Inspector General of Police, Varanasi Range, Varanasi, whereby a representation of the petitioner for closing the history sheet of the petitioner has been rejected.

2. At the very outset, it may be mentioned that a report was obtained from Police Station Cantt, Varanasi about the pendency of criminal cases against the petitioner that has resulted in the opening of the history sheet against him under the U.P. Police Regulations. The extract of the said Regulations under Chapter XX have been filed along with the writ petition as Annexure 19. The history sheet of the petitioner is numbered as 75-A. According to Regulation 223, Registration and Surveillance of Bad Characters known as a crime note book shall be kept at every police station containing the information of the crime and criminals referred to therein. The entries have to be made in five parts and Part (V) has to be maintained in accordance with the instructions contained in paragraph 228 of the U.P. Police Regulations. This proceeds to describe the classification of history sheets, namely, Class-A and Class-B history sheets. Class-A history sheet is for dacoits, burglars, cattle thieves, railway-

goods wagon thieves and abettors thereof. Class-B history-sheets are for confirmed and professional criminals who commit crimes other than dacoity, burglary, cattle-theft as well as theft from railway goods wagons, professional cheats and other experts like poisoners, railway passenger thieves, bicycle thieves and the like mentioned in the aforesaid regulations.

3. It may be noted that the history-sheet of the petitioner was opened on 26.9.2002 when three criminal cases had been registered against the petitioner, namely, Case Crime No.101 of 1984, under Sections 457/380 IPC, Police Station Chaubepur, District Varanasi, Case Crime No.494 of 1993, under Sections 364, 506 IPC, Police Station Cantt, Varanasi and the third case was Case Crime No.357 of 2000, under Sections 147, 148, 149, 307 IPC, Police Station Cantt, Varanasi.

4. Two further cases after the opening of the history-sheet came into existence, namely, Case Crime No.311 of 2003 where the petitioner was called upon to fill a bond for good behaviour under Section 110 Cr.P.C., Police Station Cantt, Varanasi and the fifth case was registered against the petitioner which was tried and ultimately the petitioner was acquitted on 16.12.2009 giving him the benefit of doubt. A copy of the judgment in Case Crime No.25 of 2009, Sessions Trial No.415 of 2009, is Annexure 12 to the writ petition. It is in this background that the history-sheet was continuing against the petitioner.

5. The petitioner contends that because of the continuance of such history-sheet he is unable to get a character certificate for the purpose of entering into any contract with the Government or such other facilities and consequently he came up before this Court in Criminal Misc. Writ Petition No.8794 of 2010 challenging the validity of the maintenance of the history-sheet on the strength of the aforesaid cases.

6. This Court after having noticed the decision in the case of Chaman Lal Vs. State of U.P., 1992 (Suppl) (2) SCC Page 84 disposed of the writ petition observing that the petitioner may file a representation before the Senior Superintendent of Police, Varanasi, who shall consider it and pass appropriate orders within two months. A copy of the said judgment dated 24.5.2010 is extracted hereinunder :-

"The petitioner has, by means of the present petition, challenged the validity of maintaining the history sheet of class A opened by the Police of P.S. Cantt. against the petitioner.

We have heard learned counsel for the petitioner and also learned A.G.A.

It would appear from the record that the police of Cantt. opened the history sheet of the petitioner on the basis of four cases registered at case crime no. 101 of 1984, under Sections 457 and 380 I.P.C., case crime 494 of 1993, under Sections 364 and 506 I.P.C., case crime no.357 of 2000, under Sections 147,148,149 and 307 I.P.C., and case crime no.311 of 2003, under Section 110 Cr.P.C.

The argument of the learned counsel for the petitioner that the history sheet of Class A can be opened when it has been established by suspicion or conviction that a suspect is an active and prominent member of a gang of dacoits. It is further argued that mere suspects should not be starred until established that one has

become dangerous and confirmed criminals and is unlikely to reform. The next contention is that the case of the petitioner is not covered by paragraph 228 of the U.P. Police Regulations. Per contra, learned A.G.A drew attention of the Court to the decision in Chaman Lal v. state of U.P. 1992 supp (2) SCC 84 (I) and suggested that the matter should be relegated to the authority concerned for deciding whether the history sheet should be closed or should be continued.

We are also of the view that the interest of justice would be best served if the matter is relegated to the Police authority to take appropriate decision in the matter.

In view of the above, it is directed that in case the petitioner prefers a representation before the S.S.P/S.P.Varanasi alongwith a self attested copy of the writ petition within two weeks from today, the authority concerned shall consider it according to law and make appropriate order within two months.

The petition is disposed of in terms of the above directions."

7. It appears that thereafter the Deputy Inspector General of Police, Varanasi proceeded to pass the order dated 24.7.2010, a copy whereof is Annexure 1 to the writ petition whereby it was not found feasible to close the history-sheet in view of the fact that the petitioner was involved in criminal activities even though he had been acquitted in the case that recorded in acquittal in his favour in 2009. The said order has also been challenged in the present writ petition.

8. The petitioner approached this Court by filing Criminal Misc. Writ Petition No.17263 of 2010 questioning the correctness of the opening of the history-sheet dated 26.9.2002 as also the order of the Deputy Inspector General of Police dated 24.7.2010 indicated above. The said writ petition was disposed of with a direction that the petitioner shall move a fresh application before the Deputy Inspector General of Police for discontinuance of the history-sheet in terms of Regulation 234 disclosing the fact of his acquittal in Case Crime No.25 of 2009 referred to hereinabove. The judgement dated 3.10.2012 is extracted hereinunder :-

"Petitioner before this Court seeks quashing of the order dated 26.09.2002, whereby a history-sheet was opened in the name of the petitioner under Regulation 228 of the Police Regulations at Police Station-Cantt., District- Varanasi, as also the order dated 24.07.2010, whereby his application for closer of the history-sheet was rejected by the Deputy Inspector General of Police, Varanasi.

The order passed by the Deputy Inspector General of Police records that for the offences the history-sheet was opened in the name of the petitioner, such action was justified. It has also been recorded that in the year 2009 the petitioner was involved in offences under Section 452, 323, 504, 506, 307 IPC, being Case Crime No. 25 of 2009, duly registered at Police Station- Sarnath.

Counsel for the petitioner submitted that on the date the order was passed he had already been acquitted of the aforesaid offences by the competent Court. He further submits that against the order of acquittal neither any appeal nor revision has been filed.

In the facts and circumstances of the case, petitioner is at liberty to make a

fresh application before the Deputy Inspector General of Police for discontinuance of the history-sheet, as per the provisions of Regulation 234 of the Police Regulations, disclosing the fact of his acquittal in the aforesaid Case Crime No. 25 of 2009.

Accordingly, the writ petition is disposed of by providing that the petitioner may file a fresh application before the Deputy Inspector General of Police, Varanasi within two weeks from today along with certified copy of this order. On such application being filed, the Deputy Inspector General of Police shall consider and decide the same by means of a reasoned speaking order, preferably within eight weeks thereafter."

9. The petitioner thereafter appears to have filed his representation and according to the relevant government orders as well as the Police Regulations, the matter was to be looked into by the Superintendent of Police as also per the judgment of the Apex Court in Chaman Lal's case. At this juncture it will be appropriate to quote the order passed in the case of Chaman Lal (supra) which is as follows :-

"1992 Supp (2) Supreme Court Cases 84 (I)

(BEFORE K. JAGANNATHA SHETTY, S.C. AGRAWAL AND R.C. PATNAIK, JJ.)

CHAMAN LAL ....Appellant;

Versus

STATE OF U.P. AND OTHERS ....Respondents.

Civil Appeal No.2471 of 1982, decided on December 4, 1991

Police - U.P. Police Regulations - Paras 228 & 240 - History Sheet- Opened against appellant -Writ petition filed by appellant under Art. 226 dismissed by High Court - Having regard to Paras 228 and 240, the facts and circumstances of the case, held, no interference of Supreme Court called for in appeal- Appellant could make a representation to District Superintendent of Police to close the History Sheet on the ground that nothing found against him since then - Constitution of India, Arts. 136, 226

Appeal disposed of R-M/11257/SR

ORDER

It is not in dispute that the police under the U.P. Police Regulation has opened a 'History Sheet' against the appellant. Challenging the validity of maintaining the History Sheet, the appellant moved the High Court for relief. The High Court has rejected his writ petition. In this appeal, it is contended that maintaining the History Sheet against the appellant does not fall within the paragraph 228 of the UP Police Regulations. We have perused the said paragraph and also the provisions of paragraph 240. We have also considered the facts and circumstances of the case. We are of the opinion that no interference is called for in this case. However, it is open to the appellant to make representation to the District Superintendent of Police to close the History Sheet on the ground that nothing has been alleged or attributed against him since then. If any such representation is made, the Superintendent of Police shall consider it according to law and make appropriate order. With these observations, the appeal is disposed of."

10. Accordingly, it appears that the Senior Superintendent of Police, Varansai entertained the representation of the petitioner in terms of the directions issued by the High Court and as per Regulation

234 of the U.P. Police Regulations. Regulation 234 is extracted hereinunder :-

234. No history-sheet of class A may be discontinued without the sanction of the Superintendent of Police. If it is denied to discontinue the surveillance of the subject of a history sheet of class B, the sanction of the Deputy Inspector General or Superintendent, Railway Police, must be obtained. Proposals from station officers for the discontinuance of history-sheets and for the 'starring or unstarring' of a class suspects must be made through the circle inspector unless dealt with directly by a gazetted officer in the course of an inspection."

11. Sri Umesh Narain Sharma, learned senior counsel for the petitioner, submits that the impugned order passed by the Senior Superintendent of Police is absolutely tangent and based on absolutely new grounds about which the petitioner was never put to notice. He also submits that the ground now mentioned by the Senior Superintendent of Police for not closing the history sheet is not tenable and is not in conformity with the U.P. Police Regulations. He has also invited the attention of the Court to the Regulation 231 to contend that there exists no material or any element that may allow the continuance of history sheet of Class- A.

12. In view of the aforesaid facts as on date the only case that can be stated to be pending is Case Crime No.357 of 2000 under Sections 147, 148, 149, 307 IPC where there is neither any conviction nor any trial as proceedings in the said case have been stayed at the instance of another co-accused and not at the instance of the petitioner.

13. Sri Sharma has further relied on three judgments of the Apex Court in this regard, namely AIR 1963 SC 1295, Kharak Singh Vs. State of U.P., AIR 1975 SC Page 1378 Gobind Vs. State of Madhya Pradesh and AIR 1981 SC Page 760 Mahak Singh Vs. State of Punjab & Haryana to contend that the fundamental rights of the petitioner are being violated by continuance of such surveillance and maintenance of history sheet. He also contends that the principles of natural justice have been violated and the history sheet is being continued contrary to the provisions of the U.P. Police Regulations.

14. He has then invited the attention of the Court to the counter affidavit filed on behalf of the State, particularly, paragraphs 7, 8 and 9 of the affidavit to urge that the reasons given in the counter affidavit clearly indicate that the allegations are without any basis and secondly, if the petitioner's wife is running a licensed bar, then on a mere possibility of the association of the petitioner with criminals or criminal activities, the petitioner cannot be said to be a history sheeter. He submits that this ground at least cannot be available for either opening a history sheet or continuing it as no such element of mere apprehension has been defined in the U.P. Police Regulations authorizing the police to open a history sheet or continue the same on such grounds.

15. A rejoinder affidavit has been filed denying the allegations made in the counter affidavit and it has been urged that a miscarriage of justice has occurred on account of a total non-application of mind by the Senior Superintendent of Police and continuing the history sheet on a perverted misapprehension which

cannot be sustained in law in view of the pronouncements of the Apex Court and the provisions of the U.P. Police Regulations, referred to hereinabove.

16. Sri Nitin Sharma has vehemently opposed the petition and he urges that the petitioner is a criminal and was habitual in indulging in criminal activities as is evident from the criminal cases against him. Even otherwise he is running a licensed bar in the name of his wife and his association with anti social elements cannot be ruled out as has been indicated in the counter affidavit. It is neither desirable nor feasible to close the history sheet at this stage. He therefore submits that the orders impugned do not require any judicial review by this court and the petition deserves to be dismissed.

17. At the very outset, we may put on record that there is no occasion for this Court now to consider quashing of the order dated 24.7.2010 as the reasons given therein are not the reasons for continuing the history sheet as per the subsequent order dated 3.2.2014. The impact of the order dated 24.7.2010 therefore vanishes after this Court had directed the concerned competent authority to dispose of the representation to be filed by the petitioner afresh under the judgment dated 3.10.2012 in Writ Petition No.17263 of 2010. Since the said order looses its efficacy after the passing of the order dated 3.2.2014 pursuant to the directions of this Court, as mentioned above, it is not necessary for us to consider the validity or otherwise of the said order which has outlived itself.

18. Coming to the impugned order dated 3.2.2014, we find that this order merely mentions that if the petitioner has been acquitted in the criminal cases, the same cannot by itself be a ground to close the history sheet. No reason has been given as to why his involvement in the said criminal cases is being considered to be a valid ground for continuance of the history sheet. For this, one has to fall back upon the Police Regulations which provide the conditions under which a history sheet has to be opened or discontinued. It is correct that Regulation 240 of the U.P. Police Regulations also authorizes the continuance of a history sheet on suspicion, but the suspicion also has to be founded on some material or else if the conclusions drawn by the authorities are vague then it would be hit by Article 14 and 21 of the Constitution of India. This has been clearly ruled by the Apex Court and is evident from a conspectus of the decisions that have been relied upon by Sri Sharma, learned counsel for the petitioner and indicated hereinabove. History sheets cannot be opened or continued except when the same fulfils the criteria of the Police Regulations referred to hereinabove. The impugned order except for a solitary sentence that merely because the petitioner has been acquitted, the same cannot be a ground to close the history sheet, we find no other valid reason given for the same. There is no indication that the petitioner is a habitual offender and that he forms a class of criminals as defined in Class- A of Regulation 228. It is not the case of the respondents that the petitioner is a criminal of Class-B of Regulation 228 nor is there any such finding to that effect. The impugned order, therefore, is vitiated on this ground as it does not objectively consider the case of the petitioner in terms of the regulations as directed by the High Court in the judgment dated 3.10.2012.

19. The other ground given by the Senior Superintendent of Police is that there is a strong possibility of commission of offences by the petitioner as he is likely to be in association with anti social elements who keep coming to the bar for which licence is owned by his wife. Firstly, the petitioner does not appear to have been put to any such notice about any such activity in which the petitioner is involved of associating himself with anti social elements and, therefore, the order dated 3.2.2014 is in violation of principles of natural justice. Secondly, even assuming for the sake of arguments that there was any information available to the Senior Superintendent of Police about visits of anti social elements to the bar licensed in the name of the petitioner's wife, then such information is not disclosed either in the impugned order nor is it disclosed in the counter affidavit. There is no indication as to who are those anti social elements who allegedly participated in the commission of offences or are habitual offenders either within Class-A or Class-B of the offences mentioned under Regulation 228. There is no indication of any offence having been abetted by the petitioner in association with any such anti social elements after the petitioner's wife has opened the licensed bar. In such circumstances, the impugned order suffers from perversity and nonobjectivity. The impugned order dated 3.2.2014, therefore, cannot be sustained for the reasons aforesaid.

20. We accordingly allow the petition and quash the order dated 3.2.2014 with a direction to the Senior Superintendent of Police, Varanasi to pass a fresh order keeping in view the observations made hereinabove within a period of three months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.04.2015

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

C.M.W.P. No. 23887 of 2009

Sunil Kumar Dubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri P.N. Tripathi, Sri Harsh Kumar, Sri Satish Chandra Pandey, Sri Shailesh Pandey, Sri Yamuna Pandey

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

U.P. Intermediate Education Act 1921-Section 9-A-Power of Government-interference with appointment and cancellation regarding non teaching staff-either commission or the State Government-no authority to interfere-if commission triangulated it power-shall be without jurisdiction-petitioner's appointment on post of class 4th employee after due compliance of recruitment procedure-duly approved by DIOS as well as regional committee-without canceling the order-order impugned passed by principal in compliance of direction of commission-illegal quashed.

Held: Para-28 & 29

28. In view of the above discussion I hold that the State Government does not have any power under sub. section (4) of Section 9 of the Act No. II of the 1921, in respect of recruitment of teachers or non teaching staff or Class IV employees as the power is vested to various educational authorities in respect of recruitment of the teachers and non teaching staff.

29. After careful consideration of the material on record I am of the view that the termination order passed by the Principal of the College in compliance of

the order of the State Government, Joint Director and the District Inspector of Schools are patently illegal and arbitrary.

Case Law discussed:
2013 (1) ADJ 606; 1966 SC 292; AIR 1967 SC 109; (2002) 4 SCC 743; AIR 2002 SC 2004; (2003) 8 SCC 673; (2013) 3 UPLBEC 1879.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner Sunil Kumar Dubey is a Class IV employee in a recognized Intermediate College.

2. Brief reference of the factual aspects would suffice.

3. Adarsh Inter College, Bisunderpur, district Mirzapur is a recognized Institution by the Board of High School and Intermediate. It receives aid out of the State Fund. the provisions of the Act No.II of 19211, regulations framed thereunder and the Act No. 24 of 19712 are applicable to the institution. The institution is established by a society and its affairs are administered by the Committee of Management, the respondent no.3 herein, in terms of the provisions of the aforesaid Acts.

4. In the said College three post of Class IV employee fell vacant. The Principal under the Act No. II of 1921, is the appointing authority of Class IV employee. He made an application dated 8.9.2005 seeking permission of the District Inspector of Schools for appointment on the post of three peons in accordance with law. A copy of the permission accorded by the District Inspector of Schools is on the record as Annexure-1 to the writ petition. It is averred in the writ petition that after obtaining the said permission the Principal issued advertisement in two newspapers namely Rashtriya Sahara and in one local newspaper on 10.1.2006 calling the application for appointment on the aforesaid three posts. Copies of the advertisement published in the newspaper is Annexure-2 and 3 to the writ petition.

5. The petitioner claims that in pursuance to the said advertisement he made an application and after the interview he was found suitable. The Principal of the College sent papers to the District Inspector of Schools for its approval and in the meantime he issued an appointment on 15.2.2006. The District Inspector of Schools in terms of the Government Order dated 16.12.2000 referred the matter to the Regional Level Committee for approval of the payment of salary. The Joint Director who is Chairman of the Regional Level committee vide order dated 4.7.2007 directed the District Inspector of Schools, Mirzapur to make the payment of salary to the petitioner. A copy of the order of the Joint Director of Education is Annexure-7 to the writ petition. It is stated that pursuance to the said order the District Inspector of Schools accorded his financial approval vide order dated 10.7.2007 and from the said date the petitioner has pleaded that he was continuously working and receiving his salary.

6. In the meantime one Sandeep Kumar Pandey who was not even candidate challenged the appointment of the petitioner before this Court by means of Writ Petition No. 49181 of 2007 (Sandeep Kumar Pandey v. State of U.P. And others), which was disposed of on 11.10.2007 with a direction upon the District Inspector of Schools to consider the complaint of Sandeep Kumar Pandey and pass appropriate order in accordance

with law. In compliance thereof the District Inspector of Schools passed a elaborate reasoned order on 8.1.2008 wherein he found that the complaint made by Sandeep Kumar Pandey was baseless and incorrect. He has also recorded a finding that the appointment of the petitioner is in accordance with law. The said order was challenged by the Sandeep Kumar Pandey by means of Writ Petition No. 23106 of 2008. In the said writ petition no interim order was passed by this Court and it is tagged with the present writ petition.

7. In the meantime one Bharat Kumar Tiwari approached the Commissioner of the Mirzapur Region. In his complaint he has reiterated the allegations which have been found incorrect by the District Inspector of Schools and the said order is subjudice before this Court. The Commissioner sent a communication dated 27.6.2008 to the Director of Education (Madhyamik), Uttar Pradesh, Lucknow with a copy to the Principal Secretary (Madhyamik Education), Uttar Pradesh, Lucknow and Secretary(Madhyamik Education), Uttar Pradesh, Lucknow. From the records it appears that the Director has not taken any action on the letter of the Commissioner.

8. On the basis of the said communication the Joint Secretary vide communication dated 6th March, 2009 issued a direction to the Director of Education (Madhyamik), to cancel the appointment of the petitioner with immediate effect. It is averred in the writ petition that in compliance of the said order of the State Government/Joint Secretary, the appointment of the petitioner has been cancelled by the Joint Director of Education, Vidhyachal Region, Mirzapur on 30.3.2009 and a consequential order has been passed by the District Inspector of Schools and the Committee of Management terminating the services of the petitioner.

9. In paragraph 27 of the writ petition the petitioner has stated that all these proceedings by the State Government and other authorities have been conducted without giving any opportunity.

10. The contention of learned counsel for the petitioner is that his appointment was challenged in this Court and in compliance of the order of this Court dated 11.10.2007 the District Inspector of Schools after giving full opportunity to the complainant has passed a detailed order on 8.1.2008 and he found that the appointment of the petitioner was valid. He has also referred the matter in respect of payment of salary to the petitioner to the Regional Level Committee and after the approval of the Regional Level Committee the salary of the petitioner has been paid. The said order has been challenged before this Court by means of Writ Petition No. 23106 of 2008 but the Court has not granted any interim order and the petitioner therein is not pursuing the matter. The said writ petition is listed today but there is no one to press the said writ petition.

11. Learned counsel for the petitioner submits that another complainant has made a complaint to the Commissioner who has conducted an enquiry behind the back of the petitioner without giving any opportunity to the petitioner. He wrote a letter to the State Government go cancel the appointment of the petitioner ignoring the fact that Regional Level Committee and the District Inspector of Schools accordingly held that the appointment of the petitioner is valid and legal and the validity of the said order is

subjudice before this Court. He further urged that the Commissioner and the State Government has exceeded their jurisdiction by taking decision in the matter which is already subjudice before this Court.

12. Lastly he urged that under the provisions of the Act No. II of 1921, the Commissioner is completely alien and State Government also has no authority to cancel the appointment of a Class IV employee of a recognized Institution.

13. A counter affidavit has been filed. The stand taken in the counter affidavit is on the basis of enquiry conducted by the Commissioner, the State Government has taken the decision and a direction has been issued to cancel the appointment of the petitioner. In the counter affidavit the averments made in the writ petition that all the action of the State Government and the Commissioner, Vindhyachal Region, has been taken without any opportunity has not been denied.

14. On 7.5.2009 time was granted to the respondent no.1 but he has preferred not to file counter affidavit.

15. Learned Standing Counsel has taken the Court to the various paragraphs of the counter affidavit in support of his submission that the enquiry was conducted by the Commissioner who found that the petitioner's appointment was illegal. He further submitted that he has also received the instruction by the District Inspector of Schools. On the basis of the said instructions he has tried to justify the action of the State Government and the Commissioner. Learned Standing Counsel has also submitted that the State Government under section 9(4) of the Act No. II of 1921 has ample power to cancel the appointment.

16. I have heard learned counsel and perused the material on record. The Principal is the appointing authority of a Class IV employee in an Intermediate College. It is on the record that on 8.9.2005, the Principal had sought the permission from the District Inspector of Schools to fill the vacancies of Class IV employee. The District Inspector of Schools had permitted him to initiate the recruitment process by order dated 15.12.2005. In compliance thereof the advertisement were made in two newspapers and after the appointment petitioner's papers were sent to the District Inspector of Schools for his approval. The District Inspector of Schools, sent the papers before the Regional Level Committee. The Regional Level Committee accorded its approval for payment of salary and this decision was communicated by the Joint Director of Education, Vindhyachal Region, vide communication dated 4.7.2007. The District Inspector of Schools after affording opportunity to the complainant Sandeep Kumar Pandey came to hold that the allegations against the selection of the petitioner was baseless and incorrect and he found that the appointment of the petitioner was made in accordance with law.

17. The said order has been challenged by means of Writ Petition No. 23106 of 2008 before this Court which has been dismissed by the Court. The petitioner's services have been terminated pursuant to the order of the State Government dated 6th March, 2009. From the said letter it appears that the State Government has passed that order only on the basis of the recommendation of the Commissioner without giving any opportunity to petitioner. The order also

indicate that there is no application of mind.

18. The issue whether a Commissioner has authority to conduct such enquiry has already been considered by this Court in the case of Madan Kumar and others v. District Magistrate, Auraiya reported 2013 (1) ADJ 606, while considering the said issue the Court held that under the Act No. II of 1921 the District Magistrate does not have any power to issue a direction to the District Inspector of Schools to cancel the appointment of the employees of a recognized Institution. Relevant paragraph of the said judgement reads as under:-

"A close look at the gamut of the Scheme of the Act instantly brings out that the District Magistrate is a foreign authority under the Scheme. There is no reference of the District Magistrate in the entire Scheme of the Act.

In case the institution receives aid out of the State Fund the provisions of the U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 (hereinafter referred to Act No. 24 of 1971), a close look at the Scheme of the said Act No. 24 of 1971 also establishes that like U.P. Intermediate Education Act, 1921 under this Act also the District Magistrate has not been assigned any role. The Regional Deputy Director of Education and the District Inspector of Schools are authorities to pass orders/directions against the erring managements. The order passed by those authorities are appealable under section 7 and under section 8 revision lies to the State Government. Again in this Act also there is no reference of the District Magistrate under any provisions of the Act."

19. What emerges from the above mentioned case is that any authority which has not been conferred any power under the Act, Regulation or Rules has no jurisdiction/power/authority to take decision independently. If he has received some complaint, he may refer it to the appropriate authority to take action in accordance with law.

20. In the present case I am of the view that the action of the Commissioner is totally arbitrary and he has transgressed his jurisdiction by conducting an enquiry in the matter. The Act does not give any power to the District Magistrate, Commissioner or any Administrative Officer to conduct an enquiry and take decision himself. If the Commissioner had received any complaint against the selection of a Class IV employee, the proper course was that the Commissioner ought to have sent the complaint to the appropriate authority. However, in the present case the Commissioner has exceeded his jurisdiction by conducting an enquiry himself in the matter. The said exercise taken by the Commissioner is wholly without jurisdiction, arbitrary and appears to be infected with bias.

21. In addition to above the order of the Commissioner is totally unfair as he has not given any opportunity to the petitioner before reaching at the conclusion that the appointment of the petitioner is illegal. The petitioner has averred in writ petition in paragraph 24 and 27 that no opportunity was afforded to the petitioner. Paragraph 24 and 27 of the writ petition reads as under :-

"24. That even the principal of the college also passed the impugned order dated 28.04.2009, without affording an opportunity of hearing to the petitioner

and without giving any show cause notice to him hence the impugned order dated 28.4.2009 passed by the respondent no.4 is liable to be quashed by on this ground alone.

27.That it appears that behind the back of the petitioner, some body has made complaint to the State Government upon which the Joint Secretary of the State Government and upon which the Joint Director of Education, Vindhyachal Mandal, Mirzapur have directed the District Inspector of Schools, Mirzapur to cancel the appointment of the petitioner and to terminate his services."

22. The reply given by the respondents in their counter affidavit in paragraph 13 and 15 reads as under :-

''13–यहकि याचिका के प्रस्तर 20 से 24 तक में वर्णित कथन में यह कहना है कि शासन के पत्र दिनांक 6 मार्च 2009 के अनुपालन में उक्त कार्यवाही की गई है । जिसकी छाया प्रति संलग्नक सी0ए0 1 के रूप में संलग्न की जा रही है ।''

''15–यहकि याचिका के प्रस्तर 26 से 30 तक में वर्णित कथन में यह कहना है कि आयुक्त विन्ध्याचल मण्डल मीरजापुर के जॉच आख्या दिनांक 27–6–2008 एवं शासन के पत्र दिनांक 6 मार्च 2009 के क्रम में समस्त कार्यवाही प्रतिवादी द्वारा की गयी हैं जिसकी छाया प्रति संलग्नक सी0ए0 2 के रूप में संलग्न की जा रही है। यदि जॉच में नियुक्ति में अनियमितता पायी गयी है तो उसके अनुसार विभाग द्वारा कार्यवाही की है जो नियमानुकूल है,

अतः उपरोक्त वर्णित तथ्यों के आधार पर याची द्वारा दायर याचिका आधारहीन व बलहीन होने के कारण पोषणीय नहीं है और याची माननीय न्यायालय से किसी भी प्रकार अनुतोष प्राप्त करने का अधिकारी नहीं है और याची की याचिका सव्यय निरस्त किये जाने योग्य है ।''

23. From a reading of the aforesaid paragraphs it is evident that there is no specific denial of the fact. It is trite law that if a fact is not denied specifically then it amounts admission. Reference may be made to the judgement of the Supreme Court in Tek Bahadur Bhujil v. Debi Singh Bhujil and Ors, 1966 SC 292; Jahuri Sah v. Dwarika Prasad Jhunjhunwala & Ors, AIR 1967 SC 109; M.L. Subbaraya Setty vs. M.L. Nagappa Setty (2002) 4 SCC 743; Rakesh Wadhawan & Ors. v. Jagdamba Industrial Corporation & Ors., AIR 2002 SC 2004 and Sushil Kumar v. Rakesh Kumar, (2003) 8 SCC 673.

24. The State Government has also exceeded its jurisdiction as simply on the basis of the order of the Commissioner without affording opportunity to the petitioner, has passed the order cancelling the appointment of the petitioner. The State Government does not have any such power in respect of the recruitment of a teacher or non teaching employee or Class IV employee. On the other hand the submission of the learned Standing Counsel that the State Government has exercised its power under section 9 (4) of the Act II of 1921, hardly merit acceptance. Section 9 (4) of the Act, II of 1921 reads as as under:-

"9 (4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may be such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly."

25. A simple reading of Section 9 (4) of the Act No. II of 1921 makes it clear that the State Government can exercise its power only in consistent with

the provisions of the Act. It does not have any power to pass order contrary to the Act.

26. The scope of Section 9 (4) of the Act has been considered by this Court in C.M.W.P.No. 24401 of 2013 (Committee of Management, Shiv Charan Das Kanhaiya Lal Inter College and Another v. State of U.P. And others) reported (2013) 3 UPLBEC 1879, in the following terms:-

"The question, therefore, is can the Government Order dated 15.3.2012 be read as a Government Order under Section 9 (4) of the U.P. Intermediate Education Act, 1921. The provisions of Sub-section (4) of Section 9 are extracted hereunder:-

"(4) Whenever, in the opinion of the State Government, it is necessary or expedient to take immediate action, it may, without making any reference to the Board under the foregoing provisions, pass such order or to take such other action consistent with the provisions of this Act as it deems necessary, and in particular, may, by such order modify or rescind or make any regulation in respect of any matter and shall forthwith inform the Board accordingly."

A perusal of the aforesaid power as conferred on the State Government clearly indicates that such a power can be exercised provided the action is consistent with the provisions of the Act. The Regulations framed under Chapter III of the U.P. Intermediate Education Act makes a provision for appointment of class-III and IV employees. There is no amendment in the 1921 Act or the Regulations framed thereunder of banning any such appointments. In the absence of any such specific provision being made, the Government Order dated 15.3.2012 would not survive the test of the ingredients of Section 9 (4) of the 1921 Act. The said Government Order nowhere discusses as to why and why not is it necessary, to proceed, not to make appointments against class-III posts in Intermediate and High Schools governed by the 1921 Act."

27. The appointment of the petitioner has been approved by the District Inspector of Schools , Regional Level Committee and the Joint Director of Education, Vindhyachal Region. Those orders have not been cancelled. In fact in one of the writ petition filed by the complainant Sandeep Kumar Pandey, it was disposed of by a direction to the authority concerned to adjudicate the matter. In compliance thereof the appointment of the petitioner was found legal. Therefore, the State Government ignoring these material facts and the order and the Commissioner without application of mind has issued the direction for cancellation of the appointment of the petitioner.

28. In view of the above discussion I hold that the State Government does not have any power under sub. section (4) of Section 9 of the Act No. II of the 1921, in respect of recruitment of teachers or non teaching staff or Class IV employees as the power is vested to various educational authorities in respect of recruitment of the teachers and non teaching staff.

29. After careful consideration of the material on record I am of the view that the termination order passed by the Principal of the College in compliance of the order of the State Government, Joint Director and the District Inspector of Schools are patently illegal and arbitrary.

30. All the three impugned orders need to be set aside. It is accordingly set aside.

31. The appointment of the petitioner has already been approved by the District Inspector of Schools and Regional Committee. Those order have not been recalled or cancelled. Therefore, there is no need to send the matter to competent authority.

32. A direction is issued to the respondents for continuance of petitioner, treating the impugned orders as they have never been passed.

33. Writ petition is allowed.

34. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.04.2015

BEFORE
THE HON'BLE MAHESH CHANDRA TIPATHI, J.

C.M.W.P. No. 27102 of 2013

Sarvajeet Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri N.L.Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-interest-on delayed payment of gratuity-no explanation for delay given-warrants liability of interest-direction to pay 10% simple interest on delayed period given.

Held: Para-7
Since the date of retirement is known to the respondents well in advance, there is no reason for the respondents not to make arrangement for payment of retiral benefits to the employee well in advance so that as soon as he retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues.

Case Law discussed:
AIR 1985 SC 356; 1987 UPLBEC 583 (SC); (1995) 1 UPLBEC 89; AIR 1997 SC 27; (1999) 2 UPLBEC 1006 (SC); (2000) 2 UPLBEC 1599; 2001 ALJ.L.J. 2026; (2008) 1 UPLBEC 301; 1998 (1) ESC 735 (P & H); (1985) 1 SCC 429; (2014) 8 SCC 894.

(Delivered by Hon'ble Mahesh Chandra Tripathi, J.)

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

2. By means of present writ petition, the petitioner has prayed for direction in the nature of mandamus commanding the respondent no.2 to pay 10% interest per annum to him from 01.7.2010 to the date of actual payment i.e. 11.11.2012 on the amount of Rs.8,52,837/-.

3. It appears from the record that the petitioner was appointed as Tubewell Operator on 24.5.1977 in the office of respondents. He retired after attaining the age of superannuation on 30.6.2010. He received the payment of provident fund just after his retirement. The respondents had not made payment of other retiral benefits like pension, gratuity, computation of pension etc to the petitioner. On 22.10.2012 he made a representation before the respondent no.2 for payment of retiral dues. The respondent no.2

sent a letter on 2.11.2012 to the Chief Treasury Officer, Allahabad-respondent no.4 directing him to pay the retiral benefits to the petitioner. The respondent no.4 gave a cheque of Rs.8,52,837 to the petitioner on 29.10.2012. Thereafter the petitioner made a representation before respondent no.2 on 12.12.2012 for payment of interest on the delayed payment of retiral benefits from 1.7.2010 to 11.11.2012, which is still pending.

4. Learned counsel for the petitioner submits that the petitioner is legally entitled to receive payment of entire retiral benefits on the date of retirement. The respondents did not pay the entire retiral benefits to him on the date of retirement and they paid the retiral benefits amounting to Rs.8,52,837/- after more than two years and four months. Therefore, the petitioner is entitled to get interest @ 10% per annum from 01.7.2010 to the date of actual payment i.e. 11.11.2012 on the aforesaid amount. The respondents have delayed the payment of retiral benefits willfully and deliberately. After receiving the representation dated 12.12.2012, the respondent no.2 neither paid the interest nor have passed any order on the representation of the petitioner till date. The respondent no.2 did not perform his legal and statutory duty, which is vested in him. The action of the respondent no.2 is illegal, arbitrary and bad in law and against the principles of natural justice.

5. Learned counsel for the petitioner has relied upon the judgments of the Supreme Court in State of Kerala & Ors. Vs. M. Padmanabhan Nair, AIR 1985 SC 356; O.P. Gupta Vs. Union of India & Ors., 1987 UPLBEC 583 (SC); R. Kapur Vs. Director of Inspection (Painting and Publication) Income Tax and Anr., (1995) 1 UPLBEC 89; S.R. Bhanrale Vs. Union of India and ors., AIR 1997 SC 27; Dr. Uma Agrawal Vs. State of U.P. & Anr., (1999) 2 UPLBEC 1006 (SC); Vijay L. Mehrotra vs. State of UP and others (2000) 2 UPLBEC 1599 and Gorakhpur University & others vs. Dr. Shitla Prasad Nagendra and others 2001 ALL. L. J. 2026; S.K. Dua Vs. State of Haryana & Anr., (2008) 1 UPLBEC 301 and the judgments of Punjab and Haryana High Court in A.S. Randhawa Vs. State of Punjab & Ors., 1998 (1) ESC 735 (P&H); the Division Bench judgment of this Court dated 11.8.2008 in Writ Petition No.5667 of 2001, Smt. Kavita Kumar Vs. State of U.P. & Ors. in support of the submission that the High Court under Article 226 of the Constitution of India, has ample powers to be exercised in appropriate and deserving cases to award interest, in cases of inordinate delay, attributable wholly to the employer in settling the retrial dues.

6. Learned Standing Counsel, on the other hand, submits that the petitioner was working as Tubewell Operator in Nalkoop Khand, Irrigation Department, Allahabad. He was sent on deputation to Panchayati Raj Department pursuant to Government Order dated 12.4.1999 and was posted as Gram Panchayat Vikas Adhikari, Vikas Khand Saidabad, Allahabad. He was transferred back to his parent department on 28.7.2005. While working as Tubewell Operator, he retired on 30.6.2010 on attaining the age of superannuation. During the period from September, 2004 to July, 2005, when he was posted as Gram Panchayat Vikas Adhikari, he had withdrawn the fund for construction of Kisan Market but the construction work was not completed. Therefore, by the order dated 8.3.2006 the District Magistrate, Allahabad directed recovery of

Rs.1,50,000/- from the petitioner. Against the order of recovery, the petitioner filed a Writ Petition No.15476 of 2007, in which an interim order was passed on 22.3.2007 staying the recovery with condition that the petitioner shall deposit a sum of Rs.5000/-. In compliance with the interim order, the petitioner deposited Rs.5000/-. The said writ petition is still pending. The petitioner did not fill up the pension papers after his retirement and had not fulfilled the requisite formalities for sanction of pension, gratuity etc. On 7.7.2010 he was asked to submit the pension papers after completing the requisite formalities. He moved an application on 25.8.2010 requesting that his pay scale be fixed by giving him benefits of ACP as per VIth Pay Commission. The pay scale of the petitioner was fixed on 5.10.2010 by giving him benefit of ACP on completion of 26 years. Since the petitioner did not deposit Rs.1,50,000/- and the matter was subjudiced in Writ Petition No.15476 of 2007, therefore, the Executive Engineer, Nalkoop Khand, Allahabad requested the Additional Director, Treasury and Pension, Allahabad on 30.8.2011 to release the pension, gratuity etc. after withholding the amount of Rs.1,50,000/-. The respondent no.3 sanctioned the pension and gratuity of the petitioner on 26.9.2011 by withholding an amount of Rs.1,50,000/-. For sanction of post retiral benefits, the petitioner was required to be present before the Treasury Officer for verification but he did not approach the respondent no.4 for his personal verification. On the representation of the petitioner dated 22.10.2012 the Executive Engineer, Nalkoop Khand, Allahabad requested the Treasury Officer, Allahabad on 2.11.2012 for payment of retiral dues of the petitioner. The petitioner appeared before respondent no.4 on 22.10.2012. The verification was made on the same day and an amount of Rs.8,52,837/- was sanctioned. The petitioner himself did not approach the office of respondent no.4 for physical verification, therefore, for the delay in releasing the post retiral dues, the respondents are not responsible. The petitioner himself is responsible for the delay in sanction of post retiral dues and despite several letters and reminders, he did not approach the office of respondent no.4 for physical verification.

7. Since the date of retirement is known to the respondents well in advance, there is no reason for the respondents not to make arrangement for payment of retiral benefits to the employee well in advance so that as soon as he retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues.

8. In the case of State of Kerala Vs M Padmanabhan Nair and Som Prakash (1985) 1 SCC 429, the Supreme Court held as follows:

"Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment."

9. In a more recent decision in D D Tewari Vs Uttar Haryana Bijli Vitran Nigam Ltd (2014) 8 SCC 894, the

Supreme Court observed that any culpable delay in settlement and disbursement thereof is to be visited with penalty of payment of interest. Hence, interest @ 9% on delayed payment was awarded to be paid within six weeks failing which interest @ 18% p.a. would need to be paid. An erroneous withholding of gratuity amount to which the employee is legally entitled, entails penalty on the delayed payment

10. In this view of the matter, this Court is of the view that the claim of the petitioner for interest on the delayed payment of retiral benefits has to be sustained and it is a fit case where the writ petition is liable to be allowed.

11. Normally this Court in exercise of its equitable discretion does not settle the State with civil liability unless the Court is satisfied that the helpless employee had been compelled to litigate for his survival for more than two years and the action of the respondent State Government and its officers is found to be wholly arbitrary, unreasonable and malicious in non finalization of the retiral to the petitioner in time.

12. The Court may add here that after serving the qualifying period of service, the employee does not ordinarily have any other means of livelihood, when he needs them more other than his dues. It is extremely unjust and harsh to allow a retired employee to wait to receive the dues, and to depend upon his friends, relatives and children. The right to receive retiral dues/ terminal dues is closely linked to his right of self-respect, and human dignity, which is included in right to life guaranteed by Article 21 of the Constitution of India.

13. Accordingly, this writ petition is allowed. The respondents are directed to calculate and pay to the petitioner interest on the delayed payment of the retiral benefits amounting to Rs.8,52,837/- from 01.7.2010 to the date of actual payment i.e. 11.11.2012 @ 10% simple per annum. The required calculation shall be made within two months, and the interest shall be paid to him within one month thereafter.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2015

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

C.M.W.P. No. 30688 of 2011

Amar Pal Singh ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

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

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Dismissal of sub-inspector of police-charged with negligence in duty-enquiry officer submitted report-without giving opportunity to adduce witness-contrary to provision of Rule 1991-inspite of specific ground taken in appeal as well as revision-remained-held-principle of natural justice-violated-untouched order quashed with direction to proceed with fresh disciplinary proceeding from the stage of denial of opportunity.

Held: Para-19
After careful consideration of the matter, I am of the view that the enquiry has vitiated on the ground of violation of principles of natural justice and non-application of mind. Accordingly, the dismissal order, appellate order and revisional order dated 29th January, 2009, 03rd February, 2010 and 27th

November, 2010, as are impugned in this writ petition, passed by the fourth, third and second respondents respectively, are quashed. The disciplinary authority is directed to conduct a fresh enquiry from the stage when the petitioner was denied the opportunity. The fresh enquiry may be concluded expeditiously.

Case Law discussed:
(1999) 2 SCC 10; (1978) 3 SCC 366:1978 SCC (L& S) 458: AIR 1978 SC 1277:(1978) 3 SCR 708; (1964) 2 LLJ 150: AIR 1963 SC 1723: (1964) 3 SCR 25; (1969) 2 LLJ 377: AIR 1969 SC 983; (1976) 1 SCC 518: 1976 SCC (L&S) 92:1976 Lab IC 4:AIR 1976 SC 98:(1976) 2 SCR 280; (1984) 4 SCC 635:1985 SCC (L&S) 131:AIR 1984 SC 1805:(1985) 1 SCR 866: (1985) 3 SCC 378: (1966) 1 SCR 466:AIR 1966 SC 671:(1966) 1 SCJ 204:(1971) 1 SCR 201:(1970) 1 SCC 764; (2006) 5 SCC 88.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. This is a writ petition under Article 226 of the Constitution by a Sub-Inspector (Special Grade) against the order dated 29th January, 2009, whereby he has been dismissed from service on the ground of negligence in his duty as two prisoners escaped from the police custody, and orders dated 03rd February, 2010 and 27th November, 2010 whereby his statutory appeal and revision respectively have also been dismissed.

2. A brief reference to the factual aspect would suffice. The petitioner was initially appointed as a Constable in Civil Police in the year 1977. He earned his promotion on the post of Head Constable in 1992. On the basis of his satisfactory service, he was further promoted as Sub-Inspector (Special Grade) in 2007. In the year 2008 he was posted in District Firozabad. On 11th April, 2008 the petitioner along with Head Constable Horam Singh; Constables Khajan Singh, Jaiveer Singh, Gazendra Singh and Lal Singh; and Constable Driver Dashrath Singh were deputed for producing six prisoners, namely, Lala, Rakesh alias Lohare, Parveen, Mangal Singh, B.D.O. alias Rajan Singh and Anil Sharma in the Court. Out of six prisoners, two prisoners, namely, Rakesh alias Lohare and Lala escaped from the police van while it was stationed in the Court premises. With regard to the said incident a first information report was lodged on the same day i.e. 11th April, 2008 at Police Station New Agra. The petitioner was placed under suspension by the Superintendent of Police, Firozabad, the fourth respondent, on the same day on the allegation that the aforesaid two prisoners escaped from the policy custody. On the basis of a preliminary enquiry report dated 30th June, 2008 a charge-sheet was served upon the petitioner on 21st July, 2008. The only allegation in the charge-sheet was that due to negligence of the petitioner two prisoners successfully escaped from the custody of the police. The petitioner submitted a detailed reply to the charge-sheet. The reply filed by the petitioner is on the record as annexure-6 to the writ petition. In the enquiry, the department produced nine witnesses, who were cross-examined by the petitioner.

3. On 11th December, 2008 a communication was issued by the Enquiry Officer to the petitioner to the effect that he may submit the names of the witnesses and his explanation within a week. In response to the said letter, the petitioner submitted a detailed explanation/reply on 18th December, 2008. In the said reply he has also mentioned the names of his defence witnesses and seven documentary evidences to indicate that he was not guilty of the charges levelled against him. He submitted an application for providing him copy of the statements of some of the

witnesses and also submitted an application for extension of time to submit the reply. On 19th December, 2008, just after one day, the Enquiry Officer directed the petitioner to appear before him on 22nd December, 2008 i.e. three days' time was granted to the petitioner.

4. The petitioner has averred that he could not produce his witnesses as a very short time of three days was granted to him to produce the witnesses. In view of the short time, the petitioner had also obtained the affidavits of some of his witnesses and he made a request that Beeresh Kumar and Ramvir Singh, who were posted as Court Moharrir in the District Court, be summoned for recording their evidence. In this regard, the petitioner had moved an application dated 24th December, 2008, which is on the record as Annexure-10 to the writ petition.

5. The grievance of the petitioner is that the Enquiry Officer ignored his request and did not summon the witnesses, who, according to the petitioner, were important witnesses. The Enquiry Officer thereafter proceeded exparte and submitted an enquiry report dated 26th December, 2008 holding that the charge levelled against the petitioner has been proved and he is guilty of negligence of duty. A copy of the enquiry report has been brought on record as Annexure-11 to the writ petition.

6. Thereafter a show cause notice was issued to the petitioner on 29th December, 2008, which he had replied on 15th January, 2009. A copy of the reply submitted by the petitioner dated 15th January, 2009 is on the record as annexure-13 to the writ petition. The disciplinary authority found the petitioner guilty and dismissed him from service vide order dated 29th January, 2009.

7. Dissatisfied with the order of dismissal, the petitioner preferred an appeal before the appellate authority i.e. Inspector General of Police, Agra Region, Agra, who dismissed the appeal on 03rd February, 2010. Aggrieved by the said order, the petitioner preferred a revision before the Additional Director of Police/ Director (Traffic), U.P., Lucknow which has also been dismissed on 27th November, 2010.

8. A counter affidavit has been filed on behalf of the fourth respondent wherein it is stated that as per the procedure laid down under Rule 14(1) of the Uttar Pradesh Police Officers of the Subordinate Ranks (Punishment and Appeal) Rules, 19911 a disciplinary proceeding was initiated against the petitioner and after giving him opportunity, the charge levelled against him about his negligence has been proved and thus, there is no error in the dismissal of the petitioner. No other fact has been mentioned in the counter affidavit. Only charge and the findings recorded by the Enquiry Officer have been referred.

9. I have heard Sri Ashok Khare, learned Senior Advocate, assisted by Sri Siddharth Khare, learned counsel for the petitioner, and learned Standing Counsel.

10. It is contended on behalf of the petitioner that the disciplinary proceeding has been conducted in violation of the principles of natural justice as only three days' time was granted to the petitioner vide notice dated 19th December, 2008, whereby the petitioner was asked to appear on 22nd December, 2008 at 11.00

A.M.. Although very short time was granted to the petitioner, when he reached at the office where he was called, the Enquiry Officer had already left the place. Thus, the petitioner could not produce his witnesses, however, he submitted the affidavits of the witnesses in the office of the Enquiry Officer. It is submitted that no fresh date was fixed by the Enquiry Officer and he proceeded exparte and submitted the report. Sri Khare further urged that the petitioner's reply and the affidavits of his witnesses, which have been extracted in the enquiry report, have not been adverted to by the Enquiry Officer and he has simply recorded his conclusion without any reason. Sri Khare has placed the enquiry report before the Court to demonstrate that the Enquiry Officer has not adverted to any evidence adduced by the petitioner and even the documentary evidences which the petitioner had produced have not been considered by the Enquiry Officer. Lastly, he urged that along with the petitioner there were five other police officials who were deputed to produce the prisoners in the Court but only the petitioner has been picked out for the punishment and no disciplinary proceeding has been initiated against other police officials, in whose custody the prisoners were sent.

11. Learned Standing Counsel submits that the disciplinary proceeding has been initiated under the provisions of the Rules, 1991 and the procedure laid down under the said Rules have been followed. He further submits that the petitioner was given full opportunity to produce his witnesses and cross-examine the witnesses of the department and the prisoners, who have escaped, were in his custody.

12. I have considered the rival submissions advanced by the learned counsel for the parties and perused the record.

13. On 11th April, 2008 six prisoners were to be produced before the concerned Courts in criminal cases and along with the petitioner five other police officials including Head Constable and Constables were accompanying the said prisoners. In the charge-sheet the allegation against the petitioner is that two prisoners asked water from the petitioner and when the petitioner opened the window to provide them water, one of the prisoners threw the powder of red chilli in his eyes and taking advantage of the said fact, they escaped from the police van. The departmental witnesses, who were produced against the petitioner, have made a statement that they had gone to the respective Courts to produce other prisoners in different Courts. Only the petitioner was there with two prisoners, namely, Lala and Rakesh alias Lohare, therefore, it was his responsibility to guard the said prisoners but after throwing the powder of red chilli in his eyes, they escaped from his custody. Thus, they supported the charge against the petitioner. On 19th December, 2008 the Enquiry Officer directed the petitioner to produce his defence on 22nd December, 2008 at 11.00 A.M. The Enquiry Officer has found that he waited the petitioner till 2.00 P.M. in the afternoon but when the petitioner did not turn up, he proceeded to attend his other duty and left the place. However, it has been referred in the enquiry report that on the same day the petitioner had submitted some of the affidavits, which have been extracted by the Enquiry Officer in his report. It is also clear that if the petitioner could not reach within time on the date fixed i.e. 22nd December, 2008, the Enquiry Officer in

all fairness ought to have fixed another date for the petitioner. From the record it is manifest that the petitioner has cooperated in the departmental proceeding and he has promptly submitted his reply to the charge-sheet and also replied to the show cause notice. Thus, there was no allegation against the petitioner that he was adopting delaying tactics in the departmental proceeding. In view of the above, I find sufficient force in the submission of Sri Khare that the enquiry has vitiated on the ground of violation of principles of natural justice as the petitioner was not granted sufficient time to produce his witnesses.

14. Insofar as the submission of Sri Khare that the reply and various documents filed by the petitioner and the affidavits filed by his witnesses have not been adverted to by the Enquiry Officer is concerned, it is also correct. A perusal of the enquiry report would demonstrate that the Enquiry Officer in his elaborate enquiry report has simply extracted the charge-sheet, reply submitted by the petitioner, statements of departmental witnesses, cross-examination and the affidavits filed by the petitioner's witnesses in defence. The Enquiry Officer has totally failed to advert to the affidavits and other reply of the petitioner before recording a finding that the petitioner is guilty of the charge. In fact, the Enquiry Officer has only recorded his conclusion, which is not supported by any reason. The affidavits of the witnesses of the petitioner and his reply indicate that the petitioner alone was not present near the police van but another Constable, namely, Lal Singh, in whose custody one of the prisoners was given, was standing there near the vehicle and it was his duty to produce the prisoner Lala, who also escaped, but no disciplinary action has been taken against the said constable by believing his version that he had gone to collect the warrant in the Court. The affidavits of the petitioner's witnesses, which indicate that the said constable was standing near the police van, have been disbelieved without adverting to those facts.

15. It is a trite law that the disciplinary proceeding is a quasi-judicial proceeding and the evidence led ought to have been considered in a fair manner. Ignoring the material evidence vitiates the enquiry. The disciplinary authority should arrive at its conclusions on the basis of the evidence on record and the matter should not be left in a suspicious state. The Supreme Court in the case of Kuldeep Singh v. Commissioner of Police and others2 held as under:

"7. In Nand Kishore Prasad v. State of Bihar3 it was held that the disciplinary proceedings before a domestic tribunal are of quasi-judicial character and, therefore, it is necessary that the Tribunal should arrive at its conclusions on the basis of some evidence, that is to say, such evidence which and that too, with some degree of definiteness, points to the guilt of the delinquent and does not leave the matter in a suspicious state as mere suspicion cannot take the place of proof even in domestic enquiries. If, therefore, there is no evidence to sustain the charges framed against the delinquent, he cannot be held to be guilty as in that event, the findings recorded by the enquiry officer would be perverse.

8. The findings recorded in a domestic enquiry can be characterised as perverse if it is shown that such findings are not supported by any evidence on record or are not based on the evidence adduced by the parties or no reasonable person could have come to those findings

on the basis of that evidence. This principle was laid down by this Court in State of A.P. v. Rama Rao4 in which the question was whether the High Court under Article 226 could interfere with the findings recorded at the departmental enquiry. This decision was followed in Central Bank of India Ltd. v. Prakash Chand Jain5 and Bharat Iron Works v. Bhagubhai Balubhai Patel6. In Rajinder Kumar Kindra v. Delhi Admn.7 it was laid down that where the findings of misconduct are based on no legal evidence and the conclusion is one to which no reasonable man could come, the findings can be rejected as perverse. It was also laid down that where a quasi-judicial tribunal records findings based on no legal evidence and the findings are its mere ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated."

16. In Anil Kumar v. Presiding Officer and others8 the Supreme Court observed as under:

"5. We have extracted the charges framed against the appellant. We have also pointed out in clear terms the report of the enquiry officer. It is well-settled that a disciplinary enquiry has to be a quasi-judicial enquiry held according to the principles of natural justice and the enquiry officer has a duty to act judicially. The enquiry officer did not apply his mind to the evidence. Save setting out the names of the witnesses, he did not discuss the evidence. He merely recorded his ipse dixit that the charges are proved. He did not assign a single reason why the evidence produced by the appellant did not appeal to him or was considered not creditworthy. He did not permit a peep into his mind as to why the evidence produced by the management appealed to him in preference to the evidence produced by the appellant. An enquiry report in a quasi-judicial enquiry must show the reasons for the conclusion. It cannot be an ipse dixit of the enquiry officer. It has to be speaking order in the sense that the conclusion is supported by reasons. This is too well-settled to be supported by a precedent. In Madhya Pradesh Industries Ltd. v. Union of India9, this Court observed that a speaking order will at best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard. Similarly in Mahabir Prasad Santosh Kumar v. State of U.P.10, this Court reiterated that satisfactory decision of a disputed claim may be reached only if it be supported by the most cogent reasons that appealed to the authority. It should all the more be so where the quasi-judicial enquiry may result in deprivation of livelihood or attach a stigma to the character. In this case the enquiry report is an order sheet which merely produces the stage through which the enquiry passed. It clearly disclosed a total non-application of mind and it is this report on which the General Manager acted in terminating the service of the appellant. There could not have been a more gross case of non-application of mind and it is such an enquiry which has found favour with the Labour Court and the High Court.

6. Where a disciplinary enquiry affects the livelihood and is likely to cast a stigma and it has to be held in accordance with the principles of natural justice, the minimum expectation is that the report must be a reasoned one. The Court then may not enter into the adequacy or sufficiency of evidence. But where the evidence is annexed to an order sheet and

no corelation is established between the two showing application of mind, we are constrained to observe that it is not an enquiry report at all. Therefore, there was no enquiry in this case worth the name and the order of termination based on such proceeding disclosing non-application of mind would be unsustainable."

17. In respect of nature of disciplinary proceedings the Supreme Court in M.V. Bijlani v. Union of India and others11 has observed as under:

"25. It is true that the jurisdiction of the court in judicial review is limited. Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidence to prove the charge. Although the charges in a departmental proceeding are not required to be proved like a criminal trial i.e. beyond all reasonable doubt, we cannot lose sight of the fact that the enquiry officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures. He cannot enquire into the allegations with which the delinquent officer had not been charged with."

18. I have perused the orders of the appellate authority and the revisional authority also. The petitioner has taken the aforesaid grounds in his memo of appeal and revision but his appeal and revision have also been dismissed without adverting to the said facts.

19. After careful consideration of the matter, I am of the view that the enquiry has vitiated on the ground of violation of principles of natural justice and non-application of mind. Accordingly, the dismissal order, appellate order and revisional order dated 29th January, 2009, 03rd February, 2010 and 27th November, 2010, as are impugned in this writ petition, passed by the fourth, third and second respondents respectively, are quashed. The disciplinary authority is directed to conduct a fresh enquiry from the stage when the petitioner was denied the opportunity. The fresh enquiry may be concluded expeditiously.

20. The writ petition is, accordingly, allowed.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.04.2015

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

C.M.W.P. No. 31663 of 2009

Suresh Chandra Pandey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.K. Upadhyaya

Counsel for the Respondents:
C.S.C., Sri A.K. Yadav, Sri Chandra Narayan Tripathi

Constitution of India, Art.-226-Interest-on 2 years delay in release of post reitiral benefits-cause of delay unexplained - held-entitled for interest @ 6% per annum-with liberty to recover the same from erring officer.

Held: Para-15
In view of the above, I am of the considered opinion that the petitioner is entitled for interest on the delayed payment of his post retiral benefits @ 6% per annum from the date of his retirement till the date of actual payment. The said amount shall be paid to the petitioner by the second respondent within four months from the date of communication of a certified copy of this order. It is open to the State Government that after payment of the amount of interest to the petitioner, as directed above, it can hold an enquiry to find out the person who is responsible for the delay and deduct the amount of interest from the salary/post retiral benefits/pension of the officer/official held responsible for the delay.

Case Law discussed:
2009 (9) ADJ 154; Writ-A No. 16146 of 2012; AIR 1985 SC 356; (1992) 1 UPLBEC 674.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner is a retired Headmaster of a Junior High School, which is run by the Basic Shiksha Parishad, Uttar Pradesh and the salary of the teachers of the said institution is paid from the State exchequer.

2. The petitioner seeks a direction ordering the respondents to release the amount of interest on the delayed payment of his post retiral benefits.

3. The facts are: the petitioner was initially appointed as an Assistant Teacher; later on he was promoted on the post of Headmaster; and, he retired reaching the age of superannuation on 30th June, 2006. The petitioner claims that the State has given him award of best teacher. After the retirement of the petitioner, his post retiral benefits have been paid to him on 11th June, 2008. The petitioner has averred in paragraph-13 of the writ petition that he received a bankers cheque for a sum of Rs.2,68,537/- issued by the Allahabad Bank on 11th June, 2008.

4. The grievance of the petitioner is that admittedly, his post retiral benefits have been paid to him after lapse of a period of two years from the date of his retirement but no interest has been paid on the delayed payment. For payment of interest on the delayed payment, the petitioner has made a representation dated 11th November, 2008, which has been received in the office of the second respondent, but no order has been passed thereon.

5. A counter affidavit has been filed on behalf of the second and third respondents wherein it is clearly admitted that there was a delay in payment of post retiral benefits of the petitioner. Such admission has been made in paragraphs-14 and 19 of the counter affidavit, which are extracted herein-below:

"14. That the contents of paragraph 3 of the writ petition are incorrect as stated hence denied and in reply thereto it is submitted that the petitioner has already been paid all the retiral dues, however the said payment has been made on account of the implementation of 6th Pay Commission Report as result thereof some delay has been caused which was neither intent full of deliberate. The all payments have been made to the petitioner including the arrears but some delay has been made due to paucity of the

budget, therefore the petitioner is not entitled for any interest against the alleged amount stated by the petitioner.

19. That the contents of paragraphs 10, 11 & 12 of the writ petition are subject matter of record which can be examined by this Hon'ble Court at the time of hearing of the writ petition. However it is submitted that since the petitioner has already been paid all the retiral dues but some delay has been caused due to implementation of the 6th Pay Commission Report and paucity of budget, therefore, the implication cited by the petitioner by means of the judgment is not applicable in the present case."

6. I have heard learned counsel for the petitioner and learned Standing Counsel.

7. Learned counsel for the petitioner has submitted that admittedly there is a delay in payment of post retiral benefits of the petitioner, therefore, the respondents are liable to pay interest. He has placed reliance on the judgments of this Court in Suresh Chandra Rai v. U.P. Power Corporation Ltd., Lucknow and others, 2009 (9) ADJ 154, and Panna Lal v. State of U.P. and another, Writ-A No. 16146 of 2012, decided on 02nd April, 2012.

8. Learned Standing Counsel submits that after the implementation of the report of the VIth Pay Commission some delay has been caused in making payment but the payment has already been made to the petitioner.

9. I have considered the submissions of the learned counsel for the parties and perused the record.

10. Admittedly, the petitioner retired as a Headmaster on 30th June, 2006 and payment of his post retiral benefits were made on 11th June, 2008. The respondents have admitted in the counter affidavit that there was delay in payment of post retiral benefits of the petitioner.

11. In Panna Lal (supra) this Court has observed as under:

"A Division Bench of this Court in the case of Wig Brothers (Builders & Engineers) (P) Ltd. & another vs. Union of India & others; reported in (2003) 3 Company Law Journal, 328 (Alld.) has explained that payment of interest is a necessary corollary to the retention of amount. It is neither penal nor compensatory in nature. In view of the aforesaid, the right of the petitioner to claim interest on the delayed payment accrues and it has to be adjudicated by respondent no. 1 (The State of U.P. through its Secretary, Higher Education, Lucknow), at the first instance.

Accordingly the present writ petition is disposed of with liberty to the petitioner to make a representation ventilating all his grievances before respondent no. 1, within two weeks from today, along with a certified copy of this order. On such a representation being made the respondent no. 1 shall call for the records and shall pass a reasoned speaking order preferably within eight weeks after affording opportunity of hearing to respondent no. 2. The respondent no. 1 shall determine as to who is responsible for the delay. The interest shall be recovered from the person concerned immediately thereafter and paid to the petitioner."

12. The Supreme Court in the case of State of Kerala and others v. M. Padmanabhan Nair, AIR 1985 SC 356, has laid down the law that in case of delay

in payment of post retiral benefits, the employee shall be entitled for the interest on the delayed payment.

13. This Court way back in the year 1992 in the case of Mukti Nath Rai v. State of U.P. and others, (1992) 1 UPLBEC 674, has issued a general mandamus in the following terms:

"10. I, therefore, direct that henceforth Rules 906 to 960 of the Civil Service Regulations be followed strictly by all concerned officials, and payment of pension must begin promptly on the retirement of the U.P. Government employee. This mandamus must be strictly complied with, and all those responsible for its violation, whether in the parent department of the retiring employee or in the Accountant General's office, shall be held accountable of this court for such violation."

14. It is pertinent to mention that after the judgment of this Court in Mukti Nath Rai (supra), the State Government has framed the Uttar Pradesh Pension Cases (Submission, Disposal and Avoidance of Delay) Rules, 1995 (for short, the "Rules, 1995"), providing detailed procedure with regard to sanction of pension. As defined under Rule 2(b) and 2(k) of the said Rules, a specific Time-Schedule has been provided to be followed and complied with at each and every stage. In the said time-schedule, the description of work, time within which work is to be done and the person responsible for the work have specifically been mentioned in Columns-2, 3 and 4 respectively thereof. Under Rule-4 of the Rules, 1995, procedure for implementation of the time schedule and allied matters has been provided. It is apposite to reproduce Rule-4 of the Rules, 1995, as under:

"4. Procedure for implementation of the time schedule and allied matters.--(1) A delay may be ascertained by the Nodal Officer/ Chief Nodal Officer:

(a) from the complaint of the Pensioner/Pensioner's Organization;

(b) from the follow up of the disposal of pension cases.

(2) Whenever any delay comes to notice of the Nodal Officer/ Chief Nodal Officer, he shall require the Head of the Department/the Head of the Office to furnish all relevant informations in respect of the reasons for delay and, after such enquiry as he considers proper, find out the person responsible for the delay and send a proposal to the disciplinary authority concerned for disciplinary proceeding against him. The Nodal Officer/Chief Nodal Officer shall follow up the matter till the completion of the disciplinary proceeding and maintain record of such proceeding. The Nodal Officer shall intimate to the Chief Nodal Officer in respect of the result of such disciplinary proceeding.

(3) A person, who fails to furnish required information to the Nodal Officer/Chief Nodal Officer in respect of retirement of an employee or in respect of any other matter relating thereto, or who is responsible for delay, shall be guilty of misconduct and be punishable under the punishment rules applicable to him.

(4) Duly completed pension papers alongwith all relevant documents shall be sent to the pension sanctioning authority within the time schedule specified in the schedule in respect thereof.

(5) The Chief Nodal Officer/Nodal Officer and the pension sanctioning

authority shall ensure arrangement for disposal of pension matters within the time schedule.

(6) The pension sanctioning authority shall hold or cause to be held regular monthly meeting of officers/officials, who deal such matters, and shall take all appropriate steps for examination and disposal of such matters.

(7) The Principal Secretary or Secretary, as the case may be, to the Government in the Department concerned shall supervise the work of the Head of the Department/Head of the Office in relation to all pension matters within the time schedule."

15. In view of the above, I am of the considered opinion that the petitioner is entitled for interest on the delayed payment of his post retiral benefits @ 6% per annum from the date of his retirement till the date of actual payment. The said amount shall be paid to the petitioner by the second respondent within four months from the date of communication of a certified copy of this order. It is open to the State Government that after payment of the amount of interest to the petitioner, as directed above, it can hold an enquiry to find out the person who is responsible for the delay and deduct the amount of interest from the salary/post retiral benefits/pension of the officer/official held responsible for the delay.

16. The writ petition is, accordingly, allowed.

17. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2015

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

C.M.W.P. No. 32284 of 2011

Sri Surendra Prasad Dixit & Anr. ...Petitioners

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar (Sharma)

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Claim of promotional pay-based upon G.O. Dated 03.09.2001-throughout service carrier they got only one promotion-after completely 24 years service entitled for second promotional pay of Rs. 5000-8000.

Held: Para-21 & 24

21. The fact of the case of Ram Chandra Verma, which has been affirmed in the Special Appeal, is applicable to the case in hand. In the present case also, the petitioners were granted only one promotion although their designation was changed as a Senior Assistant but they remained in the same pay scale of Rs.4500-7000. They were granted only one promotion. The second promotion of the petitioners in pay scale of Rs.5000-8000 was denied although they were entitled for the same in terms of paragraph no.2-A of the Government Order dated 3.9.2001.

24. After careful consideration, I am of the view that the petitioners are entitled to benefit of Ram Chandra Verma's judgment which has been affirmed in appeal and for the law laid-down in the above judgment. The impugned orders dated 1.4.2011 passed by the respondent no.2 (Annexure-8 to the writ petition) and 14.3.2011 passed by the respondent no. 4(Annexure-9 to the writ

petition) are unsustainable under law that need to be set aside. Accordingly, the writ petition succeeds and is allowed and both the orders dated 1.4.2011 and 14.3.2011 are set aside.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The two petitioners have joined this writ petition, who have retired as a Senior Clerk in the Irrigation Department. They are aggrieved by the order dated 1.4.2011 passed by respondent no.2, Superintending Engineer, Gandak Sichai Karya Mandal-I, Gorakhpur and order dated 14.3.2011 passed by the respondent no.4, Executive Engineer, Barh Karya Khand, Deoria whereby the petitioners' claim for the second promotional pay scale has been rejected.

2. The essential facts are that the petitioner no. 1 was appointed as a Junior Clerk on 10.1.1973 in the Irrigation Department. He got his promotion on the post of Senior Clerk on 1.9.1983. According to the petitioner no.1, in the revised pay, his pay was fixed in the pay scale of Rs.4500-7000 in 1987 in terms of the Government Order dated 23.12.1987. The petitioner no.1 has completed his 24 years of service on 9.1.1997. His grievance is that in terms of the Government Order dated 3.9.2001, he is entitled for the next promotional pay scale of Rs.5000-8000 as in the entire career, he was given only one promotion. The petitioner no.1 retired on 31.3.2008 on attaining the age of superannuation in the pay scale of Rs.4500 to 7000.

3. The petitioner no.2 was also appointed as Junior Clerk on 13.1.1969 in the same department on 14.10.1978, he was promoted as a Senior Clerk and his pay was fixed in Rs.4500-7000 in the year 1997. His grievance is also the same as that of the petitioner no.1 that having completed 14 years of service on 1.10.1992 he was entitled to higher scale as per Government Order dated 3.9.2001 in the pay scale of Rs.5000-8000.

4. It is averred by the petitioners that in their service tenure of more than 24 years they were given only one promotion in the pay scale of Rs.4500-7000. Their posts were re-designated as Senior Assistant but their pay scale was same with the Rs.4500-7000.

5. It is stated that the State Government took a policy decision that to avoid stagnation to its employees, who were not promoted on the next post in the absence of the promotional avenue, they were granted time scale and the promotional pay scale. Accordingly, a Government Order dated 3.9.2001 was issued wherein it was directed that all those employees, who were directly appointed and completed their tenure of 24 years of service and who were granted only one promotion in 24 years, they are entitled for grant of time scale as provided in clause IV of the said Government Order. The previous and revised time scale and next pay scale are given hereinbelow.

Rs.2750-4400
Rs.3200-4900
Rs.4500-7000
Rs.5000-8000

5. The aforesaid benefit was made available to the eligible persons with effect from 1.5.2000.

6. From the record it transpires that some of the eligible persons who could not get the benefit of the said Government

order, preferred the writ petition no. 36816 of 2004 (Ram Chandra Verma Vs. State of U.P. and others) and the writ petition no. 5934 of 2009 (Amar Bahadur Singh Vs. State of U.P. and others). Similar other petitions were also filed.

7. The writ petition filed by Ram Chandra Verma and another was allowed on 21.4.2008 and the order of the State Government whereby their claim was rejected, was quashed and a direction was issued to the respondents to grant benefit of time pay scale in terms of the Government Order dated 3.9.2001 to the petitioners.

8. Other writ petitions for the same relief were also allowed by a Division Bench of Lucknow Bench of this Court in writ petition no.5934 of 2009 (S/S) on 17.9.2009.

9. Aggrieved by the aforesaid order, the State preferred a Special Appeal No. 8 of 2012 (State of U.P. and others Vs. Ram Chandra Verms) and Special Appeal No. 291 of 2012 (State of U.P. and others Vs. Malik Shakil Ahmad). Both the Special Appeals were dismissed on 20.5.2014. The Division Bench found that the petitioners have completed 24 years of satisfactory service prior to their retirement and they were entitled to second promotional pay scale vide Government Order dated 3.9.2001. There is nothing on record to indicate that any Special Leave Petition was filed in Supreme Court against the order of the special appeal.

10. A counter affidavit has been filed wherein the respondents have taken a stand that the petitioner no. 1 retired from Sinchain Khand-II, Deoria. It is also stated that the petitioner was appointed on the post of Junior Clerk on 10.1.1973 and he was promoted on the post of Senior Clerk on 1.9.1983 and thus the petitioner no.1 completed 24 years of service on 9.1.1997 and according to the provisions of Government Order dated 3.9.2001, petitioner is not entitled to pay scale of Rs.5000-8000. The similar stand has been for petitioner no.2 also. It is also stated the competent authority has passed the order dated 21.4.2008 in accordance with law.

11. A supplementary counter affidavit has been filed. The stand taken in the supplementary counter affidavit is that both the petitioners were appointed on the post of Junior Clerk by way of direct recruitment. The Petitioner no. 1 was promoted on the post of Senior Clerk on 1.9.1983 and has completed 24 years of service on 9.1.1997. The petitioner no. 2 before completing 10 years of service was promoted on the post of Senior Clerk on 14.10.1978 and the petitioners are not entitled for higher pay scale of Rs.5000-8000 according to Government Order dated 21.6.2007. The second promotional pay scale of Rs.5000-8000 cannot be given to the petitioners because the pay scale of Rs.5000-8000 is third promotional pay scale. Copy of the Government Order dated 21.6.2007 is annexed as Annexure SCA-1. It is further averred in the counter affidavit that the Executive Engineer Irrigation Division-II, Deoria issued order dated 23.2.2012 regarding grant of the second promotional pay scale of Rs.5000-8000 to the divisional clerk in which it has been mentioned that after completion of 24 years of service on the post of Senior Clerk, some of the persons were granted pay scale of Rs.5000-8000.

12. In paragraph no. 8 of the supplementary counter affidavit it is averred that on 24.2.2012 Superintending Engineer, Gandak Sichai Karya Mandal-I, Gorakhpur issued a notification stating that according to the Government Order dated 26.1.2012, the pay scale of Rs.5000-8000 which was granted as second promotional pay scale be cancelled.

13. The petitioners have filed rejoinder affidavit and the stand taken by the respondents in the counter affidavit has been denied. It is stated in the rejoinder affidavit that the Government Order dated 30.6.1989 was amended by the Government Order dated 10.8.1989. According to new pay scale, the pay scale of Senior Assistant, Senior Clerk and Junior Clerk have been revised and the pay scale of Rs.4500-7000 is a revised pay scale of Rs.1350-2200, therefore, it is not a second promotional pay scale but it is a revised pay scale. It is also stated that the Special Appeal filed against the order of the Learned Single Judge has been dismissed.

14. Heard learned counsel for the petitioner, Sri Manoj Kumar Sharma and the learned Standing Counsel.

15. Learned counsel for the petitioners submits that both the petitioners were entitled for second promotional pay scale in terms of paragraph no. 4 of the Government Order dated 3.9.2001. The relevant paragraph of the Government Order dated 3.9.2001 is extracted hereinbelow:-

'' उपर्युक्त श्रेणी के पदधारक जिन्हें 24 वर्ष की सेवा पूर्ण करने की तिथि तक सीधी भर्ती के पद के सन्दर्भ मे दो प्रोन्नतीय/अगला वेतनमान अथवा दो पदोन्नतिया अनुमन्य नही हुई हो, परन्तु जिन्हें एक पदोन्नति प्राप्त हो चुकी हो और वे सीधी भर्ती के पद पर नियमित हों उनकी 24 वर्ष की सन्तोषजनक सेवा पूर्ण करने की तिथि अथवा दिनांक 1.3.2000 जो भी बाद में हो, से सीधी भर्ती के पद के संदर्भ मे द्वितीय प्रोन्नति / अगला वेतनमान वैयवितक रूप से अनुमन्य करा दिया जाय। ''

'' शासनादेश दिनांक 02 दिसम्बर, 2000 के प्ररतर –4(1) में लागू व्यवस्थानुसार अगले वेतनमान की अनुमन्यता के मामलों में वेतनमान रू0 2750–4400 तथा रू0 4500–7000 के लिये अगला वेतनमान कमशः रू0 3200–4900 तथा रू0 5000–8000 माना जाय। ''

16. Earlier the pay scale of Senior Clerk was Rs.430-685 which has been revised in the year 1989 vide Government Order dated 10.8.1989. The enclosures of Government Order dated 10.8.1989 indicate that the pay scale of Rs.430-685 of the Senior Clerk mentioned at item no. 94 has been revised as Rs.1200-2040 and the pay scale of Rs.354-550 of Junior Clerk mentioned at item no. 95 has been revised as Rs.950-1500. It is important to note that at item no. 93, the post of Senior Assistant is also mentioned and its pre-revised pay scale of Rs.470-735 has been revised as Rs.1200-2040 which is same pay scale of the Senior Clerk. This fact is evident from the enclosures of the Government Order dated 10.8.1989 which is on the paper book at page130.

17. On 19.10.1991 the State Government amended the previous Government Order dated 10.8.1989 and by the said amendment the pay scale of the Senior Assistant and Head Clerk was revised from Rs.1200-2040 to 1350-2200.

18. The State Government in compliance of the VIth Pay Commission issued a Government Order dated 23.12.1997, which is on the record. The pay scale of Rs.1350-2200 has been

shown at serial No.10 which was revised as Rs.4500-125-7000 from 1.1.1996. It is evident from the Government Order dated 23.12.1987 that the petitioners' pay scale Rs.1350 to 2200 was revised to Rs.4500-7000 with effect from 1.1.1996. This fact has been considered by this Court in the writ petition no.36816 of 2014 the Court while allowing the writ petition has issued the following directions.

Accordingly, this writ petition stands allowed. The order dated 13.1.2003 is quashed in so far as it relates to the petitioners. It is directed that the respondents shall grant the petitioners the benefit of the time pay scale in terms of the Government Order dated 3.9.2001. Necessary orders may be passed by the respondent-authorities within two months. The arrears shall be paid to the petitioners within three weeks thereafter. However, the current enhanced salary shall be paid to the petitioners immediately. However, there shall be no order as to costs.

19. Being dissatisfied with the judgment of Learned Single Judge, a Special Appeal was filed. The Division Bench has extracted the ground nos. 4 and 5 of the said Special Appeal. Incidentally, the same stand has been taken in the impugned order. Paragraph no. 4 of the judgment of the Division Bench is extracted hereinbelow.

"4. In the memo of appeal of Special Appeal No.8 of 2012 it is stated in ground nos. 4 and 5 as follows:-

4. Because, admittedly here in the instant case the petitioner/respondent no. 1 was initially appointed on the post of Junior Clerk on 11.9.1973 in the pay scale of Rs.3050-4590 and where after the petitioner/respondent no.1 was given first promotion on the post of Senior Clerk in the pay scale of Rs.4000-6000, where-after on completion of 14 years satisfactory service the petitioner/respondent no.1 was further granted second promotional pay scale of Rs.4500-125-7000 w.e.f. 1.9.1997, which is admissible to Senior Assistant. Keeping in view the aforesaid facts and reasons the petitioner/respondent no.1 was not eligible for the benefit of Time Pay Scale as he has already been granted two promotional pay scale, but the learned Single Judge in ignoring to consider it has committed a manifest error of law causing grave injustice to the State.

5.Because, admittedly the petitioner/respondent no. 2 was initially appointed on the post of Junior Clerk on 11.8.1972 in the pay scale of Rs.3050-4590 and thereafter, the petitioner/respondent no. 2 was further promoted on the post of Senior Clerk in the pay scale of Rs.4000-6000 on 27.6.1979 and where-after on completion of 14 years satisfactory service the petitioner/respondent no. 2 was granted second promotional pay scale of Rs.4500-7000 admissible to Senior Assistant. Keeping in view the aforesaid facts and reasons the petitioner/respondent no.2 was also not eligible for the benefit of the Time Pay Scale."

20. The said plea has been rejected by the Court on 20.5.2014 in the following terms:-

"7. By the Government Order dated 19.10.1991 the post of Senior Assistant at serial no. 93 was given the pay scale on its revision from Rs.1200-2040 to Rs.1350-2200. The pay scale of Senior Clerk was not changed and remained the same as Rs.1200-2040. The pay scale of

Rs.1200-2040 was revised on 3.12.1997 w.e.f. 1.1.1996 to the pay scale of Rs.4500-7000. This pay scale was thus the first promotional pay scale for the Senior Clerks. It was a revised pay scale and was not the promotional pay scale."

"The words "the pay scale of Senior Clerk was not changed and remained the same as Rs.1200-2040" and "1989" occurring in 2nd, 3rd and 4th line of para-7 of the judgment dated 20.5.2014 shall be read as "the pay scale of Senior Clerk was also changed from Rs.1200-2040 to Rs.1350-2200" and "1996".

This order shall be treated as part of the order dated 20.5.2014. A certified copy of this order shall be issued along with the copy of order dated 20.5.2014."

21. The fact of the case of Ram Chandra Verma, which has been affirmed in the Special Appeal, is applicable to the case in hand. In the present case also, the petitioners were granted only one promotion although their designation was changed as a Senior Assistant but they remained in the same pay scale of Rs.4500-7000. They were granted only one promotion. The second promotion of the petitioners in pay scale of Rs.5000-8000 was denied although they were entitled for the same in terms of paragraph no.2-A of the Government Order dated 3.9.2001.

22. The contention of the learned Standing Counsel that since the petitioners were promoted on the post of the Senior Assistant, therefore, they have got the promotion is misconceived. From a perusal of the Government Order dated 10.8.1989 it is manifestly clear that the pay scale of the Senior Assistant, Senior Clerk is same i.e. Rs.1200-2040 which was revised by the Government Order dated 19.10.1991 to Rs.1350-2200. Vide Government Order dated 23.12.1997, the pay scale of Rs.1350-2200, which was the pay scale of Senior Assistant and Senior Clerk, was revised to Rs.4500-7000.

23. In view of the above, the submission of the learned Standing Counsel that the petitioners were granted second promotion is not correct.

24. After careful consideration, I am of the view that the petitioners are entitled to benefit of Ram Chandra Verma's judgment which has been affirmed in appeal and for the law laid-down in the above judgment. The impugned orders dated 1.4.2011 passed by the respondent no.2 (Annexure-8 to the writ petition) and 14.3.2011 passed by the respondent no. 4(Annexure-9 to the writ petition) are unsustainable under law that need to be set aside. Accordingly, the writ petition succeeds and is allowed and both the orders dated 1.4.2011 and 14.3.2011 are set aside.

25. For the reasons stated above, direction is issued to the State Government to pay the second promotional pay scale i.e. Rs.5000-8000 to both the petitioners as this Court has directed in the case of Ram Chandra Verma, which has been affirmed in Special Appeal.

26. The State Government shall pay regard to the fact that both the petitioners have retired, therefore, the next promotional pay scale of Rs.5000-8000 shall be given to the petitioners expeditiously but not later than three months from the date of communication of this order.
