APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.03.2011

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Second Appeal No. 8 of 2006

Sardar Gurtahal Singh ...Petitionner
Versus
Anand Singh Jagdhari and 8 others ...Respondents

Code of Civil Procedure-Order 41 Rule 19-Re-admission of Appeal-Second Appeal dismissed in defaults-restoration application-prayer objected as no question of exercising inharant jurisdiction-Held-mis-concieved unless appeal restored-can not be listed for re-admission-the provisions of order 41 Rule 19 be construcd and understand in the sense-more practicable reasonable and legal-

Held: Para 12

The second objection raised by Sri P.V. Chaudhary is that even if the order is restored the interim order, if any granted earlier should not be revived automatically. This argument also does not stand to reason. Once the court is satisfied that there was sufficient reason under Order 9 Rule 13 and the court feels that the appellant or any other party had sufficient reason for applying for restoration then there can not be any half measures. It is a subjective satisfaction of the court which will vary from case to case. The requirement in the Rule 19 is that it should be proved that the appellant was prevented from coming to the court when the appeal was called for hearing. This clearly shows that the grounds for restoration have to be made out by the appellant and if the court is satisfied then there is no reason that the appellant should be put to any kind of penalty by not giving him a status which he was enjoying prior to the dismissal of his case in default.

Case law discussed:
AIR (35) 1948 Awadh 116 (CN 43) Gajraj Singh vs. Suraj Bux singh and another

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri Munawar Sultan learned counsel for the appellant and Sri P.V. Chaudhary for the opposite parties.

2. This second appeal was dismissed in default on 9.10.2009. The appellant moved an application for its restoration on 13.1.2010 with an application for condonation of delay under section 5 of the Limitation Act. He has explained the reasons for moving the application with delay. Objection was invited from Sri P.V. Chaudhary on application for condonation of delay. Sri Chaudhary has raised objection that the delay should not be condoned.

3. Sri P.V. Chaudhary has raised another legal objection that in second appeal application for restoration can only be moved under Order 41 Rule 19. It reads as follows :

" **19**. ***Re-admission of appeal dismissed for default***.- *Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17, the appellant may apply to the Appellate Court for the re-admission of the appeal; and , where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit. "*

4. Sri P.V. Chaudhary says that the application is not in a proper format.

There is no provision for recall of an order dismissing the appeal in default. The application can only be moved for *'re-admission'*. In his support he has shown a case law ***AIR (35) 1948 Awadh 116 (CN 43) Gajraj Singh vs. Suraj Bux Singh and another.*** In paragraph no. 43 of this very old judgment it has been stated as follows :

" (43) It was argued by the learned counsel for the applicant that apart from the provisions of Order 41, Rule 19 C.P.C., the Court could restore the appeal in exercise of its inherent powers. As pointed out by Chitaley in his Commentary on Section 151, Civil Procedure Code, it has been held by the High Courts of Allahabad, Calcutta, Lahore, Madras, Patna, Rangoon, and the Judicial Commissioner's Courts of Oudh and Sind that there is no inherent power to set aside an ex-parte decree, or restore a suit dismissed for default, except under the circumstances and conditions mentioned in Order 9, Rule 13 and Rule 19 respectively. The same remarks would apply to the provisions applicable to restoration of appeals under Order 41, Rule 19 C.P.C. I agree with the view thus stated. "

5. This judgment which has not been over-ruled till date observes that the High Court does not have any inherent powers for restoration of a second appeal. The application has to be moved under Order 41 Rule 19 and it has to fulfill the conditions laid down in order 9 Rule 13 which is the basic law for restoration of cases dismissed in default or ex-parte. On this count Sri P.V. Chaudhary says that the application moved by the appellant should be thrown out as it is not in the proper format and the court can not exercise inherent powers. The second appeal can not be restored to its original number.

6. The appellant counsel Sri Munawar Sultan argued that the application which he has moved contains the reasons which are required under order 9 Rule 13. The court is satisfied with this aspect of the matter. He further says that he agrees that the court does not have inherent powers of restoration of an appeal which is dismissed in default and that is the reason that a formal application detailing all the facts have been moved before the court. He is not invoking the court's inherent powers in this regard. He says that the application which has been moved by him in-fact contains all the ingredients required under Order 41 Rule 19. The only deficiency in his application is the heading which ought to have given the exact provision under which he was moving the application before the court.

7. The court feels that it may not have inherent powers of restoration but it does have the inherent power of correcting the heading of an application. This lapse on the part of the appellant can be condoned and the application can be treated maintainable because of its contents as a proper application under Order 41 Rule 19.

8. Mr. Chaudhary has futher argued that now the courts can not simply restore the dismissed appeal to its original number. The appeal will have to be re-admitted. Under Order 41 Rule 9 which has already been quoted supra. The argument of Sri P.V. Chaudhary has raised an important question which needs to be answered. A number of counsel including Senior Advocate Mohd. Arif

Khan and Sri B.K. Saxena stood up to assist the court. They have submitted that Order 41 Rule 19 needs fresh look and the word *'re-admission'* also requries to be interpreted in a manner so as to harmonize their purpose of the rule in consonance with the provisions of Section 100 Code of Civil Procedure.

9. After hearing the counsel the court feels that if the word 're-admission' is given a literal interpretation then it will mean that the earlier order of Hon'ble Judge admitting the petition will be subjected to a review by the Judge who is restoring the appeal. This can never be the intention of Order 41 Rule 9. *'Re-admission*' of an already admitted appeal on substantial questions of law will be inherently contradictory, it will amount to an indirect 'review'. This can not stand to logic. Moreover, if strict interpretation as proposed by Sri P.V. Chaudhary is adhered to then the question will crop up as to how the appellant counsel can argue for re-admission in an appeal which stands dismissed on that particular date. Unless the petition is restored to its original number no argument of any kind is possible. So a natural corollary of this argument will be that the petition has to be restored before any kind of order is passed either of admission or of hearing in the matter.

10. Law is a codified common sense. Nothing can be construed to be illogical or unreasonable. If the matter is restored and listed for admission again then it amounts to review and if directly a counsel is required to argue on admission then he will be hampered because the appeal lies dismissed on that date. Both the situations can not be permitted. Therefore, the Order 41 Rule 19 will have to be construed and understood in the sense which is more practical, reasonable as well as legal.

11. I, therefore, come to the conclusion that the word *'re-admission'* in the aforesaid rule should be interpreted as *'restoration'* for all practical purposes.

12. The second objection raised by Sri P.V. Chaudhary is that even if the order is restored the interim order, if any granted earlier should not be revived automatically. This argument also does not stand to reason. Once the court is satisfied that there was sufficient reason under Order 9 Rule 13 and the court feels that the appellant or any other party had sufficient reason for applying for restoration then there can not be any half measures. It is a subjective satisfaction of the court which will vary from case to case. The requirement in the Rule 19 is that it should be proved that the appellant was prevented from coming to the court when the appeal was called for hearing. This clearly shows that the grounds for restoration have to be made out by the appellant and if the court is satisfied then there is no reason that the appellant should be put to any kind of penalty by not giving him a status which he was enjoying prior to the dismissal of his case in default.

13. Accordingly, this court feels that when the matters are restored they should be restored to original number and to the same status to which the petitioner / appellant was enjoying on the date of dismissal in default.

14. However, in the present case the facts are different.

15. It transpires from the record that the case was lastly listed on 27.7.2007. On that date the interim order was not extended till the dismissal of the petition.

16. Accordingly, let the petition be restored to its original number. Since it was already admitted It will be treated as having been admitted.

17. Let it be listed in the next cause list for hearing on merits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2011

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Company Application No. - 15 of 2010

In The Matter Of: Triveni Engineering & Industries and another ...Applicants

Counsel for the Petitioner:
Sri R.P. Agarwal

Counsel for the Respondent:
Sri S.K. Bisaria

Code of Civil Procedure-Section 148-A-Maintainability of caveat application under Chapter 22 rule 5-relating to proceeding u/s 394/391 of Company Act-whether maintainable ? held-'No' but the provisions of C.P.C. Equally applicable by virtue of rule 6 of company Rules-hence caveat lodged u/s 1448-A-held-proper-even the caveator no right to claim opportunity of hearing at preliminary stage of issue notice-but growing tendency of ignoring caveat by the Registry as well as of the Counsels-undermine the dignity of Noble Profession-Court expressed its great concern by issuing general directions.

Held: Para 8

Now Rule 6 of the aforesaid Rules clearly provides that the provisions of the code which means Code of Civil Procedure, 1908 shall apply to all proceedings under the Act and these Rules. In other words by virtue of Rule 6 of the aforesaid Rules provisions of C.P.C. have been made applicable in respect of all proceedings taken by parties under the Act or under the aforesaid Rules. There is no dispute that an application for acceptance of the scheme of arrangement under Section 391/394 of the Act is in the nature of proceedings under the Act/Rules and as such the applicability of C.P.C. to such proceedings cannot be ruled out. Consequently, the provisions of Section 148A C.P.C. which entitles a party to lodge a caveat gets attracted enabling the party concern to lodge a caveat in respect of proceedings/applications under Section 391/394 of the Act.

Case law discussed:
[2009] 147 Company Cases 677.

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

Re: Civil Misc. Recall Application No.319680 of 2010

1. The above application has been filed by Ashok Kumar Sharma, Proprietor, A.K. Builders & Suppliers, Lucknow together with M/s A.K. Builders & Suppliers claiming to be the unsecured creditors of the demerged company M/s Triveni Engineering & Industries Ltd.

2. By the above application they have prayed for the recall of the order dated 9.9.2010 passed by me in Company Application No.15 of 2010 filed under Section 391/394 of the Companies Act, 1956 for accepting the scheme of arrangement annexed thereto between the aforesaid demerged company and the

resultant company Triveni Turbine Limited.

3. The court on the aforesaid application for acceptance of the scheme of arrangement, vide order dated 9.9.2010 had directed for convening meetings of the equity shareholders, secured and unsecured creditors of the demerged company in respect whereof notices were directed to be issued under certificate of posting and by publication in the two newspapers published from New Delhi and the other from Meerut so as to ascertain their wishes regarding the scheme of arrangement.

4. I have heard Sri Prashant Kumar, learned counsel for the applicants, Sri R.P. Agarwal, learned counsel for the demerged and resulting companies and the official liquidator as representative of Regional Director, North Region, Ministry of Corporate Affairs, NOIDA.

5. The submission of Sri Prashant Kumar is that the applicants have lodged three consecutive caveats in connection with of the filing of the above company application for accepting the scheme of arrangement but none of the above caveats were reported by the office of the court with the result applicants were denied opportunity of hearing before passing of the order dated 9.9.2010. He has further submitted that the demerged company as well as resulting company had the notice of the lodging of the caveats by the applicants but even then they have not chosen to serve notice/copies of the application before moving the same in the court. The demerged and resulting companies as such have not approached the court with clean hands. Accordingly, the order dated 9.9.2010 is liable to be recalled.

Sri R.P. Agarwal learned counsel for the demerged and resulting company to counter the above submissions, has argued that under the scheme of the Companies Act 1956 and the Company Court Rules, 1959 (hereinafter referred to as an Act & the Rules respectively, for short) the applicants have no right to be heard at the time of issuing directions for convening meetings and issuing notices as the initial proceedings under Section 391/394 of the Act are to be taken ex parte. The provisions of lodging a caveat existing under Section 148A C.P.C. and under Chapter 22 Rule 5 of the High Court Rules 1952 are not applicable to proceedings of such a nature under the Act. Therefore, the caveat was not even maintainable. If the office has inadvertently failed to report about the caveats of the applicants, no illegality has been committed. It is for this very reason even the demerged and resulting companies have not cared to serve the copy of the application/upon the applicants. The order dated 9.9.2010 causes no prejudice to the applicants even if passed ex parte and as such it is not liable to be recalled. In support he is relied upon a decision of the Supreme Court reported in **[2009] 147 Company Cases 677 Chembra Orchard Produce Ltd. and others vs. Regional Director of Company Affairs and another.**

6. A plain reading of Chapter XXII Rule 5 of the High Court Rules makes it abundantly clear that the same is applicable in connection with filing of writ petitions under Article 226/227 of the Constitution of India except for writs in nature of Habeas Corpus. The provisions

of Chapter XXII of the High Court Rules are not applicable in connection with any other proceedings before the court much less the proceedings of the nature as contemplated under the Act. Therefore, in my opinion, no caveat under Chapter 22 Rule 5 of the Rules can be lodged in respect of an application/proceedings under Section 391/394 of the Act.

7. Section 148A C.P.C. also gives a right to a person to lodge caveat where an application is expected to be made or has been made in a suit or proceeding instituted or about to be instituted in a court. This right has been given to a person who is claiming right to oppose such an application in a suit or any proceeding instituted or about to be instituted.

8. Now Rule 6 of the aforesaid Rules clearly provides that the provisions of the code which means Code of Civil Procedure, 1908 shall apply to all proceedings under the Act and these Rules. In other words by virtue of Rule 6 of the aforesaid Rules provisions of C.P.C. have been made applicable in respect of all proceedings taken by parties under the Act or under the aforesaid Rules. There is no dispute that an application for acceptance of the scheme of arrangement under Section 391/394 of the Act is in the nature of proceedings under the Act/Rules and as such the applicability of C.P.C. to such proceedings cannot be ruled out. Consequently, the provisions of Section 148A C.P.C. which entitles a party to lodge a caveat gets attracted enabling the party concern to lodge a caveat in respect of proceedings/applications under Section 391/394 of the Act.

9. In view of the above, I am of the opinion that a caveat can always be lodged in proceedings connected with the matters under the Companies Act/Rules under Section 148-A C.P.C. read with Rule 6 of the Rules but not under Chapter XXII Rule 5 of the Rules. Accordingly, caveat was maintainable and was rightly lodged by the applicants.

10. Now let me consider the question of entitlement of the applicants to get the order dated 9.9.2010 recalled.

11. In this connection Rule 67 of the Rules is relevant. It provides that an application under Section 391 of the Act for convening meetings shall be by a judges summons and the summons shall be moved ex parte provided certain conditions laid down in the Rule are fulfilled. It also provides the format of the summons. It means the motion for convening meetings by an application for acceptance of scheme of arrangement is to be moved ex parte. There happens to be no adversaries so as to oppose the motion. Any opposition to such a claim for acceptance of the scheme of arrangement is to be taken care of in the meetings itself. The issuance of notice and direction to convene meetings of the equity shareholders and secured and unsecured creditors as such happens to be an uncontested matter. The Court in directing for convening meetings and in issuing notices on such an application does not either adjudicate any rights of the parties or decides any controversy intersee which may cause prejudice to any of them. It is for this reason only that Rule 67 of the Rules contemplates that ex parte motion at the preliminary stage.

12. In **Chembra Orchard Produce Ltd. and others** (supra) the apex court has clearly laid down that if hearing is required to be given to contributors, creditors and shareholders at the initial stage in considering application under Section 391/394 of the Act the entire scheme would become unworkable and further that when Rule 67 of the Company Court Rules categorically states that summons for directions shall be moved ex parte the question of prejudice or rule of natural justice does not come into play. The moving of an application under Section 391/394 of the Companies Act is only a preliminary step and at that stage it is not necessary for the company to give notice of hearing to the creditors or the shareholders.

13. In view of the aforesaid ratio laid down by the Supreme Court interpreting the purpose and object of Rule 67 of the Companies Court Rules, when this court after due application of mind and on being prima facie satisfied about the genuineness of the two companies in submitting the scheme of arrangement directs for the issuance of notices and for holding of the meetings of the equity shareholders, secured and unsecured creditors, no caveatable interest accrues to anyone including the applicants in the present case.

14. In short the applicants have a right to lodge a caveat in connection with an application under Section 391 of the Act but have no caveatable interest entitling them to be heard at the above described preliminary stage.

15. The object of entering a caveat is to avoid ex parte orders and to afford opportunity of hearing to a person who is vigilant and wants to protect his rights by contesting the proceedings provided he has right to be heard. However, as discussed earlier the applicants have no right of hearing at the preliminary stage of issuing notice and directing for holding of meetings of the shareholders or the creditors for ascertaining their wishes regarding the proposed scheme of arrangement.

16. It is well settled that giving of opportunity of hearing or observance of principles of natural justice is not an empty formality and where despite affording opportunity the result is to remain the same, there is no purpose in giving notice or opportunity of hearing. An order passed in such a situation without notice to the other party as such causes no prejudice. It may be remembered that to sustain an allegation that the party concern has been denied opportunity of hearing one has to establish that prejudice was caused to him on account of non-observance of the principles of natural justice. However, no such prejudice has been established by the applicants.

17. In view of the above, I do not consider it to be a fit case for recalling order dated 9.9.2010 .

18. In the application no other ground for recalling the order dated 9.9.2010 has been made out.

19. The application is accordingly rejected with no order as to costs.

20. The court is noticing that in several cases lawyers are time and again complaining that the office has failed to report caveats. This reflects upon the

working of the office of the stamp reporter. Once the office of the stamp reporter has accepted a caveat and has entered the same in the register maintained for the purpose, it becomes a bounden duty of the office to submit a clear report in this connection on any cause which may be initiated in connection thereto. The non reporting of the filing of the caveat by the office is a serious thing which in some cases may affect the valuable right of a party and at least tends to caste a stigma on the working of the counsel. The court is thus, constrained to sound a note of caution to the stamp reporter to be careful in future while making reports with regard to the caveats.

21. The Registrar General is directed to call for an explanation of the office of the stamp reporter as to why the caveat lodged by the applicants in this case were not reported and to fix responsibility of the person concerned.

22. The court has also noticed tendency on part of the lawyers in receiving notice of the caveat and still not supplying copy of the applications/petitions to the counsel/person lodging the caveat and further in concealing the fact of knowledge of caveat. It undermines the nobility of the profession. Therefore, it needs to be tackled appropriately.

23. Let a note be made and placed by the registry in this connection on the administrative side for taking necessary appropriate steps to check the growth of such a menace.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.03.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE S.C. CHAURASIA, J.

Service Bench no. - 59 of 2004

Ram Shanker Shukla ...Petitioner
Versus
The State Public Service Tribunal U.P. Lko. through Its Registrar ...Respondent

Counsel for the Petitioner:
R.S.Pandey

Counsel for the Respondent
C.S.C.

Constitution of India-Article 226-punishment-major punishment by reducing 25% pension-awarded by disciplinary authority-taking different view than-report of enquiry officer-No opportunity of hearing or giving explanation given-in view of law laid down by Apex Court in Yoginath Bagde-if disciplinary authority differ from enquiry report before awarding punishment opportunity of hearing must-Tribunal failed to consider this aspect-order not sustainable.

Held: Para 11

In the present case, a perusal of the show cause notice at the face of record shows that the disciplinary authority formed an opinion without serving a prior notice containing the points with regard to difference of opinion with the enquiry officer. Thus, reasonable opportunity was not provided by the disciplinary authority to the petitioner to advance his argument and make representation with regard to tentative difference of opinion formed by the disciplinary authority. The purpose of service of notice containing the

difference of opinion as observed by the Hon'ble Supreme Court is to give an opportunity to the delinquent employee to pursue his case before the disciplinary authority with regard to tentative opinion formed by him against the opinion of the enquiry officer. A combined notice with pre-determined mind and with finding of guilt along with show cause notice with regard to proposed punishment does not fulfill the requirement of law as propounded by the Hon'ble Supreme Court. There must be separate notice with regard to tentative opinion formed by the disciplinary authority and for the purpose of punishment with due opportunity of hearing in terms of law settled by Hon'ble Supreme Court. The tribunal has failed to discharge its obligation in accordance with the settled proposition of law.

Case law discussed:

(1997)7 SCC 739; 2008(4) ALJ 481; [2011(1) ADJ 762 (DB)]; (1993)2 SCC 49; (1993(2 SCC 55; (1993) 2 SCC 56.

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

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

2. Present writ petition under Article 226 of the Constitution of India has been preferred against the impugned judgment dated 5.7.2000, passed by the State Public Services Tribunal, Indira Bhawan, Lucknow in Claim Petition No.2027 of 1997 Ram Shanker Shukla versus State of U.P. and others.

3. In brief, the petitioner, who was a Tehsildar promoted on the post of Deputy Collector from 12.11.1986, was served with two charge-sheets dated 22.8.1989 and 28.8.1989. After enquiry, the enquiry officer submitted a report exonerating the petitioner with regard to the charges. On the report dated 2.4.1992 being placed before the disciplinary authority, he was not agreed with the finding recorded by the enquiry officer. He served a show cause notice dated 11.2.1994 seeking reply as to why 25% of the pension may not be reduced as a measure of punishment. The petitioner submitted a reply but of no avail and he was punished accordingly. The punishment awarded by the disciplinary authority was subject matter of dispute before the tribunal.

4. The petitioner took two-fold pleas before the tribunal. Firstly, no finding could have been recorded by the disciplinary authority on the judicial order while discharging his obligation to award punishment and secondly, the petitioner took a plea that the impugned order of punishment was passed in violation of principle of natural justice. It was stated by the petitioner before the tribunal that the disciplinary authority has not issued a notice containing point of disagreement with the enquiry officer and straightway a show cause notice was issued referring the difference and intention to award punishment with reduction of 25% of pension. The tribunal recorded a finding that the notice dated 11.2.1994 is a combined notice which also contains the difference expressed by the disciplinary authority as well as the show cause with regard to proposed punishment.

5. While assailing the impugned order, it has been submitted by the petitioner's counsel that firstly, the disciplinary authority should have given finding after seeking reply from the petitioner on the difference of opinion from the enquiry officer and only thereafter, the show cause notice with regard to proposed punishment could

have been given. Learned counsel for the petitioner has relied upon the cases reported in **(1999)7 SCC 739 Yoginath D. Bagde versus State of Maharashtra and another, (1998)7 SCC 84 Punjab National Bank and others versus Kunj Behari Misra, 2008(4) ALJ 481 O.N. Srivastava versus Punjab National Bank and others and [2011(1)ADJ 762 (DB))] V.K. Pathak versus Food Corporation of India and others.**

6. With regard to the second submission that no finding could have been recorded on the judicial order while discharging obligation to award punishment, the petitioner's counsel has relied upon the cases reported in (1993)2 SCC 49 Union of India and another versus R.K. Desai, **(1993)2 SCC 55 V.D. Trivedi versus Union of India and (1993)2 SCC 56 Union of India and others versus K.K. Dhawan.**

7. Now coming to the first limb of argument, whether a combined notice could have been given by the disciplinary authority with regard to the proposed punishment and also referring the difference of opinion. In the case of **Yoginath D. Bagde** (supra), their Lordships of Hon'ble Supreme Court observed as under :

"28. In view of the provisions contained in the statutory rule extracted above, it is open to the disciplinary authority either to agree with the findings recorded by the enquiring authority or disagree with those findings. If it does not agree with the findings of the Inquiring Authority, it may record its own findings. Where the Inquiring Authority has found the delinquent officer guilty of the charges framed against him and the Disciplinary Authority agrees with those findings, there would arise no difficulty. So also, if the Inquiring Authority has held the charges proved, but the Disciplinary Authority disagrees and records a finding that the charges were not established, there would arise no difficulty. Difficulties have arisen in all those cases in which the Inquiring Authority has recorded a positive finding that the charges were not established and the delinquent officer was recommended to be exonerated, but the Disciplinary Authority disagreed with those findings and recorded its own findings that the charges were established and the delinquent officer was liable to be punished. This difficulty relates to the question of giving an opportunity of hearing to the delinquent officer at that stage. Such an opportunity may either be provided specifically by the Rules made under Article 309 of the Constitution or the Disciplinary Authority may, of its own, provide such an opportunity. Where the Rules are in this regard silent and the Disciplinary Authority also does not give an opportunity of hearing to the delinquent officer and records findings, different from those of the Inquiring Authority that the charges were established, "an opportunity of hearing" may have to be read into the Rule by which the procedure for dealing with the Inquiring Authority's report is provided principally because it would be contrary to the principles of natural justice if a delinquent officer, who has already been held to be 'not guilty' by the Inquiring Authority, is found 'guilty' without being afforded an opportunity of hearing on the basis of the same evidence and material on which a finding of "not guilty" has already been recorded.

31. In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the Enquiry Officer into the charges leveled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the Enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the Disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away by any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution.

34. Along with the show-cause notice, a copy of the findings recorded by the Enquiry Officer as also the reasons recorded by the Disciplinary Committee for disagreeing with those findings were communicated to the appellant but it was immaterial as he was required to show-cause only against the punishment proposed by the Disciplinary Committee which had already taken a final decision that the charges against the appellant were proved. It was not indicated to him that the Disciplinary Committee had come only to a "tentative" decision and that he could show cause against that too. It was for this reason that the reply submitted by the appellant failed to find favour with the Disciplinary Committee.

35. Since the Disciplinary Committee did not give any opportunity of hearing to the appellant before taking a final decision in the matter relating to findings on the two charges framed against him, the principles of natural justice, as laid down by a Three-Judge Bench of this Court in Punjab National Bank and Ors. v. Kunj Behari Mishra referred to above, were violated."

8. Thus, from the perusal of the aforesaid judgment of Hon'ble Supreme Court, it is evident that a delinquent employee has got right of hearing not only during enquiry proceedings conducted by the enquiry officer into the

charges levelled against him but also at the stage when findings were considered by the disciplinary authority and latter, namely the Disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the Enquiry Officer. Their Lordships further held that the right of hearing to the delinquent employee is a constitutional right and will be available to the delinquent employee up to the final stage. Meaning thereby, in the event of disagreement with the enquiry officer, it shall be incumbent on the disciplinary authority to serve a notice expressing the difference of opinion and after receiving the reply from the delinquent officer, the disciplinary authority may form final opinion after providing opportunity of hearing.

9. In the case of Kunj Behari Misra(supra), their Lordships of Hon'ble Supreme Court observed that whenever the disciplinary authority disagrees with the enquiry authority on any article of charges, then before he records his own finding on such charges, it must record a tentative reason for such disagreement and give the delinquent officer an opportunity to represent before it records its conclusive finding.

10. The other cases relied upon by the petitioner's counsel (supra) reiterate the aforesaid proposition of law with regard to service of notice indicating therein the difference of opinion by the disciplinary authority and only thereafter, a final decision may be taken.

11. In the present case, a perusal of the show cause notice at the face of record shows that the disciplinary authority formed an opinion without serving a prior notice containing the points with regard to difference of opinion with the enquiry officer. Thus, reasonable opportunity was not provided by the disciplinary authority to the petitioner to advance his argument and make representation with regard to tentative difference of opinion formed by the disciplinary authority. The purpose of service of notice containing the difference of opinion as observed by the Hon'ble Supreme Court is to give an opportunity to the delinquent employee to pursue his case before the disciplinary authority with regard to tentative opinion formed by him against the opinion of the enquiry officer. A combined notice with pre-determined mind and with finding of guilt along with show cause notice with regard to proposed punishment does not fulfill the requirement of law as propounded by the Hon'ble Supreme Court. There must be separate notice with regard to tentative opinion formed by the disciplinary authority and for the purpose of punishment with due opportunity of hearing in terms of law settled by Hon'ble Supreme Court. The tribunal has failed to discharge its obligation in accordance with the settled proposition of law.

12. So far as the submission of the petitioner's counsel based on certain judgments claiming protection under the Judicial Protection Act or any other law for the time being in force is concerned, that aspect of the matter shall be looked into by the disciplinary authority since we are of the view that the procedure adopted by the disciplinary authority while submitting the combined notice is not in conformity with the law settled by the Hon'ble Supreme Court (supra).

13. In view of above, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned

judgment dated 5.7.2000 passed by the State Public Service Tribunal as well as the impugned order dated 4.10.1995 with regard to punishment awarded for reduction from the petitioner's pension with liberty to the disciplinary authority to pass a fresh order keeping in view the observation made hereinabove. In case a decision is taken to pass fresh order, then the decision be taken expeditiously and preferably within a period of three months from the date of service of a certified copy of the present order.

14. The writ petition is allowed accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.03.2011

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE VEDPAL, J.

Special Appeal No. 211 of 2011

Smt. Rani Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

U.P. Police Subordinate Officers/employees (Punishment & Appeal) Rules, 1991-Rule 8(2) (b)-Dismissal by evoking Power u/s 8(2-B) of the Rules-on ground the delequinted employer might be in Jail-disciplinary Proceeding not possible-challenged by widow of deceased employee-dismissal on ground of delay-without considering this aspect the detention order was set-a-side by High Court-during pendency of criminal appeal her husband died-without considering the question of abatement-dismissal order can not sustain-but these facts could be decided only after having counter affidavit-writ restored on its original number with direction to consider the amendment of Petition and to pay the admissible amount due-even on existence of dismissal order-held-delay will not came in way of widow challenging the dismissal order of her husband in facts and circumstances of the case.

Held: Para 18, 19, 20 and 21

In view of the peculiar circumstances of the case, the Court held that the High Court was not justified in rejecting the prayer of the appellant primarily on the ground of delay and laches on the part of the appellant in questioning the order of termination passed on 4.8.1992 in a petition filed in the year 2005, after acquittal by Sessions Court in appeal.

In the instant case, there is one more aspect which requires consideration i.e. status of the employee, namely, the Constable Raj Kumar Singh for the purpose of passing of the order of dismissal from service, when he unfortunately died during the course of trial. If the trial was not completed before his death, the question of abatement would be taken into consideration and also that whether the dismissal order passed without taking into consideration the aforesaid fact, could be passed or sustained. Simply because at the time of passing of the dismissal order the person was in jail or on bail in pending criminal trial and the dismissal order was not challenged, that would not conclude the fate of disciplinary proceedings.

This apart, the dismissal order passed on 5.6.01 says that Raj Kumar Singh is in detention under National Security Act whereas his order of detention under the said Act was quashed by the High Court much before i.e. 16.10.2000.

Since all these questions arise in the writ petition, which could not be considered by the learned Single Judge in the absence of the counter affidavit filed by the State, we set aside the order passed by the learned Single Judge and remit

the matter to the learned Single Judge having jurisdiction to decide the matter afresh in accordance with law.

(Delivered by Hon'ble Pradeep Kant, J.)

1. Heard the learned counsel for the appellant Sri R.J. Trivedi and Sri Mukund Tiwari for the State.

2. This special appeal challenges the order dated 1.3.2011 passed by the learned Single Judge, dismissing the writ petition preferred by the appellant, Smt. Rani Singh, who is the widow of Constable Raj Kumar Singh.

3. In short, the facts of the case are that Constable Raj Kumar Singh while posted in P.A.C. was placed under suspension vide order dated 7.5.97 for the reason of a criminal case being lodged against him being Case Crime No. 280/97 under sections 452, 354, 506 IPC.

4. On 4.8.99 while under suspension he went to his hometown Barabanki on sanctioned leave of 15 days but he did not return for duty after the said period and continued to remain absent. In the meantime, he was charged in Crime No. 39/2000 under sections 302/307/504/506 IPC and on 26.2.2000 he was arrested on spot. He was detained under National Security Act also but later on, the High Court in writ petition filed by him being Writ Petition No. 416 (habeas corpus) of 2000, set aside the order of detention passed under National Security Act and directed for his release forthwith, if he was not wanted in any other case. This order was passed on 16.10.2000.

5. The dismissal order impugned in the writ petition and challenged before us in special appeal was passed on 5.6.01. The order of dismissal gives history of the criminal cases against the petitioner and then it says that since he was under detention under National Security Act, therefore, it is not possible to hold any enquiry. The order further says that the suspended Constable Raj Kumar Singh has remained completely involved in criminal offences, therefore, it is not possible for him to come outside the prison and there is no need to hold any enquiry.

6. After making the aforesaid observations, the appointing authority said that he is not a fit person to be retained as Constable in P.A.C. and, therefore, he being satisfied that no enquiry was needed, exercising powers under section 8(2)-B of the U.P. Police Subordinate Officers/Employees (Punishment & Appeal) Rules, 1991, passed the order of dismissal of Raj Kumar Singh from service.

7. It appears that husband of the petitioner did not challenge the aforesaid order for the reason that he might be waiting for the outcome of the criminal trial but in the meantime, as the luck could have it, he died on 4.4.05. The present petitioner, thereafter finding no relief from any quarter, approached this Court by filing a writ petition seeking the relief of quashing of the the order of dismissal of her husband from service and getting the post retiral dues and other dues to which she was entitled, being the widow of the deceased Constable.

8. Raj Kumar Singh, husband of the petitioner, did not challenge the order of dismissal though he remained alive for more than four years and the present writ

petition has been filed after six years of his death, by his widow.

9. Normally each day delay is to be explained, if the petition suffers from laches but in a matter like the present one, if the widow of the deceased employee (Constable), who was accused in a criminal case and against whom trial was pending, after his death has approached this Court finding that the order of dismissal from service was per se illegal and it is her right to get the post retiral dues and other dues being widow of the deceased government servant, a lenient view has to be taken and the petition need not be dismissed on the ground of laches alone.

10. It is a different matter that in a given case, where a government servant, may be Constable in a disciplined force, chooses not to challenge the order of dismissal from service and dies, if his dependant, may be widow or son intends to challenge the order of dismissal from service after unreasonable delay, perhaps there would be no occasion to entertain the same but circumstances of each case differ and the principle of unexplained laches has to be applied looking to the facts and circumstances of each and every case.

11. Here, in the instant case, husband of the appellant was earlier suspended because of criminal case being registered against him under sections 452, 354, 506 IPC and thereafter he went on leave. During the period of leave he was charged of committing offence under sections 302/307/504/506 and then he was also detained under National Security Act.

12. Incidentally, the order under National Security Act was set aside by the High Court on 16.10.2000. The dismissal order was passed thereafter on 5.6.01. The order of dismissal from services apparently was passed on incorrect facts and without taking into consideration the release orders passed by the High Court and without holding any enquiry.

13. The question, whether any enquiry was conducted or was required to be conducted need be decided by the learned Single Judge as at this stage it would not be appropriate for us to record any finding on this issue.

14. Since the rights of the appellant are directly in issue, therefore, not making challenge by the husband of the appellant against the order of dismissal would not divest her of her own right and, therefore, the view that if the husband of the petitioner did not challenge the order of dismissal, the appellant also cannot challenge the same, does not appear to be correct in the facts and circumstances of the present case.

15. In the case of ***Basanti Prasad v. The Chairman, Bihar School Examination Board and Ors. AIR 2009 SC 3162,*** the Superme Court considering almost the similar plea, observed, that where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere. However, if the delay is properly explained, and if the third party right is not going to be affected, the High Court may entertain the petition and consider the case of the aggrieved person on merits.

16. In the said case, services of the appellant's deceased husband were terminated on the ground that he was convicted by a Judicial Magistrate for certain offences under the provisions of Indian Penal Code.

17. The Court observed that the dismissal was in view of the order of conviction passed by the Magistrate and till that order is set aside by a superior forum, the appellant's husband or the appellant could not have questioned the same till he was acquitted by the Sessions Court.

18. In view of the peculiar circumstances of the case, the Court held that the High Court was not justified in rejecting the prayer of the appellant primarily on the ground of delay and laches on the part of the appellant in questioning the order of termination passed on 4.8.1992 in a petition filed in the year 2005, after acquittal by Sessions Court in appeal.

19. In the instant case, there is one more aspect which requires consideration i.e. status of the employee, namely, the Constable Raj Kumar Singh for the purpose of passing of the order of dismissal from service, when he unfortunately died during the course of trial. If the trial was not completed before his death, the question of abatement would be taken into consideration and also that whether the dismissal order passed without taking into consideration the aforesaid fact, could be passed or sustained. Simply because at the time of passing of the dismissal order the person was in jail or on bail in pending criminal trial and the dismissal order was not challenged, that would not conclude the fate of disciplinary proceedings.

20. This apart, the dismissal order passed on 5.6.01 says that Raj Kumar Singh is in detention under National Security Act whereas his order of detention under the said Act was quashed by the High Court much before i.e. 16.10.2000.

21. Since all these questions arise in the writ petition, which could not be considered by the learned Single Judge in the absence of the counter affidavit filed by the State, we set aside the order passed by the learned Single Judge and remit the matter to the learned Single Judge having jurisdiction to decide the matter afresh in accordance with law.

22. We further direct that all the post retiral dues or any other service dues which were admissible to the deceased employee even after the order of dismissal from service being passed, would be paid to be appellant on furnishing of the required legal heir certificate.

23. Liberty is also given to the appellant to amend the writ petition, if she is so advised.

24. The special appeal is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE NAHEED ARA MOONIS, J.

Civil Misc. Writ Petition no. 216 OF 2011

Kamal Nayan Singh ...Petitioner
versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Umesh Narain Sharma
Sri B.D. Mandhyan
Sri Satish Mandhyan
Sri Satyendra Kumar

Counsel for the Respondents:
C.S.C.

U.P. Government Servants (Punishment and Appeal) Rules 1999 Rule-4- suspension pending enquiry-does not involve punishment-charges not appears baseless-not require strict Judicial Review.

Held: Para 17

The judicial review of suspension order is permissible in the cases where any statutory conditions or limitation in exercise of the powers to suspend an employee, has been violated, or where the suspension is by way of substantive penalty without following the principles of natural justice. An order of suspension may also be challenged on the ground of malafides. Where the suspension is pending departmental enquiry as in the present case, it does not involve punishment. It only means temporary deprivation of the functions or the right to discharge his duties. It was not necessary to make a detailed enquiry, into the allegations of alleged misconduct, or to obtain the explanation of the employee before making such order. If the charges do not appear to be groundless, the discretion of the disciplinary authority to place the government servant under suspension does not admit a strict judicial review. These principles, on which an order of suspension can be subjected to challenge, have been settled in Ghous Mohd vs. State of Andhra Pradesh AIR 1957 SC 246; Khem Chand vs. Union of India AIR 1963 SC 687; Pratap Singh vs. State of Punjab AIR 1964 SC 72; State of Haryana vs. Hari Ram Yadav AIR 1994 SC 1262; Union of India vs. Udai Narain (1998) 5 SCC 535.

Case law discussed:
AIR 1957 SC 246; AIR 1963 SC 687; AIR 1964 SC 72; AIR 1994 SC 1262; (1998) 5 SCC 535.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard Shri Umesh Narain Sharma, learned counsel for the petitioner. The State is represented by the Standing Counsel.

2. The petitioner was serving as Regional Food Officer/Incharge District Supply Officer, Gorakhpur. He has been placed under suspension by the Commissioner, Food and Civil Supplies, U.P. Lucknow by the order dated 8.12.2010, giving rise to this writ petition, for quashing the suspension order and for a writ of mandamus not to give effect to the suspension order, received by the petitioner on 12.12.2010.

3. The substance of allegations against the petitioner, on which he has been suspended, are that in between April, 2009 to April, 2010 the State Government allocated 3240 kilo litres of kerosene oil to District Gorakhpur, in addition to the allocations already made for the district. The petitioner, instead of distributing the kerosene oil in all the seven Tehsils, allotted the additional quota only in four Tehsils. He made allocations only to four whole sale dealers as against 16 in the district. The kerosene oil was distributed without verifying the previous distribution; the arrivals in the stocks of the whole sale dealers; and in making allocations to the whole sale dealers of oil companies beyond their storage capacity, thereby misusing the allocation and in not keeping effective control over the subordinate staff of his office, committing gross irregularities in discharging his duties.

4. On the first hearing of the writ petition, the suspension order was challenged on the ground that no notice or opportunity was given to the petitioner. He had not committed any misconduct and irregularity in distribution of additional quota of kerosene oil, and was not involved in the fact finding enquiry, which was completed on 20.7.2010, whereas the order of suspension was passed five months' later on 8.12.2010. It was submitted that no charge sheet has been served upon the petitioner, nor any follow up action has been taken and thus the order virtually amounts to punishment.

5. Shri Umesh Narain Sharma and Shri B.D. Mandhyan appearing for the petitioner thereafter justified the distribution. They submit that the distribution was made strictly in accordance with the demand and particularly in those Tehsils, which were affected by the floods. The additional allocation was made by the State Government to be supplied by only a few oil companies of which the whole sellers were allotted the quota for distribution.

6. A supplementary affidavit was filed on 4.2.2011 alleging that in pursuance to the letter issued by the Commissioner, Food and Civil Supplies dated 8.12.2010, the District Magistrate, Gorakhpur issued the letters on 14.12.2010 and 16.12.2010 to Sub Divisional Magistrates of all the seven Tehsils out of which the Sub Divisional Magistrates of Tehsils Sadar; Chauri Chaura; Sahjanwa; and Campairganj informed by their letters dated 27.12.2010, 28.12.2010, 30.12.2010 and 30.12.2010 that there were no irregularities regarding disbursement of the additional kerosene oil, and on the basis of these reports, the District Magistrate, Gorakhpur by his letter dated 5.1.2011 informed the Commissioner, Food and Civil Supplies not to initiate any departmental action taken in the matter, against the concerned employees.

7. Shri Sharma submits that the District Magistrate, Gorakhpur by his letter dated 09.4.2009 had informed the Principal Secretary, Food & Civil Supplies, that the regular monthly quota of district Gorakhpur is 2736 kilo litre. According to the instructions issued by the State Government the non-LPG card holders are entitled to 05 litres of kerosene oil and LPG card holders are entitled to 03 litres kerosene oil per month on every card; there are 890475 ration cards in the district out of which 235475 are LPG ration cards. On the standard fixed by the State Government, a total of 3981 kilo litres of kerosene oil was required in the district, whereas only 2736 kero litres kerosene oil was allocated for the month. The district was affected by the rostering of the electricity on account of which there was increased demand from the consumers. The District Magistrate requested that the quota of the district should be increased from 2736 kilo litres to 3981 kilo litres kerosene oil and that for the month of April, 2009 at least 400 kilo litres of additional kerosene oil be allocated. A similar letter was sent on 23.6.2009 to the Under Secretary, Food and Civil Supplies Department, Government of U.P. Lucknow, for allocating at least 600 kilo litres kerosene oil for June, 2009. The District Magistrate repeated the demands for the months of June, July, August, September, October, December, 2009 and January, February, March & April, 2010 for additional

allocation of at least 600, 450, 600, 400, 450, 600, 600, 600, 550, & 500 kilo litres kerosene oil respectively.

8. The allocations made to the various districts from April, 2009 to January, 2010 collectively annexed to rejoinder affidavit, as Annexure-RA-2 shows that the district Gorakhpur was allocated additional quota of 156 kilo litres kerosene oil for April, 2009; 288 kilo litres for May, 2009; 228 kilo litres for July, 2009; 60 kilo litres for July, 2009; 254 kilo litres for September, 2009; 204 kilo litres for October, 2009; 216 kilo litres for December, 2009 and 228 kilo litres for January, 2010 respectively.

9. The petitioner has relied upon the letters of Sub Divisional Magistrate, Sadar dated 24.4.2009 and 10.7.2009 for allocation of 80 kilo litres and 60 kilo litres of additional kerosene oil in view of the geographical position of the villages in the district. For July, October, and December, 2009 the Sub Divisional Magistrate, Campairganj repeated the demand for additional quota of 100 kilo litres of kerosene oil. The Sub Divisional Magistrate also repeated the demand of at least 100 kilo litres of kerosene oil in addition to normal allocation for August, and December, 2009. The petitioner has referred to the letters of Sub Divisional Magistrate, Campairganj for additional demand of 80 kilo litres for January, March and April, 2010 and the letters of the Sub Divisional Magistrate, Gola dated 12.1.2009 surrendering 42 kilo litres of kerosene oil. It is submitted that the allocation was made for the areas for which the demand was raised, and that in some areas the additional quota was surrendered.

10. Learned Standing Counsel has filed counter affidavit of Shri Vijay Shanker Pandey, the present District Supply Officer, Allahabad. He has raised the issues regarding the non-verification of supplies made to some whole sale kerosene dealers and the allocation beyond their storage capacity. In paragraphs 8, 10 and 11 of the counter affidavit, it is stated that out of seven Tehsils, 19 blocks and 07 town areas, in which 16 whole sale kerosene oil dealers are operating, (09 of IOC, 03 of BPC, 01 of IBPC and 03 of HPC), only 04 whole sale dealers were allocated additional kerosene oil for which no reasons were given by the petitioner. The arrivals of 24000 litres on 4.4.2009; 12000 litres on 5.4.2009; 12000 litres on 10.7.2009 and 6000 litres on 16.6.2009 in the stocks of M/s Eastern U.P. Traders, Kushnahi Bazar was not verified by the petitioner. The storage verification in some cases was done beyond the storage capacity of the dealers. The Special Enquiry Team inspected the relevant records and the arrivals of 84000 litres kerosene oil. M/s Eastern U.P. Traders, Kushnahi Bazar- authorized dealer of BPC had storage capacity of only 4000 litres, whereas the arrivals of 84000 litres were verified in his stocks which included the quantities detailed as above. In some cases a verification was made of the arrivals of kerosene oil of huge quantities of same day, namely on 27.11.2009 and 26.12.2009, contrary to the procedure of unloading of kerosene oil in the Government Orders dated 2.6.2008 and 24.12.2008. Similarly M/s Jalan Enterprises, Kolia- authorized dealer of BPC also received 6000 litres of kerosene oil on 27.12.2009 while the sale of the dealer on 27.11.2009 was found to be nil

and only 1116 litres kerosene oil was left in the storage.

11. In paras 14 and 16 of the counter affidavit, it is stated that the petitioner was given full opportunity to give his explanation in the preliminary enquiry.

12. In reply Shri Vijay Shanker Pandey, District Supply Officer, Allahabad has stated in supplementary counter affidavit that the District Magistrate had raised the demand of additional kerosene oil from April, 2009 to April, 2010 for the entire district on the ground that the entire district was affected by the rostering of electricity supply. There was great resentment among the public due to non-supply of adequate kerosene oil. The Special Enquiry Team constituted by the Food Commissioner found that the additional kerosene oil was not distributed equally in the entire district. It was confined only to four Tehsils. The petitioner was given an opportunity to explain to the Special Enquiry Team whether he had informed all the concerned Sub Divisional Magistrate about the additional allocation of kerosene oil.

13. From the aforesaid facts, we find that the petitioner, as incharge of the distribution of kerosene oil in the district, had prima facie failed to carry out his responsibilities. There was a great demand of kerosene oil (a heavily subsidised essential commodity) in the entire district. The District Magistrate did not confine the demand into any particular area. It was for the petitioner to have taken adequate and sufficient measures for equal distribution of the additional quota in all the 07 Tehsils, including 19 blocks; and 07 town areas in the district. The petitioner appears to be satisfied with some letters received from some Sub Divisional Magistrates with regard to the sufficiency of the distribution and allocated the quota 04 out of 16 dealers which was in turn distributed in only 04 Tehsils.

14. The distribution of essential commodities through Public Distribution Scheme is made to various categories of consumers. The State Government has fixed separate quotas of the kerosene oil for the card holders, who have LPC connection, and those, who do not have LPG connection. On account of rostering of electricity, floods and severe winters, the distribution was required to be made equally to all the card holders in accordance with their entitlement. The submissions made by Shri U.N. Sharma, that if the distribution of additional quota was made in the entire district, each card holder would have got only a few mili litres of kerosene oil in addition to the normal quota and consequent distribution only in a part of district, overlooks the object of the distribution of the scheduled commodities through the Public Distribution System. It is not the question of small quantity but of equal distribution of subsidised scheduled commodities to be made by the officers, who are made responsible for it. The petitioner has not given any good reasons on record in the writ petition, challenging the suspension order to justify the distribution only in a few Tehsils, and through a few whole sale dealers only. He will also have to explain in the departmental enquiry as to why he did not verify the arrivals of stocks with the whole sale dealers and stocks were allowed in their account beyond their storage capacity.

15. The suspension order is based upon the allegations, without making any enquiry. A special enquiry team had verified the arrivals and distribution and had given opportunity to the petitioner to explain the unequal distribution of the kerosene oil in the district. It is only after the special enquiry team reported the irregularities that the petitioner has been placed under suspension.

16. We are not impressed by the argument, that under the proviso to Rule 4 of the UP Government Servants (Punishment and Appeal) Rules, 1999, the allegations, even if established, will not attract major penalty. Prima facie the allegations of misconduct in the suspension order, do not suggest that on their proof a major penalty cannot be given to the petitioner.

17. The judicial review of suspension order is permissible in the cases where any statutory conditions or limitation in exercise of the powers to suspend an employee, has been violated, or where the suspension is by way of substantive penalty without following the principles of natural justice. An order of suspension may also be challenged on the ground of malafides. Where the suspension is pending departmental enquiry as in the present case, it does not involve punishment. It only means temporary deprivation of the functions or the right to discharge his duties. It was not necessary to make a detailed enquiry, into the allegations of alleged misconduct, or to obtain the explanation of the employee before making such order. If the charges do not appear to be groundless, the discretion of the disciplinary authority to place the government servant under suspension does not admit a strict judicial review. These principles, on which an order of suspension can be subjected to challenge, have been settled in **Ghous Mohd vs. State of Andhra Pradesh AIR 1957 SC 246; Khem Chand vs. Union of India AIR 1963 SC 687; Pratap Singh vs. State of Punjab AIR 1964 SC 72; State of Haryana vs. Hari Ram Yadav AIR 1994 SC 1262; Union of India vs. Udai Narain (1998) 5 SCC 535.**

18. The petitioner has not made out any good ground to challenge the suspension order. The petitioner as incharge District Supply Officer, was responsible for equal and equitable distribution of additional quota of kerosene oil in the district and to maintain the supplies for all the eligible citizen holding ration cards for entitlement of such distribution. Prima facie the allegations are not of such nature on which the powers of suspension could not be invoked. No other point was pressed.

19. The writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.03.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE SUDHIR AGARWAL, J.

Service Bench No. - 251 of 2009

Dr. S.P. Mittal ...Petitioner
Versus
State Of U.P. Thru Prin. Secy. Education and others ...Respondent

Counsel for the Petitioner:
Sri Sunil Sharma

Counsel for the Respondent:
C.S.C.

Constitution of India, Article 226-claim of medical reimbursement-kept pending for two years-on pertext original bill vouchers misplaced-upon direction of court it processed and payment given but without disclosing the name of guilty officer-no explanation given except order complied with-held-court can not sit as an idle-direction to pay 10% interest per annum on withheld amount with exemplary cost of Rs. 50000/-with liberty to recover from personal benefits of erring officer.

Held: Para 40, 41 and 42

In view of above discussion and considering the fact that genuine, valid and just claim of petitioner remained unattended before the respondents for almost two years and more, we find it a fit case where respondents must be saddled with responsibility of payment of interest on the aforesaid amount and also to pay exemplary cost to petitioner for causing harassment to him to an extent of compelling him to invoke extraordinary jurisdiction of this Court by filing writ petition traveling all along in this old age from Delhi to Lucknow.

In the above facts and circumstances, writ petition is disposed of directing the respondents to pay interest on the amount of medical reimbursement paid to the petitioner pursuant to order dated 12.2.2009, at the rate of 10% p.a. from the date of recommendation dated 21.2.2007 till actual payment.

Respondents shall also pay cost to petitioner quantified to Rs. 50,000/- (Rupees fifty thousand).

Case law discussed:

AIR 1979 SC 49; JT 2009 (13) SC 643; 2009 (2) SCC 592; JT 2007(3) SC 112; AIR 1979 SC 429; AIR 2006 SC 182; AIR 2006 SC 898; (2007) 9 SCC 497; (2009) 6 SCALE 17; (2009) 7 SCALE 622; JT (2009) 12 SC 198; 1972 AC 1027; 1964 AC 1129; JT 1993 (6) SC 307;JT 2004 (5) SC 17; (1996) 6 SCC 530; (1996) 6 SCC 558; AIR 1996 SC 715.

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard Sri Sunil Sharma, learned counsel for petitioner and learned Standing Counsel for respondents.

2. Petitioner has sought writ of mandamus commanding the respondents to pay medical reimbursement of Rs. 17,146/- and 6,570/- along with interest without insisting on the original medical vouchers and further to conduct a high level enquiry to find out the person responsible for loss of original bill vouchers.

3. The facts, in brief, giving rise to the present dispute are as under.

4. Petitioner, Dr. S.P. Mittal, retired from the post of Director of Education, U.P. on 31.7.1990 having attained the age of superannuation. After retirement, he settled at Delhi and having exercised his option, which has been accepted by the respondents, he is drawing pension at Delhi through Pay and Accounts Office, U.P. Bhawan, New Delhi. Presently, petitioner is above 78 years of age. He and his wife are chronic patients of Diabetes and Asthma, hence, undergoing regular medical treatment at Delhi. The medical reimbursement claim of petitioner and his wife used to be examined and countersigned by Addl. Director, Medical Health, Meerut Region, Meereut whereafter the payments are made by Senior Pay and Accounts Officer, U.P. Shasan at Delhi (wherefrom he is receiving his pension).

5. For reimbursement of medical bills for the period 1.7.2006 to 31.12.2006, requisite documents/original vouchers were submitted by petitioner to

the competent countersigning authority who after technical examination thereof, forwarded the same to the Government vide letter dated 21.2.2007 recommending for payment of Rs. 17,146/- for the petitioner's medical bills and Rs. 6,570/- for petitioner's wife's bills. The Deputy Secretary, U.P. Government sent letter dated 6.9.2007 addressed to the Addl. Director, Meerut Region, Meerut stating that medical reimbursement claim recommendation in regard to Dr. S.P. Mittal and his wife Smt. Savita Mittal are being returned since the same have been furnished without recommendation of Regional Medical Board/Provincial Medical Board. Petitioner, thereafter, had to appear before State Medical Board on 25.10.2007. The Provincial Medical Board consisted of the Director General, Medical and Health Service, U.P. Lucknow as Chair Person, Chief Medical Officer, Lucknow as Secretary of the said Medical Board and Head of Department, Opthalmology, Medical College, Lucknow as Member. The Board verified medical claim of petitioner and his wife for payment vide certificate dated 25.10.2007/22.11.2007, copy whereof has been placed on record as Annexure 2 to writ petition.

6. The matter remained pending with Government.

7. Again on 17.3.2008, the Special Secretary, U.P. Government, sent a letter to the Director of Education stating that in view of the Government Order dated 11.2.2008, as per the new procedure, medical bills relating to treatment obtained outside State of U.P. has to be sanctioned by the competent sanctioning authority and, therefore, a decision at the level of Director of Education was required to be taken. The aforesaid letter of the Government was transmitted to Directorate of Education, U.P. Allahabad from the Camp Office of Deputy Director of Education, Lucknow with request to take appropriate decision on the medical reimbursement claim of petitioner and his wife expeditiously.

8. The Director of Education sent a letter dated 6.8.2008 to the Deputy Secretary, U.P. Government (Education), Lucknow that alongwith Government Order dated 17.3.2008, original bill vouchers of medical claim as also the photocopy of Government Order dated 11.2.2008 were not received and, therefore, the said documents be forwarded at the earliest for further action.

9. In the meantime, since the matter was pending for more than one and half years, petitioner sent a representation dated 9.9.2008 to Chief Secretary, U.P. Government, brining to his notice petitioner's frustration and predicament as also harassment due to non clearance of medical claim. The quantum of medical claim might have been a petty amount for the authorities but of substance for the retired official and his family.

10. Thereafter U.P. Government (Education Section) issued a letter on 29.9.2008 requiring the Directorate of Education (Secondary) to make search of requisite documents, i.e., original bill vouchers and Government Order and, then to take action as desired and take appropriate steps expeditiously. It also says that for loss of documents and delay, responsibility be fixed on the person concerned and department be informed accordingly.

11. In turn, the Director of Education vide letter dated 15.10.2008 reiterated that documents are not available. It also mentioned that Dr. Mittal has sought information under Right to Information Act, hence, the documents namely original bill vouchers and copy of Government Order dated 11.2.2008 be furnished to Director of Education earliest for appropriate steps.

12. It is at this stage, the petitioner has approached this Court by means of this writ petition.

13. While entertaining this matter, on 12.2.2009 this Court passed the following order:

"Learned Chief Standing Counsel who has accepted notice on behalf of opposite parties prays for and is allowed two weeks' time to file counter affidavit, one week then for the rejoinder affidavit. List immediately thereafter on 18.03.2009.

The petitioner who retired from the post of Director of Education on 31.7.1990 has applied for medical reimbursement of Rs. 23,716/- in lieu of medical treatment, imparted to him and his wife. The State Government has recommended on 17.3.2008 for the dues in question as medical reimbursement but even then, the matter is hanging with the Deputy Director of Services. In spite of lapse of almost nine months, the medical dues have not been reimbursed to the petitioner, though the State Government has already forwarded necessary papers with due recommendations to the competent authority. It is unfortunate on the part of the opposite parties.

Accordingly, the Director of Education is directed to look into the matter and ensure that the entire dues are paid by 18.3.2009. He shall also hold an enquiry as to why the entire dues have not been paid to the petitioner in spite of the recommendations of the State Government and shall take appropriate action against the officers who are at fault in not reimbursing the medical dues and submit a compliance report to this Court by the next date of listing. In case the dues are not paid, the opposite party No. 2 shall appear in person on the next date of listing. This Court may consider to impose cost as well as payment of interest on the authorities who are at fault in not reimbursing the medical dues."

14. Having no option, respondents immediately took steps for payment of above said medical claim and a treasury cheque bearing no. 006392 dated 27.2.2009 of Rs. 23,716/- was issued to petitioner satisfying his medical claim for the period 1.7.2006 to 31.12.2006.

15. This is how the petitioner could get the medical reimbursement after more than two years and that too only when he filed the present writ petition wherein this Court, taking strict view of the matter, passed order on 12.2.2009 as said above.

16. So far as direction given by this Court with respect to enquiry is concerned, a copy of alleged enquiry report submitted by Sri Krishna Mohan Tripathi, Director of Education (Secondary), U.P. dated 3.3.2009 has been placed on record as Annexure 5 to the writ petition, which simply states that delay occurred due to loss of original bill vouchers for which department continued in correspondence, hence, there was no

deliberate delay. Evidently, respondent no. 2 did not find any one responsible for delay in reimbursement of medical claim i.e. after more than two years and felt satisfied that it was such an ordinary thing that no person be identified as responsible for delay. It is not his case that the amount has been paid to the petitioner after searching out original medical bill vouchers but he says that payment has been made pursuant to this Court's order dated 12.2.2009.

17. Learned Standing Counsel submits that since the payment has now already been made, therefore, this writ petition be dismissed having rendered infructuous.

18. Sometimes, when a claim is satisfied, this Court pass order consigning the record of writ petition having rendered infructuous, but we are of the view that the present one is not a case of such a nature where mere on this account, the matter deserves to be dropped. An aged retired employee and his wife have been made to suffer financially and otherwise in respect to a claim for which they had already incurred expenses. Their right of reimbursement is not in doubt, yet in the bureaucratic jargon the respondents kept the matter unattended for years together keeping the petitioner to run from one to other office, but nothing impressed upon the respondents to end his misery. So much so that the petitioner was compelled to file this writ petition traveling althrough from Delhi to Lucknow and only thereafter, the payment has been made. Is it what expected from a model employer or from a welfare State?

19. Moreover, the conduct of the respondent is also disturbing. The respondents are bold enough not to hold anybody responsible for the alleged loss of documents which they have made sheet anchor of their defence to extra ordinary delay in reimbursement of medical claim of petitioner. None has been identified for this negligence and none has been proceeded against. The Director of Education (Secondary) has taken entire things so lightly that even Court's order directing for enquiry has been tried to render futile by submitting that delay occurred due to loss of original bill vouchers and there is no deliberate delay. Why long drawn correspondence and that too with interval of months together continued though the payment could have been made to the petitioner even without original vouchers as has actually been done ultimately. Has neither been explained in the alleged enquiry report dated 3.3.2009 nor by the learned Standing Counsel since nothing has been said in the counter affidavit on this aspect. We have no hesitation in observing that enquiry report dated 3.3.2009 is wholly vague, sketchy and shows total apathy and a careless attitude of respondents in such matters.

20. The manner in which petitioner has been dealt with shows the highest degree of apathy on the part of respondents. We express our strongest condemnation and displeasure for such attitude and conduct on the part of respondent and in particular respondent no. 2. We enquired from learned Standing Counsel if payment could have been made without having original vouchers on 18.3.2009, why the same could not be done earlier to which he could not forward any explanation. The only thing evident from counter affidavit is that Court's order had to be complied with and

that is why payment was made immediately and this time respondents did not find the alleged loss of vouchers a reason for non reimbursement.

21. Here is not a case where anything was lacking on the part of petitioner. If the documents were lost, it was from the possession of respondents. Without holding any person responsible for such recklessness, where important documents form Government officials custody have lost, the respondents could not have left the matter in lurch in such a way. But they have done so.

22. We have no manner of doubt to infer from all these facts that entire lapses are being ignored collusively in which respondents 1 and 2 are also party.

23. Admittedly, there is no dispute about the genuineness of claim of petitioner or his entitlement for reimbursement or that he did not submit all requisite documents and completed the formality at his end. In the circumstances, non reimbursement of medical claim for such a long time is ex facie illegal, arbitrary and travels in the realm of malice in law.

24. The Apex Court has summarised "malice in law " in **(Smt.) S.R.Venkatraman Vs. Union of India and another, AIR 1979, SC 49** as under :

"It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para 8)

25. The Apex Court further in para 9 of the judgment in **S.R. Venkatraman (supra)** observed:

" 9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

26. In **Mukesh Kumar Agrawal Vs. State of U.P. and others JT 2009 (13) SC 643** the Apex Court said :

" We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved."

27. In **Somesh Tiwari Vs. Union of India and others 2009 (2) SCC 592** dealing with the question of validity of an order of transfer on the ground of malice in law , the Apex Court in para 16 of the judgment observed as under:

"16. .... Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal."

28. In **HMT Ltd. and another Vs. Mudappa and others JT 2007(3) SC 112** the Apex Court in paras 18 and 19 defined malice in law by referring to *"Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:*

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse'. In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others."

"19. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."

29. In brief malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-est or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. **[See Manager Govt. Branch Press and another Vs. D.B.Belliappa AIR 1979 SC 429; Punjab Electricity Board Vs. Zora Singh and others AIR 2006 SC 182; K.K.Bhalla Vs. State of U.P. and others AIR 2006 SC 898; P. Mohanan Pillai Vs. State of Kerala and others (2007) 9 SCC 497; M.P.State Corporation Diary Federation Ltd. and another Vs. Rajneesh Kumar Zamindar and others (2009) 6 SCALE 17; Swarn Singh Chand Vs. Punjab State Electricity Board and others (2009) 7 SCALE 622 and Sri Yemeni Raja Ram Chandar Vs. State of Andhra Pradesh and others JT (2009) 12 SC 198].** The inaction and laxity in this case, in our view, is malicious, if not in fact then in law.

30. Having said so, we are also of the view that withholding of lawful dues of Government employees for years together is not only illegal and arbitrary but a sin, if not an offence, since no law has declared so. The officials, who are instrumental in such delay causing harassment to the employees concerned, must feel afraid of committing such a sin.

Unfortunately, they do not . The skin of the authorities has got so thick that the misery of even old people does not touch them.

31. In our system, the Constitution is supreme. The real power, however, vest in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee and that too a retired, old and sick person.

32. The respondents are "State" under Article 12 of the Constitution of India. Its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions, oppressively, are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting, mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant, unlawful inaction or illegal exercise of power on the part of the public functionaries.

33. Regarding harassment of a common man, referring to observations of Lord Hailsham in **Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and Lord Devlin in **Rooks Vs. Barnard and others 1964 AC 1129,** the Apex Court in **Lucknow**

Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307 held as under:

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

34. The above observations as such have been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.**

35. The respondent-authorities appears to have taken an attitude that in whatever and whichever manner they work, nothing can happen to them. They are immune from all kind of censures, commands and adverse action. In effect, the attitude is of total lack of accountability. We feel that in the welfare State, one cannot be absolved from the principle of institutional accountability where its action or omission has caused an avoidable harassment to a person and in particular a citizen of this Country and more particular a retired and aged employee of the State. Nobody can dare to say that I can keep a claim unattended as along as I like and nobody can call upon me to function in a time bound manner or fix my responsibility. The power vested in authorities is for the benefit of individual(s) or a group, and the public at large and has to be exercised in a reasonable manner, else, it may result in travesty of justice which this Court cannot permit.

36. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

37. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

38. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

39. In **Delhi Development Authority Vs. Skipper Construction**

and Another AIR 1996 SC 715 has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

40. In view of above discussion and considering the fact that genuine, valid and just claim of petitioner remained unattended before the respondents for almost two years and more, we find it a fit case where respondents must be saddled with responsibility of payment of interest on the aforesaid amount and also to pay exemplary cost to petitioner for causing harassment to him to an extent of compelling him to invoke extraordinary jurisdiction of this Court by filing writ petition traveling all along in this old age from Delhi to Lucknow.

41. In the above facts and circumstances, writ petition is disposed of directing the respondents to pay interest on the amount of medical reimbursement paid to the petitioner pursuant to order dated 12.2.2009, at the rate of 10% p.a. from the date of recommendation dated 21.2.2007 till actual payment.

42. Respondents shall also pay cost to petitioner quantified to Rs. 50,000/- (Rupees fifty thousand).

43. The aforesaid amounts shall be determined and paid to petitioner within two months from the date of production of a certified copy of this order.

44. The aforesaid amount, at the first instance, shall be paid by respondent no. 1. However, respondent No.1 shall be at liberty to recover above amount of interest and cost paid to petitioner under this order from the official(s) concerned, who is/are found responsible for extra ordinary delay in payment of medical reimbursement to the petitioner, after such inquiry as is required in law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.03.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
HON'BLE SUDHIR AGARWAL, J.

First appeal from order no. - 699 of 2003

Smt. Premwati and another ...Petitioner
Versus
Shiv Shanker and 2 others ...Respondent

Counsel for the Petitioner:
Sri A.K. Katiyar

<u>Motor Vehicle Act, 1988</u>-Section-166-decreased 21 years old girl-no denial of accident-tribunal award Rs. 1 Lac towards Compensation-under second schedule-noticed monthly income fixed Rs. 3000/- per month-after deduction of 1/3 her annual income would be 24,000/-if 17 multiplier given-amount should come Rs. 408000/-person includes boy or girl-without any discrimination appeal for enhancement allowed accordingly.

Held: Para 10

In view of above, we are of the view that even notional income should not be less than Rs. 3000/- per month. Accordingly,

in case the income of deceased is assessed at the rate of Rs. 3,000/- per month and 1/3rd is deducted in lieu of personal expenses, the net income shall be Rs. 2000/- per month, i.e., Rs. 24,000/- per year. Since the deceased was aged about 21 years, the multiplier of 17 should be applied while assessing the income. The total compensation should be come to Rs. 4,08,000/-, loss of estate Rs. 5,000/- and funeral expenses Rs. 2,500/-. The total compensation now is 4,15,500/-. Interest awarded by the Tribunal is also too less to approve and enhanced to 8%.

Case law discussed:

2008(3) ALJ 612; 2010(28) LCD 1786.

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

1. Heard learned counsel for the appellant as well as learned counsel for the respondents and perused the record.

2. This appeal under Section 173 of Motor Vehicle Act, 1988 is against the judgment and award dated 03.09.2003 passed by Motor Accident Compensation Tribunal/Additional District Judge of Court No. 2 in Motor Accident Case No. 193 of 2002.

3. One Km. Vijay Laxmi, aged about 21 years old happens to be daughter and only child of claimant-appellants suffered an accident from Vehicle No. U.P. 30 A 5139 on 05.05.2002. When Km Vijay Laxmi was coming to her residence at Village Khemipur and crossing the road a Jeep No. UP 30 A 5139 driven rashly and negligently hit the girl and in consequence thereof she suffered and succumbed to the injury. A first information report was lodged with regard to accident in question. The claimant-appellants approached the Tribunal claiming compensation under Section 166 of Motor Vehicles Act to the extent of Rs. 10,00000/-(ten lacks). The Tribunal framed issues with regard to accident, rash and negligent driving, driving licence etc. and has recorded a finding that the accident was occurred from the Jeep in question when the deceased was crossing road to reach her house. There appears to have no dispute with regard to accident in question. The respondent-Insurance Company has also not filed any cross appeal challenging the finding recorded by Tribunal.

4. The solitary question involved in the present case is with regard to enhancement of compensation. Though the tribunal has recorded a finding that in case the sole child of claimant-appellants would have survive she would have been helpful for them during passage of time. However, Tribunal has granted compensation to the tune of Rs. 60,000/- with interest at the rate of 5%. It appears that the Tribunal has not taken note with regard to multiplier given in Second Schedule of Motor Vehicle Act. Though the multiplier given in Second Schedule is with regard to the cases filed under Section 163 A of the Motor Vehicles Act and it is always open to Tribunal to award just and proper compensation in terms of provision contained in Sections 166 read with 168 of Motor Vehicles Act but as a general practice throughout the country in pursuance to various pronouncement of Hon'ble Apex Court ordinarily, the multiplier given in Second Schedule of Motor Vehicles Act is followed, unless there is some different setup showing entitlement for higher compensation to meet the requirement of justness is established. Accordingly we are of the view that Tribunal should have applied the multiplier keeping the age of deceased

which is 21 years old in terms of Schedule II of the Motor Vehicles Act.

5. One of the argument advanced by learned counsel for the respondents is that being a girl no compensation should have been given in terms of multiplier and the fixed amount given by Tribunal is just and proper.

6. The argument advanced by learned counsel for the respondents and the finding recorded by Tribunal seems to be not sustainable. Whether the deceased, a 21 years old, was boy or girl, so far as parents are concerned for them both have equal importance. It may be noted that if a female child obtain same love and affection and serve their parents in same manner as a male child. We do not find any difference between made and female child. It is not necessary to give a reference to number of ladies who have served their parents up to mark and even better than the male child.

7. In view of Article 15 of the Constitution of India, there cannot be discrimination on the ground of religion, race, caste, sex or, place of birth. Under Section 11 of the Indian Penal Code, the word, "person" includes, male and female both. According to Sout's Judicial Dictionary of Word and Phrases, [7th Edn., on page 209], the word, "person" includes a corporation as well as a natural person, means male and female both. Section 163-A or Section 166 of Motor Vehicles Act deals with the payment of compensation in accidental matters. Any person who has sustained injury or the legal heirs, successors or dependents of a person who suffered accidental death may claim compensation in accordance with law under the Motor Vehicles Act. Whether it is the death of a male child or female child or a boy or a girl or a grown up lady or man, shall not make any difference. Awarding of lesser compensation in the event of death of a girl, shall amount to gender discrimination which is constitutionally prohibited.

8. Moreover, in the present case, it is pleaded by the appellant before the Tribunal that the monthly earning of deceased Km. Vijay Laxmi was about Rs.3,500.00 per month being engaged in embroidery and other works. The payment of fixed amount of Rs.60,000.00, seems to be not correct approach.

9. Accordingly due weight should have been given by Tribunal while awarding compensation even if the deceased is a girl without any gender discrimination. In the present case the deceased girl is of 21 years old died because of rash and negligent driving of the Jeep in question. For a person of 21 years age under Second Schedule multiplier of 17 should have been applied and in case the Tribunal has failed to assess the actual income, the notional income should be assessed for the purpose of payment of compensation. Though under the Second Schedule notional income has been given as Rs. 15000/- per year but Supreme Court in **Laxmi Devi and others Vs. Mohammad Tabbar and another, 2008(3) ALJ 612** held that Second Schedule of Motor Vehicles Act requires modification since after lapse of time it has lost its sanctity. This aspect of the matter has been considered by a Division Bench of this Court in **Guddi Singh and others Vs. Baboo and others, 2010(28) LCD 1786** and in para 15 the Court held as under:

"15. In the instant case, keeping in view the peculiar facts and circumstances of the case, the Tribunal has awarded a lump-sum compensation of Rs. 50,000/- without applying the multiplier and without taking into consideration the other factors, like age etc. The deceased Sri Nanhe Singh was aged about 40 years. Since no proof of income was submitted, the notional income will have to be taken as per the ratio laid down in the case of Laxmi Devi and others v. Mohammad Tabbar and another; 2008(2) TAC 394 (SC) where it was observed that the minimum income even notionally should not be less than Rs. 3000/- per month. Accordingly, in case the income of the deceased is assessed at the rate of Rs. 3000/- per month and 1/3rd is deducted in lieu of personal expenses, the net income shall be Rs. 2000/- per month i.e. Rs. 24,000/- per year. Since the deceased was aged about 40 years, multiplier of 15 will apply under Schedule II of Motor Vehicles Act. Thus, the compensation will come to Rs. 3,60,000/-. In addition, the claimants are also entitled for Rs. 2000/- as funeral expenses; Rs. 2500/- for loss of Estate and Rs. 5000/- as loss of consortium. Thus, total compensation comes to Rs. 3,69,500/- (Three lacs sixty nine thousand and five hundred)."

10. In view of above, we are of the view that even notional income should not be less than Rs. 3000/- per month. Accordingly, in case the income of deceased is assessed at the rate of Rs. 3,000/- per month and 1/3rd is deducted in lieu of personal expenses, the net income shall be Rs. 2000/- per month, i.e., Rs. 24,000/- per year. Since the deceased was aged about 21 years, the multiplier of 17 should be applied while assessing the income. The total compensation should be come to Rs. 4,08,000/-, loss of estate Rs. 5,000/- and funeral expenses Rs. 2,500/-. The total compensation now is 4,15,500/-. Interest awarded by the Tribunal is also too less to approve and enhanced to 8%.

11. In view of above, we are of the view that appellants shall be entitled for compensation to the tune of Rs. 4,15,5000/-. The impugned judgment and award dated 03.09.2003 passed by Tribunal stands modified accordingly. The appeal is accordingly allowed with the finding that appellants shall be entitled for compensation to the tune of Rs. 4,15,500/- (four lacs, fifteen thousand, fine hundred only), as calculated above, with simple interest at the rate of 8% per annum. The aforesaid amount shall be deposited in the Tribunal within two months from today and Tribunal shall proceed in terms of modified word (supra) expeditiously. The amount already paid to appellants shall be adjusted from the compensation enhanced by this Court. Appeal allowed accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.03.2011

BEFORE
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

U/S 482/378/407 No. - 919 of 2011

Smt. Ganga Chauhan @ Guga Chauhan and another ...Petitioner
Versus
State Of U.P. and another ...Respondent

Counsel for the Petitioner:
Rajiva Dubey
Mahendra Pratap Singh

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section 482-Summoning order in complain case on basis of affidavits of witnesses without following procedure under section 202(2) Cr.P.C.-held-great procedural illegality committed-order not sustainable.

Held: Para 11

If the mandatory provision of Section 202 of Cr.P.C. requires that the Magistrate shall examine the witnesses on Oath, the filing of affidavit by the eye witnesses can not be a substitute. Therefore, the Magistrate is under obligation and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 Cr.P.C. and non compliance of which would vitiate further proceedings. Under Section 200 Cr.P.C. the Magistrate has no option except to examine the complainant and the witnesses, if any, on oath. Thus in an inquiry into an offence by the court of a Magistrate under Section 202 Cr.P.C., the personal examination of the witnesses is compulsory and legally binding, filing of affidavit at the stage of Section of 202, Cr.P.C. is not permissible under the law. The impugned order of the Magistrate suffers from not following the mandatory provisions of sub-Section (2) of Section 202 of Cr.P.C.

Case law discussed:

1992 CRI.L.J. 1802.

(Delivered by Hon'ble Virendra Kumar Dixit, J.)

1. Heard learned counsel for the petitioners, learned A.G.A. for the State and perused the relevant papers on record.

2. Since the issue involved is based on legal premise which can be decided at this juncture hence the notice to the opposite party no.2 is dispensed with.

3. This application under Section 482 Cr.P.C. has been filed for quashing the impugned summoning order dated 02.02.2011 passed by the learned A.C.J.M., Court No. 30, Lucknow in Complaint Case No. 144 of 2010, under Sections 379,452,504 and 506 I.P.C., Police Station Hasanganj, District Lucknow.

4. Learned counsel for the petitioners submits that learned Magistrate did not record the statements of the witnesses under Section 202 Cr.P.C. and in lieu thereof he accepted the affidavits of witnesses Sunil Kumar and Onkar Nath Shukla under Section 202(2) Cr.P.C. which is not permissible under law. It is further submitted that it is no where provided under the Code of Criminal Procedure 1973 that the witnesses may file their affidavits in place of their statements under Section 202(2) Cr.P.C. It is further submitted that the Magistrate has committed gross illegality and procedural mistake and the impugned summoning order is liable to be quashed.

5. Learned A.G.A. has not raised any objection against the legal position submitted by learned counsel for the petitioner.

6. In order to appreciate the arguments of the learned counsel for the parties, the provisions of Section 202 Criminal Procedure Code 1973(hereinafter referred as Cr.P.C.) is reproduced as under:

202 (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance or which has been made over to him under Section 192, may, if he thinks fit [and

shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,-

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complaint and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under sub-Section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3)If an investigation under sub-section (1) is made by a person not being police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

7. As stated in sub Section (1) of Section 202 Cr.P.C., itself, the object of the enquiry is to ascertain the truth or falsehood of the complainant, but the magistrate making the enquiry has to do this only with reference to the inherent quality of statements on oath made by the complainant and the statements made before him by witnesses examined at the instance of the complainant. To say in other words, during the course of the enquiry under the section, the Magistrate has to satisfy himself simply on the evidence adduced by the complainant whether prima facie case has been made out so as to put the proposed accused on a regular trial.

8. The language used in sub-Section (2) of Section 202 Cr.P.C. carries a mandate for the Magistrate which has to be obeyed by him before the issues process.

9. A perusal of the Section 202 sub Section (2) Cr.P.C. makes it clear that the Magistrate has to take evidence of witnesses on oath. In sub Section (2) in an enquiry under sub Section (1), the words 'the Magistrate may, if he thinks fit, take evidence of witnesses on oath' contemplates that the Magistrate shall take the evidence of the witnesses on oath before the court. The basic purpose of the criminal law is that the person who is to be prosecuted should be summoned only if the Magistrate in an enquiry, finds substance in the allegation of the complainant which is duly supported by the witnesses who have given the statement on oath before the Magistrate. The provision of Section 202 Cr.P.C. is to enable the Magistrate to form a opinion whether the process should be issued or not. The issue of process is a matter for

judicial determination. As required under Section 200 Cr.P.C. which makes it obligatory for a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced in writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The enquiry under Section 202 Cr.P.C. is one sided as the proposed accused is not in the picture. The complainant has given his statement on oath and the witnesses have also given their statement on oath the enquiry can be said to be based on a reasonable and justified conclusion of the Magistrate when he passes an order either under Section 203 Cr.P.C. dismissing the complaint or under Section 204 Cr.P.C. issuing process against the accused after going through the statements of the complainant as well as of the witnesses. Thus it is incumbent upon the learned Magistrate taking cognizance of an offence to examine the complainant and witnesses present on oath except in the case of where the complaint is made by a public servant in discharge of his official duties.

10. In the case of **Hari Singh and another vs. State of U.P. and others** reported in **1992 CRI.L.J. 1802** it was held by this Court that in an enquiry into an offences by the Court of a magistrate under Section 202 Cr.P.C. the personal examination of witnesses is imperative. The words 'take evidence of witnesses on oath' in Section 202(2) will have to be read along with Section 274 or 275, Cr.P.C. as the case may be. Memorandum containing sustance of evidence or taking down of evidence of witnesses would be possible only when they are personally examined by the Court. Therefore, filing of affidavit at the stage of Section 202, Cr.P.C. is not permissible under the law.

11. If the mandatory provision of Section 202 of Cr.P.C. requires that the Magistrate shall examine the witnesses on Oath, the filing of affidavit by the eye witnesses can not be a substitute. Therefore, the Magistrate is under obligation and duty bound to examine upon oath the complainant and his witnesses before issuance of process under Section 204 Cr.P.C. and non compliance of which would vitiate further proceedings. Under Section 200 Cr.P.C. the Magistrate has no option except to examine the complainant and the witnesses, if any, on oath. Thus in an inquiry into an offence by the court of a Magistrate under Section 202 Cr.P.C., the personal examination of the witnesses is compulsory and legally binding, filing of affidavit at the stage of Section of 202, Cr.P.C. is not permissible under the law. The impugned order of the Magistrate suffers from not following the mandatory provisions of sub-Section (2) of Section 202 of Cr.P.C.

12. As discussed in view of the specific provision under sub Section 202 (2) of Cr.P.C. the Magistrate has committed illegality and procedural mistake and the impugned summoning order is not in consonance with the provisions of law and is liable to be quashed.

13. Accordingly, the application under Section 482 Cr.P.C. is allowed. The impugned order dated 02.02.2011 passed by the learned Magistrate in complaint Case No. 144 of 2010, under Sections 379,452,504,506 I.P.C., Police Station

Hasanganj District Lucknow is hereby quashed and the matter is remanded back to the concerned learned Judicial Magistrate to proceed with the case in accordance with the provisions of law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE K.N. PANDEY, J.

Special Appeal No. 1323 D of 2009

Smt. Sadhana Singh ...Appellant-Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Abhishek Srivastava

Counsel for the Respondents:
Sri R.A. Akhtar
Sri S.G. Hasnain
Sri Ram Krishna

Constitution of India, Art. 14 and Art. 226-Special B.T.C. Training Course-petitioner obtained decree from State of Jammu Kashmir-denied admission-held-discriminatly-can not be denied-view taken by Single Judge Contrary to full Bench decision-not sustainable-Candidature can not be cancelled provided on merit she stand in merit list.

Held: Para 13 & 14

Special BTC training course is designed to equip those candidates, who have B.Ed. degrees to take teachers training for primary classes for the purposes of employment. It is an employment oriented course. It is not denied that all the successful candidates, who have passed BTC examination are employed in Primary Schools funded by the Central Government under Serv Shiksha Abhiyan. The exclusion of some of the candidates, who have taken degrees from the universities situate in the State to which NCTE Act does not apply would be a hostile and invidious discrimination to them. Such students cannot be put at fault on account of special status given to the State of Jammu and Kashmir.

The reasoning given by the Full Bench in Bhupendra Nath Triapthi is squarely applicable to the case. If the students having obtained B.Ed. degrees in the period, when NCTE Act was not enforced or where institutions have applied but the recognition was not given can be considered for selection in Special BTC course, the exclusion of those candidates, who have obtained degrees from the States to which NCTE Act does not apply, would be discriminatory and violative of right to equality under Art.14 and 16 of the Constitution of India.

Case law discussed:
Special Appeal No.858 of 2008, Bhupendra Nath Tripathi & others Vs. State of U.P. & Ors, Kamlesh Kumar & Others Vs. State of U.P. & Ors., Writ-A No.25186 of 2008, 2005 (2) Western Law Cases (Raj.) 358.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. We have heard Shri Abhishek Srivastava, learned counsel for the petitioner-appellant. Shri R.A. Akhtar appears for the National Council for Teachers' Education (NCTE)-respondent No.3. Shri S.G. Hasnain, AAG has appeared for the State of U.P.

2.. Cause shown for condonation of delay is sufficient. The delay condonation application is allowed.

3. The petitioner has obtained degree of B.Ed. from the Jammu and Kashmir University. They applied in the selections for Special BTC Training

Course, 2007 designed specially for those, who have B.Ed. degrees, for training to fill up vacancies of teachers with primary school teachers training, after seeking approval of the NCTE. The petitioner was excluded from the selection on the ground that she has obtained B.Ed. degree from Jammu and Kashmir University.

4. The question whether the candidate, who had obtained B.Ed. degree prior to the enforcement of National Council of Teachers Education Act, 1993 or after the enforcement of the Act, during the period, when the application of the institution or university was pending consideration was referred to a larger Bench.

5. The Full Bench of this Court in its judgment dated 6.1.2009 in **Special Appeal No.858 of 2008, Bhupendra Nath Tripathi & others Vs. State of U.P. & Ors**. held as follows:-

"The exclusion of the candidates from the field of eligibility for Special Basic Training Course 2007, who had obtained B.Ed degree prior to enforcement of National Council for Teacher Education Act, 1993 or after the enforcement of National Council for Teacher Education Act, 1993 during the period when the application of the institution or the University was pending consideration is arbitrary, unreasonable and violative of Article 14 and 16 of the Constitution of India, and that the above two categories of candidates are also eligible to participate in Special Basic Training Course 2007".

6. In the judgment giving rise to this special appeal, learned Single Judge has held that though NCTE has taken a stand that the Degree/ Diploma awarded by the State of Jammu and Kashmir will be valid for giving appointment in the rest of the country there was justification in the wisdom of the State Government to exclude those candidates who have not obtained B.Ed. Degree from the institute recognized by the NCTE. In the judgment, the Court has held that the candidates with a degree of B.Ed. from institutions in Jammu and Kashmir form a different class, and if such class of candidates have been excluded from consideration for admission to BTC Special Training Course, 2007 by the State Government, purposely, it cannot be said to be violative of Article 14 of the Constitution of India.

7. Learned counsel for the petitioner has filed supplementary affidavit annexing public notice of the State Universities published by the University Grants Commission on 25th August, 2010, the Universities in the State of Jammu and Kashmir including Jammu University, Jammu Tawi at Item No.86, declared eligible for central assistance under the UGC Act, 1956 with effect from 1969. The Jammu University is one of the university recognized by the University Grants Commission.

8. Shri R.A. Akhtar, learned counsel appearing for the NCTE submits that the Council had taken clear stand in the year 2007 by issuing letter No.49-21/2005/NCTE/ (N&S) dated 31.5.2007 and letter No.49-21/2005/NCTE/N&S dated 27th June, 2007 sent by Shri V.C. Tewari, Member Secretary to all Educational Secretaries of all State Governments/ UTs as per list clarifying the stand of the Council. Both the letters are quoted as below:-

"F.No.49-21/2005NCTE/(N&S) 31.05.2007

To

All Education Secretaries
All State Govts/ UTs as per list

Sub. Issues related to validity of degree in teacher education obtained from the State of J & K

Sir,

The NCTE Act, 1993 extends to the whole of India except of State of J & K the issue of validity of degrees in teacher education obtained from the State of Jammu & Kashmir has been attracting the attention of NCTE and MHRDd for quite some time past Now the MHRD has given the following clarifications.

(a) Persons who have obtained degree from institutions recognized by the Govt. of J & K/ UGC would be eligible for employment in Central Govt. and other States and

(b) As the NCTE Act does not cover the issue of admission in institutions for higher qualifications, the eligibility of persons with degrees from institutions in J & K will not be governed by the provisions of the NTE Act but by the relevant laws/ rules/ regulations of the respective States/ Universities.

The above clarifications are for information and necessary action.

The above clarifications are for your information and necessary action.

Yours faithfully

Sd/-V.C. Tewari
Member Secretary

****

No.49-21/2005/NCTE/N&S 27 June, 2007

To

All Education Secretaries
All State Govts/ UTs as per list.

Sub. Issues related to validity of Diploma/ Certificate in teacher education obtained from the State of J & K.

Sir,

This is in continuation of our letter of even number dated 31.05.2007 on the above mentioned subject. The following clarifications have further been issued by Ministry of HRD.

"a diploma or certificate in teacher education awarded by an institution/ university in the State of Jammu & Kashmir is also valid for employment in other parts of the country subject to the provisions of the act. In other words such certificates/ diplomas will also have to be treated on the same footing as a degree awarded by such institutions."

2. The above clarifications are for your information and necessary action.

Yours faithfully,

(V.C. Tewari)
Member Secretary."

9. We are informed that learned Single Judge of this Court in **Kamlesh Kumar & Others Vs. State of U.P. & Ors., Writ-A No.25186 of 2008** decided on 6.1.2011 has taken a view, following the reasoning given in the Full Bench

judgment in Bhupendra Nath Tripathi's case that where a degree of B.Ed. was obtained prior to the enforcement of NCTE Act, meaning thereby that the degree was obtained, when NCTE Act was not enforce the candidate having such a degree cannot be disqualified for holding such a degree. The view taken by learned Single Judge is quoted as below:-

"All these petitioners have been disqualified for admission in Special B.T.C. Course-2007 on the ground that they have obtained their B.Ed. degree from various institutions/Universities located in Jammu and Kashmir and the said degrees are not recognized by N.C.T.C.

The petitioners 1 to 5 passed B.Ed. examination in the year 2005, 2003, 2995, 2004 and 2004 respectively. N.C.T.E. Act, admittedly, has no application to the State of Jammu and Kashmir and it has not been extended thereto. The educational degrees imparted by various Universities in State of Jammu and Kashmir, satisfying the standards set up by University Grants Commission, are valid for all purposes. In Bhupendra Nath Tripathi & others Vs. State of U.P. & others 2009 (1) ADJ 232), this Court held that when N.C.T.E. Act was not in force, the degree of B.Ed. obtained from respective educational institutions can not be held to be invalid for the purpose of selection and admission in Special B.T.C. Course since the Act at that time was not applicable. In the case of State of Jammu and Kashmir also, the Act has no application. B.Ed. degree granted by the Universities in Jammu and Kashmir, in absence of application of N.C.T.E. Act therein, cannot be distinguished qua degrees awarded by institutions where the Act is applicable and degrees are recognized or approved by N.C.T.E.

In my view, the view taken by Full Bench in Bhupendra Nath Tripathi (supra) which holds good in respect to B.E.d degrees obtained by the candidates before the enforcement of N.C.T.E. Act would equally apply to B.Ed. degrees obtained from Jammu and kashmir where N.C.T.E. Act is yet to be applied. The disqualification of the candidates on this ground cannot sustain.

In view of above, respondents are directed to re-consider case of petitioners for admisssion in Special B.T.C. Course-2007 in the light of the observations made hereinabove.

With the aforesaid directions/observations, writ petition is disposed of finally."

10. Shri Abhishek Srivastava submits that the same reasoning, which was adopted by the Full Bench, and in the judgment in Kamlesh Kumar following the Full Bench in Bhupendra Nath Tripathi's case, was adopted by the Rajasthan High Court in **Emarata Ram Pooniya & 8 Ors. Vs. State of Rajasthan** decided on 15.2.2005 reported in **2005 (2) Western Law Cases (Raj.) 358,** the relevant portion of the judgment is quoted as below:-

"EXCLUSION OF CANDIDATES HAVING B.ED. DEGREE FROM UNIVERSITIES IN THE STATE OF J & K:

32. Lastly, we may deal with the contention raised by Mr. M.R. Singhvi and Mr. M.S. Singhvi with respect to

finding of the learned Single Judge excluding the candidature of the persons who have passed their B.Ed. from the institutions affiliated to the Universities of State of Jammu & Kashmir. Learned Single Judge accepted the contention holding that the degree of B.Ed. awarded by the Universities in the State of Jammu & Kashmir may be valid in that State but so far as the selections are being held in the State of Rajasthan pursuant to the advertisement, in view of the specific condition in the advertisement that the candidate must possess a degree as recognized by the institution, which has the sanction of N.C.T.E. cannot be held to be valid. In view of the finding, the learned Single Judge directed the respondents to exclude such of the candidates from consideration who are holding the degree of B.Ed. from such institutions, which are not recognized by the N.C.T.E.

33. Assailing the finding of the learned Single Judge on this count, it is vehemently argued by Mr. M.R. Singhvi, learned counsel for the interveners that in terms of Article 1(ii) of the Constitution of India, the State of Jammu & Kashmir is integral part of the Union of India, as it finds place in S. No. 15 of the First Schedule. Since Jammu & Kashmir forms an integral part of the Union of India, the citizens of Jammu & Kashmir possessing requisite qualification, have the same right as citizens of the other States to be considered for recruitment on the posts advertised. It is further submitted that it was open for the Union to make law under Article 317 of the Constitution, which applies to the State of Jammu & Kashmir but if the Act of 1993 has not been made applicable to the State of Jammu & Kashmir, no fault can be found with the persons obtaining the degree from a University situated in the State of Jammu & Kashmir. It is further submitted that the learned Single Judge has erroneously placed reliance on a decision of the Apex Court in Union of India v. Shah Goverdhan L. Kabra Teachers College reported in JT 2002 (8) SC 269. Mr. N.M. Lodha, learned Additional Advocate General, has also supported the contention raised on behalf of the interveners. It is submitted by Mr. Lodha that the contention of obtaining a degree from such institutions which are not recognized by the N.C.T.E., refers to only those degrees which have been obtained from an area to which the provisions of the National Council for Teachers Education Act, 1993, hereinafter referred-to as the "Act of 1993" are applicable, as the State of Jammu & Kashmir has been excluded from the application of the Act of 1993, the question of recognition of degrees awarded by the Universities in the State of Jammu & Kashmir by N.C.T.E. does not arise. It is further submitted that the same view has been taken by a learned Single Judge of this Court in Surendra Kumar Gupta v. State of Rajasthan reported in 2002 (3) RLR 854. The State filed an application for Special Leave to Appeal before the Apex Court, but later on, the same was withdrawn. Thus, The order of the learned Single Judge has attained finality. Pursuant to the directions of the learned Single Judge in Surendra Kumar's case, the State issued a direction to consider the candidature of the persons holding B.Ed. Degree from a University in the State of Jammu & Kashmir. On that basis, the selection list has also been prepared considering such candidates eligible for appointment. Mr. Mridul appearing for

the appellants has supported the judgment of the learned Single Judge on this count.

34. We have considered the rival contentions. It is not in dispute that the Universities of Jammu & Kashmir awarding the B.Ed. Degrees finds place in the list of the Universities published by the University Grants Commission. Thus, the B.Ed. Degree obtained by the candidates in the State of Jammu & Kashmir is a degree from legally and duly constituted University. It is also not in dispute that the provisions of the Act of 1993 have not been made applicable to the Universities in the State of Jammu & Kashmir. Thus, the question of recognition of degree awarded by the Universities in Jammu & Kashmir by the N.C.T.E. Does not arise. So far as the decision of the Apex Court in Goverdhan L. Kabra Teachers College's case (supra), relied upon by the learned Single Judge is concerned, the same has no application to the facts of the case. In the said case, the question was with respect to the Constitutional validity of Section 17(4) of the Act of 1993. The Division Bench of this Court declared the provisions of Section 17(4) of the Act of 1993 ultra vires of the Constitution being beyond the competence of the Union Legislature. On examining the Statute as a whole and applying the doctrine of pith and substance, the Apex Court held that even if Sub-section (4) of Section 17 is very much a law dealing with the co-ordination and determination of standards in institutions for higher education giving the chief Entry 66 of the List III of VIIth Schedule and, as such, the Union Legislature did hold the competence for enacting the said provisions.

35. The State Government pursuant to the directions of this Court in Surendra Kumar Gupta's case (supra), has issued direction to consider the candidature of the persons holding B.Ed. degree from the duly constituted Universities in the State of Jammu & Kashmir. We do not find any infirmity in the said Circular, as the same has been issued in pursuance of the directions of this Court. The view taken by this Court in Surendra Kumar Gupta's case (supra), further finds support from another decision delivered by Hon'ble Mr. Justice P.P. Naolekar (as his Lordship then was) dated 10.4.2002 rendered in S.B. Civil Writ Petition No. 96/2000. We are in complete agreement with the view expressed in Surendra Kumar Gupta's case (supra). Learned Single Judge has committed apparent error in directing to exclude the candidates who have obtained B.Ed. degree from the Universities situated in the State of Jammu & Kashmir. The part of the judgment in that regard deserves to be quashed.

36. Before parting with, we make it clear that keeping in view the standing practice in vogue since long following the Rules of 1971, we have not disturbed the selections but it would be just and fair for the State Government and its authorities to give a fresh look to the relevant rules before the next selection, particularly the issues raised in the instant petitions. We have adopted the course of non-interference, as the decision in the instant case is not going to adversely affect any of the appellants.

37. Consequently, the group of Special Appeals are partly allowed. The impugned judgment dt. 4.11.2004 of the learned Single Judge is modified. The direction to exclude the candidates from

consideration on the post of Teacher Gr.II/Senior Teachers, who have obtained B.Ed. degree from the Universities in the State of Jammu & Kashmir, is set aside. The judgment under appeal stands modified to that extent only. No order as to costs."

11. Shri S.G. Hasnain, AAG appearing for the State of U.P. has justified the exclusion of the candidate on the ground that after enforcement of NCTE Act the degree obtained from another University, which is not recognized by NCTE could not be considered and that if the Court will interfere, the notifications for recruitment will be affected and that large number of candidates, who have obtained B.Ed. from Jammu and Kashmir University and were excluded from the selection will be deprived of their rights in the selection.

12. We have carefully considered the submissions and agree with the view of learned Single Judge in Kamlesh Kumar's case that the candidates, who have obtained B.Ed. degree from the State of Jammu and Kashmir to which NCTE Act do not form a class to be excluded from selection. The reasoning is not in consonance with constitutional scheme of equality. Jammu and Kashmir is an integral part of Union of India. It has been given special status so far as laws relating to the citizens of Jammu and Kashmir are concerned. The historical reasons for which special status was given has been considered in several judgments of the Supreme Court. The citizens of Jammu and Kashmir cannot be excluded from consideration for employment in the other States of the country on the ground that some of the Act such as NCTE Act does not have application in the State of Jammu and Kashmir. Exclusion of such candidates cannot be treated to be valid classification under Art.14 and 16 of the Constitution of India to support the argument that such class is exclusive class and could be excluded from consideration for Special BTC Training Course.

13. Special BTC training course is designed to equip those candidates, who have B.Ed. degrees to take teachers training for primary classes for the purposes of employment. It is an employment oriented course. It is not denied that all the successful candidates, who have passed BTC examination are employed in Primary Schools funded by the Central Government under Serv Shiksha Abhiyan. The exclusion of some of the candidates, who have taken degrees from the universities situate in the State to which NCTE Act does not apply would be a hostile and invidious discrimination to them. Such students cannot be put at fault on account of special status given to the State of Jammu and Kashmir.

14. The reasoning given by the Full Bench in Bhupendra Nath Triapthi is squarely applicable to the case. If the students having obtained B.Ed. degrees in the period, when NCTE Act was not enforced or where institutions have applied but the recognition was not given can be considered for selection in Special BTC course, the exclusion of those candidates, who have obtained degrees from the States to which NCTE Act does not apply, would be discriminatory and violative of right to equality under Art.14 and 16 of the Constitution of India.

15. The special appeal is **allowed**. The judgment of learned Single Judge dated 5.11.2009 is set aside. The petitioner

will not be treated to be disqualified and will be considered along with the candidates of Special BTC Course 2007 subject to her comparative merit with other candidates.

16. We may add caveat here that only those candidates having degrees from State of Jammu and Kashmir will be considered qualified, who have obtained these degrees from the universities recognized by the University Grants Commission.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.03.2011

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 1719 of 2009

Smt. Dayawati and others ...Petitioner
Versus
Deputy Director of Consolidation, Baghpat and others ...Respondents

Counsel for the Petitioner:
S.K. Tyagi

Counsel for the Respondents:
Sri A. N. Srivastava
Sri Sandeep Kumar
Sri Ashish Kumar
Sri Rahul Mishra
Sri Vivek Chaudhary
C.S.C.

U.P. Consolidation of Holdings Act-1953, Section-53-B-applicability of the provision of section 5 of limitation Act-D.D.C. by Detail order-disclosed reason for non condoling delay-petitioner in very crytic casual manner without any detail-disclosed the source of knowledge-held-righty refused to condone delay. Court declined to interfere.

Held: Para 6

It is therefore obvious that the provisions of Section 5 of Limitation Act with all its necessary accessories can be invoked in proceedings before the Consolidation Authorities provided there is a plausible and valid explanation attributed for having arrived at a delayed point of time. The affidavit which has been filed by the petitioners in support of the delay condonation application is absolutely casual, cryptic and without any details. The Deputy Director of Consolidation has therefore rightly recorded a finding that in the absence of any plausible explanation or any cogent reason having been offered in not having arrived before the Court in time, there was no occasion to condone the delay.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard learned counsel for the petitioner and the learned counsel for the contesting respondents.

2. The issue is very short, as the matter has now to be examined in the light of the earlier judgment of this Court dated 10th September 2007 in writ petition No. 16761 of 2007. The judgment being precise and which also details the facts necessary for adjudication, is being gainfully reproduced here under:

"Hon'ble Janardan Sahai,J.

Counsel for the parties agree that the writ petition may be disposed of finally.

The plot in dispute is 2941. It was recorded in the basic year in the name of late Indra Raj father of the petitioners and late Hari Singh father of the respondents 3, 4 and 5. Objections under Section 9 of the U.P. Consolidation of Holdings Act were filed by Indra Raj. The

compromise was entered on 31.1.1990 and order of compromise was passed by the Consolidation Officer on 15.2.1990. Against the order dated 15.2.1990 two appeals were filed one by the respondents 3, 4 and 5 and another by the respondents 2, 3 and 4, in the years 2003 and 2004 and were therefore belated and applications for condoning the delay was filed in both the appeals. The Settlement Officer Consolidation by his order dated 31.8.2004 dismissed both the appeals on the ground that sufficient explanation for the delay had not been given. The order of the Settlement Officer Consolidation was challenged in revision by the respondents 2 to 5. The Deputy Director of Consolidation has allowed the revision, has set aside the order of the Settlement Officer Consolidation as well as of the Consolidation Officer dated 15.2.1990 and has directed the Consolidation Officer to decide the case on merits.

It was submitted by the petitioners counsel that the Deputy Director Consolidation has not considered whether the Settlement Officer Consolidation was right in dismissing the appeal on the ground that the delay had not been explained, in as much as that was the basis of the order of the Settlement Officer Consolidation. ***There appears to be some merit in the contention of the petitioners' counsel. The Deputy Director Consolidation has not adverted to the question whether finding of the Settlement Officer Consolidation was right that the delay was not properly explained. The matter has therefore to go back to the Deputy Director Consolidation for a fresh decision in accordance with law.*** *The writ petition is allowed. The order dated 14.2.2007 passed by the Deputy Director Consolidation, Baghpat is set aside. The matter is sent back to the Deputy Director Consolidation for a fresh decision and the Deputy Director Consolidation shall try to decide the revision expeditiously and if possible within a period of six months from the date a certified copy of this order is filed before him."*

3. Sri Tyagi learned counsel for the petitioners submits that when the matter was remitted to the Deputy Director of Consolidation, the petitioner had taken full care to explain the delay in the grounds of revision and the delay having been explained and the obvious consequences of losing property being evident, it was just and equitable for the Deputy Director of Consolidation to have condoned the delay taking a liberal view in the matter. He therefore submits that the impugned order deserves to be set aside and the delay as prayed for deserves to be condoned.

4. Learned counsel for the contesting respondents has invited the attention of the Court to the affidavit filed in support of the delay condonation application. The affidavit has been sworn by Surajpal son of late Hari Singh the petitioner no. 2. The only averment made in the said affidavit is that the deponent arrived from Delhi only yesterday and upon having come to know that name of his father has been scored out from the records therefore now he has filing the application for condoning the delay under Section 5 of the Limitation Act. The same is dated 27.2.2004.

5. Needless to mention that by virtue of amendment through U.P. Act No. 38 of 1958 the provisions of the Limitation Act were made enforceable in proceedings under the U.P. Consolidation of Holdings Act, 1953 by adding Section 53-B which is quoted herein under:

"53-B. Limitation. - The provisions of Section 5 of the Limitation Act, 1963, shall apply to the applications, appeals, revisions and other proceedings under this Act or the rules made thereunder."

6. It is therefore obvious that the provisions of Section 5 of Limitation Act with all its necessary accessories can be invoked in proceedings before the Consolidation Authorities provided there is a plausible and valid explanation attributed for having arrived at a delayed point of time. The affidavit which has been filed by the petitioners in support of the delay condonation application is absolutely casual, cryptic and without any details. The Deputy Director of Consolidation has therefore rightly recorded a finding that in the absence of any plausible explanation or any cogent reason having been offered in not having arrived before the Court in time, there was no occasion to condone the delay.

7. There is no reason to take a liberal view in the matter keeping in view the fact that the appeal was filed after 13 years.

8. I do not find any merit in the submissions raised. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.02.2011

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE SHYAM SHANKAR TIWARI,J.

Civil Misc. Writ Petition No. - 1952 of 2011

M/S Nutech Pakcaging Limited And Another ...Petitioner
Versus
State Of U.P. And Others ...Respondents

Counsel for the Petitioner:
Sri S.M.G. Asghar
Sri V.M. Zaidi

Counsel for the Respondents:
Sri Nripendra Mishra
Sri Anurag Khanna
C.S.C.

U.P. Public Money (Recovery of Does) Act 1972-Recover certificate against guarantor issued on 26.03.02-while company notified under Act 1993 on 34.01.04-moreover Recovery Certificate has been issued against company-cannot be held to be barred under the provision of 1993 Act.

Held: Para 14 and 27

Thus when the recovery proceedings have been initiated prior to notification of PICUP, the said proceedings could be continued even after the 1993 Act and the said proceedings cannot be held to be barred under the provisions of the 1993 Act.

In view of the above discussions, following the judgment of the Apex Court in Kailash Nath Agarwal's case (supra), it is clear that the recovery against the guarantor is not prohibited by Section 22(1) of the 1985 although recovery against the industry concerned is prohibited by virtue of Section 22(1) of the 1985 Act. From a perusal of the recovery certificate (Annexure-3 to the writ petition), it is clear that recovery certificate has not been issued against petitioner No.1, rather recovery certificate has been issued against the guarantors, who have given personal guarantee, which fact is mentioned in paragraph 5 of the recovery certificate.

Case law discussed:

A.I.R 2003 S.C. 2103; A.I.R. 2005 (Alld.) 320; JT 2006(1) SC 380; (2004) 6 S.C.C. 758; (M/s Rafat Paper Mills Pvt. Limited and others vs. The Pradeshiya Industrial & Investment Corporation of U.P. Limited and others) decided on 22nd April, 2009; (2003)4 S.C.C.

159; Writ Petition No.28924 of 2005 (Man Mohal Goel vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd.) decided on 13th April, 2005 ; 1992 (3) S.C.C. 159; 2009(9) SCC 478; Writ Petition No.15796 of 2010 (J.C. Deewan and others vs. State of U.P.) decided on 26th May, 2010.; S.L.P.(C) No. 14065 OF 2006 (Sobran Singh vs. State of U.P. and others); S.L.P. (C) No.9692 of 2005 (R.K. Dewan (Dead) by Lrs & others vs. State of U.P. and others).

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

1. Heard Sri V.M. Zaidi, learned Senior Advocate, assisted by Sri S.M.G. Asghar, for the petitioners, Sri Anurag Khanna appearing for respondent No.4 and learned Standing Counsel for the State-respondents.

2. These two writ petitions, raising common question of facts and law, have been heard together and are being decided by this common judgment.

3. The Writ Petition No.1952 of 2011 is treated as leading writ petition and for deciding the issues raised, it is sufficient to refer to the pleadings in the leading writ petition.

4. By this writ petition, the petitioners have prayed for quashing the recovery certificate dated 26nd March, 2002/22nd July, 2010 sent by respondent No.4 to the Collector, Ghaziabad for recovery of an amount of Rs.5,43,57,761.68. A writ of mandamus has also been sought commanding the respondents not to make recovery of the amount in dispute from the petitioners and its guarantors by adopting coercive method.

5. Counter and rejoinder affidavits have been exchanged between the parties and by consent of the learned counsel for the parties, both the writ petitions are being finally decided.

6. Brief facts, which emerge from pleadings of the parties, are; petitioner No.1 is a registered company, which established its factory for manufacture of goods at district Ghaziabad. The company took loan from the respondent No.4 (Pickup, the Pradeshiya Industrial Investment Corporation Limited, U.P.) and other financial institutions. The company had approached the respondent No.4 for grant of term loan of Rs.4 crores for manufacture of flexible laminated packaging and co-excluded multilayer films in two phases. The loan of Rs.2,32,00,000/- was disbursed. The petitioner No.1 submitted an application before the Board for Industrial and Financial Reconstruction (hereinafter referred to as the B.I.F.R) under Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as the 1985 Act). The reference was received in the Board on 6th December, 2001. The recovery certificate dated 26th March, 2002 was sent by the respondent No.4 to the Collector, Ghaziabad for recovery of an amount of Rs.5,43,57,761.68 from the guarantors of the loan, namely, Manish Goel (petitioner No.2), Piyush Goel son of S.C. Goel, Ritu Goel wife of Manish Goel, S.C. Goel son of late Raman Lal Goel and Vijay Goel wife of S.C. Goel. The petitioners' company was declared as sick unit under the 1985 Act. The I.D.B.I. was appointed as operating agency by order dated 25th August, 2005. Petitioners' case is that the proceedings before the B.I.F.R. are still pending.

7. The Collector vide his endorsement dated 22nd July, 2010

forwarded the recovery certificate to Tahsildar, Ghaziabad for recovering the same as arrears of land revenue. The writ petition has been filed challenging the recovery certificate dated 26th March, 2002/22nd July, 2010.

8. Learned counsel for the petitioners, in support of the writ petition, made following submissions:-

(i) The recovery certificate issued for recovery under the provisions U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter referred to as the 1972 Act) is without jurisdiction since after the enforcement of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the 1993 Act), the recovery of dues of a financial institution can be made only in accordance with the 1993 Act as Section 18 of the 1993 Act bars any other proceeding for recovery.

(ii) The petitioners' company having been declared as sick unit under the 1985 Act, recovery proceedings under the 1972 Act are barred by virtue of Section 34 of the 1985 Act. The respondents being participating in the proceedings before the B.I.F.R. where the preparation of rehabilitation scheme is under process, the respondent No.4 has no jurisdiction to resort to recovery proceedings under the 1972 Act.

(iii) The proceedings before the B.I.F.R. being pending, the recovery both against petitioner No.1, i.e., the company, as well as guarantors of the loan is barred.

Learned counsel for the petitioners has placed reliance on the judgment of the Apex Court in the case of ***M/s. Unique Butyle Tube Industries Pvt. Ltd. vs. U.P. Financial Corporation and others*** reported in A.I.R. 2003 S.C. 2103, Full Bench judgment of this Court in the case of ***Suresh Chandra Gupta and another vs. The Collector, Kanpur Nagar and others*** reported in A.I.R. 2005 (Alld) 320 and judgments of the Apex Court in the cases of ***Iqbal Naseer Usmani vs. Central Bank of India and others*** reported in JT 2006(1) SC 380 and ***M/s. A.P.T. Ispat Pvt. Ltd. vs. U.P. Small Industrial Corporation Ltd. and another*** reported in A.I.R. 2010 S.C. 2095.

9. Sri Anurag Khanna, learned counsel appearing for respondent No.4, refuting the submissions of learned counsel for the petitioners, contends that the recovery proceedings under the 1972 Act are not barred in view of the fact that recovery proceedings were initiated in the year 2002 whereas the respondent No.4 was notified under the 1993 Act on 24th January, 2004 only. It is submitted that in view of the law laid down by the Apex Court in the case of ***Pawan Kumar Jain vs. Pradeshiya Industrial and Investment Corporation of U.P. Limited and others*** reported in (2004)6 S.C.C. 758 the recovery proceedings, which have been initiated under the 1972 Act before the date of notification of respondent No.4 under the 1993 Act can continue and are not barred by the 1993 Act. Reliance has been placed by learned counsel for the respondent No.4 on the Division Bench judgment of this Court in 18435 of 2009 ***(M/s Rafat Paper Mills Pvt. Limited and others vs. The Pradeshiya Industrial & Investment Corporation of U.P. Limited and others)*** decided on 22nd April, 2009. Sri Khanna further submits that petitioner No.2 and other guarantors are bound by there bond of guarantee in which it was

clearly undertaken by the guarantors that any amount due from them to the Corporation shall be recoverable under the 1972 Act as arrears of land revenue and further it shall not be necessary for the Corporation to sue the Company/Borrower before suing guarantors for the amount due. Sri Khanna submits that in view of the pendency of proceedings before the B.I.F.R., the recovery against the industry concerned, i.e., petitioner No.1 is barred by Section 34 of the 1993 Act but the said bar is not applicable against the guarantors and the respondent No.4 can proceed to recover the amount from the guarantors in view of the law laid down by the Apex Court in the case of ***Kailash Nath Agarwal and others vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd. and another*** reported in (2003)4 S.C.C. 305. Learned counsel for the respondent No.4 has further placed reliance on a Division Bench judgment of this Court in Writ Petition No.28924 of 2005 ***(Man Mohal Goel vs. Pradeshiya Industrial and Investment Corporation of U.P. Ltd.)*** decided on 13th April, 2005 and further on the judgment of the Apex Court in the cases of ***S.B.I. vs. Ind. Export (regd).*** reported in 1992(3) S.C.C. 159 and ***Industrial Investment Bank of India Limited vs. Vishwanath Jhunjhunwala*** reported in 2009(9) SCC 478. Reliance has also been placed on the Division Bench judgment in Writ Petition No.15796 of 2010 ***(J.C. Deewan and others vs. State of U.P.)*** decided on 26th May, 2010.

10. Learned Standing Counsel appearing for the State-respondents, has adopted the submissions made by Sri Anurag Khanna and submitted that the recovery under the 1972 Act is not barred and there is no illegality in the recovery proceedings against the guarantors.

11. We have considered the submissions of learned counsel for the parties and have perused the record.

The first issue, which needs consideration, is as to whether the recovery proceedings under the 1972 Act can be resorted to in view of the provisions of 1993 Act. The judgment of the Apex Court relied by the learned counsel for the petitioners in ***M/s. Unique Butyle's*** case (supra) had occasion to consider the provisions of the 1993 Act in context of the provisions of the State Financial Corporation Act, 1951 and U.P. Public Moneys (Recovery of Dues) Act, 1972. Section 34 of the 1993 Act was interpreted by the Apex Court and it was laid down that jurisdiction of the Tribunal in regard to adjudication of dues of financial institution is exclusive and the 1972 Act does not find place in Sub-Section (2) of Section 34 of the 1993 Act, hence proceedings under the 1972 Act cannot be resorted to in view of the provisions of the 1993 Act. Following was laid down by the Apex Court in paragraph 9 of the judgment in ***M/s. Unique Butyle's*** case (supra):-

"9. *Section 34 of the Act consists of two parts. Sub- section (1) deals with the over-riding effect of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. Sub-section (1) itself makes an exception as regards matters covered by sub-section (2). The U.P. Act is not mentioned therein. The mode of recovery of debt under the U.P.*

Act is not saved under the said provision i.e. sub- section (2) which is of considerable importance so far as the present case is concerned. Even a bare reading therein makes it clear that it is intended to be in addition to and not in derogation of certain statutes; one of which is the Financial Act. In other words, a Bank or Financial institution has the option or choice to proceed either under the Act or under the modes of recovery permissible under the Financial Act. To that extent, the High Court's conclusions quoted above were correct. Where the High Court went wrong is by holding that proceedings under the U.P. Act were permissible. U.P. Act deals with separate modes of recovery and such proceedings are not relatable to proceedings under the Financial Act."

12. The same view was taken by the Apex Court in ***M/s A.P.T. Ispat's*** case (supra) relied by the learned counsel for the petitioners. In the said case challenge was made to the recovery proceedings initiated under the 1972 Act for payment of goods which was received by the A.P.T. Private Limited. Payment of goods having not been made, the Corporation issued recovery certificate. The High Court dismissed the writ petition. The judgment of the High Court was overruled. The Apex Court took the view that there was no financial assistance given by the Corporation in the facts of the aforesaid case. The dues do not relate to any financial assistance hence could not be recovered and further in view of the judgment of the Apex Court in ***Unique Butyle's*** case (supra) after the 1993 Act recourse cannot be taken to the 1972 Act. Following was laid down by the Apex Court in paragraphs 15 and 18 of the said judgment:-

"15. *In the present case it is evident that the dues of which recovery is sought by the impugned certificates do not pertain to any loan, advance or grant given to the appellant or to any credit concerning any hire purchase of goods sold to the appellant by the Corporation under any agreement, express or implied. The dues do not relate to any financial assistance.*

18. *There is another point and though it was not raised before the High Court, we think proper to mention it since it is crucial to the proceeding under section 3 of the U.P. Public Moneys (Recovery of Dues) Act, 1972. In a decision by this court in Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and Others, (2003) 2 SCC 455, it was held that after the coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, recourse cannot be taken for recovery of dues to the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972 because the U.P. Act does not find mention in section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993."*

13. Thus there cannot be any dispute to the proposition that in view of the provisions of the 1993 Act for recovery the provisions of the 1972 Act cannot be resorted to, but the distinguishing feature in the present case is the fact that in the present case the recovery proceedings were initiated by sending the recovery certificate by respondent No.4 dated 26th March, 2002 whereas respondent No.4 was notified under the 1993 Act on 24th January, 2004. Thus when the recovery proceedings under the 1972 Act were

initiated the respondent No.4 was not notified under the 1993 Act and the 1993 Act was not applicable. The similar issue came for consideration in ***Pawan Kumar Jain's*** case (supra) in which case also the financial assistance was extended by the respondent No.4. The recovery proceedings under the 1972 Act were challenged by means of the writ petition. The writ petition was dismissed by the order dated 1.9.1997. The writ petitioner filed special leave petition in the Apex Court in which relying on the judgment of the Apex Court in ***Unique Butyle's*** case (supra) it was submitted that after the 1993 Act the recovery proceedings cannot be initiated by PICUP under the 1972 Act. The said submission was considered and was rejected by the Apex Court laying down following in paragraphs 3 and 4 of the said judgment:-

*"**3.** Mr. Mohta submitted that the Central Government has issued a Notification specifying 1st Respondent-Corporation as a Financial Institution within the meaning of the term as defined in Section 2(h) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the "Debt Recovery Act"). He submitted that such an Institution can only proceed in the manner laid down in the Debt Recovery Act. He submitted that it is not open to give a go-by to the provision of the Debt Recovery Act and use the machinery under the U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter called the "U.P. Act"). For this reason the Notice is bad and requires to be quashed. In support of his submission, he relied upon the case in Unique Butyle Tube Industries (P) Ltd. Vs. U. P. Financial Corporation & Ors. [(2003) 2 SCC 455]. In this case, it has been held that a Financial Institution within the meaning of that term in the Debt Recovery Act cannot proceed under the U. P. Act.*

***4.** This authority would have been binding upon us. However, in reply Mr. Bhalla pointed out that in respect of the 1st Respondent- Institution the Notification by the Central Government has only been issued on 24.01.2004, whereas the Recovery Certificate is of a much earlier date. He submitted that, therefore, in this case the proceedings under the U. P. Act are not barred. He pointed out that under Section 31 of the Debt Recovery Act, it is only suit or proceeding pending before any Court, which stand transferred to the Tribunal established under that Act. In our view, Mr. Bhalla is right. As the action was initiated prior to the Notification being issued by the Central Government, the action would not be barred and would not stand transferred to the Tribunal."*

14. Thus when the recovery proceedings have been initiated prior to notification of PICUP, the said proceedings could be continued even after the 1993 Act and the said proceedings cannot be held to be barred under the provisions of the 1993 Act.

15. Sri Zaidi has further submitted that, in fact, the recovery certificate, which was issued on 26th March, 2002, was not proceeded with on account of the objection raised by the petitioners that the matter is pending before the B.I.F.R. and the endorsement of the Collector on the recovery certificate on 22nd July, 2010 is initiation of fresh recovery proceedings, which is not permissible.

16. Copy of the recovery certificate has been filed as Annexure-3 to the writ petition which indicates that on the same recovery certificate, which was issued on 26nd March, 2002, the Collector has made endorsement. The Collector has initially made endorsement on 22nd March, 2002 to the Tahsildar, Ghaziabad for recovery as arrears of land revenue and again endorsement was made on 22nd July, 2010 to the Tahsildar, Ghaziabad for recovery as arrears of land revenue. The recovery certificate dated 26th March, 2002 was not satisfied and the certificate remained pending and it has been only again directed to be implemented on 22nd July, 2010. The endorsement of the Collector dated 22nd March, 2010 cannot be said to be initiation of fresh recovery proceedings since recovery certificate is the same (dated 26th March, 2002) which was sent for recovery of Rs.5,43,57,761.68. Thus the endorsement of the District Magistrate on 22nd July, 2010 cannot be said to be initiation of fresh recovery proceedings and the recovery proceedings have to be treated to have been initiated by recovery certificate dated 26th March, 2002 itself when the Collector made earlier endorsement on 22nd March, 2002 to the Tahsildar, Ghaziabad. Thus from the above discussion, it is clear that although for a financial institution, which is covered under the 1993 Act no fresh recovery proceedings can be initiated under the 1972 Act after applicability of the 1993 Act, but recovery proceedings initiated before applicability of the 1993 Act by a financial institution can continue and shall not be barred in view of the clear pronouncement of the Apex Court in ***Pawan Kumar Jain's*** case (supra).

17. The Full Bench of this Court in ***Suresh Chandra Gupta's*** case (supra) had occasion to consider the provisions of the 1972 Act, the 1993 Act and the State Financial Corporation Act, 1951. Considering Section 32-G of the State Financial Corporation , 1951 and the provisions of the 1972 Act, the Full Bench opined that there is no conflict between the recovery under Section 32-G of the 1951 and the 1972 Act. The Full Bench, however, after considering the provisions of the 1993 Act came to the conclusion that recovery proceedings can neither be initiated against the principal borrower nor against the guarantors under the 1972 Act and it can be initiated only under the 1993 Act. Following was laid down by the Full Bench in paragraph 19 of the said judgment:-

"19. *In the Unique Butyle case, the recovery was against the principal borrower. While deciding point-IV, we have held that recovery against the guarantor can be initiated under the 1993 Act. Same reasoning as applicable to the principal borrower will apply to a recovery against the guarantor. In view of the UniqueButyle case, recovery proceedings can neither be initiated against the principal borrower nor against the guarantor under the 1972 Act if the debt is more than 10 lakhs: recovery proceedings can only be initiated under the 1993 Act."*

18. One of the questions, which was also framed for consideration before the Full Bench of this Court in ***Suresh Chandra Gupta's*** case (supra) was as to whether the Corporation was bound to exhaust its remedy under the 1951 Act before initiating recovery proceedings against the sureties/guarantors. The said question was not decided.

19. In the case before the Full Bench the loan was granted on 18th October, 1996. The Corporation issued notice on 23rd November, 2000 for recovery and possession was taken by the Corporation of the premises on 2nd March, 2001. The proceedings were initiated under the 1972 Act by issuing citation on 25th January, 2002, which was challenged. The Central Government had notified the State Financial Corporation by notification dated 28th March, 1995. Thus when the loan was sanctioned and proceedings were initiated by the State Financial Corporation for recovery under the 1972 Act, the Corporation had already been notified and in view of the judgment of the Apex Court in ***Unique Butyle's*** case (supra), the proceedings under the 1972 Act were barred. The distinguishing fact of the present case with the case of ***Suresh Chandra Gupta i***s the fact that in the present case the recovery proceedings were initiated in the year 2002, i.e. before the respondent No.4 was notified under the 1993 Act. There cannot be any dispute to the proposition as laid down by the Full Bench in ***Suresh Chandra Gupta's*** case (supra), however, the said case is distinguishable in view of the fact that respondent No.4 was not notified under the 1993 Act when the recovery proceedings were initiated under the 1972 Act and the ratio of the judgment in ***Pawan Kumar Jain's*** case (supra) is fully attracted in facts of the present case.

20. The second and third submission of the learned counsel for the petitioners is based on the provisions of the 1985 Act. There is no dispute that petitioner No.1 has been declared as sick unit under the 1985 Act. Under Section 22 of the 1985 Act, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie. Section 22(1) of the 1985 Act is quoted below:-

"22. Suspension of legal proceedings, contracts, etc. *(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."*

21. The provisions of Section 22 of the 1985 Act qua the provisions of the 1972 Act were considered by the Apex

Court in ***Kailash Nath Agarwal's*** case (supra). The Apex Court in the said judgment took the view that Section 22(1) of the 1985 Act prohibits recovery against the industrial company but there is no protection afforded to the guarantors against recovery proceedings under the U.P. Act. Following was laid down in paragraph 35 of the said judgment:-

"35. *Finally, the phrase introduced by the 1994 amendment relates to the pre-decretal stage because recovery proceedings by way of execution is already covered under the first half of sub-section (1) of Section 22. If the procedure under the U.P. Act is covered under the word 'proceeding' in the first limb of Section 22(1) of SICA, which it is according to Maharashtra Tubes, it is not a 'suit' for recovery under the second limb of that Section. As rightly contended by learned counsel appearing for PICUP, the proceedings under the U.P. Act are really recovery proceedings within the meaning of the word 'proceeding' as defined in Maharashtra Tubes. Since Section 22(1) only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings under the U.P. Act."*

22. The Division Bench judgment relied by learned counsel for the respondents in ***M/s. Rafat Paper Mills'*** case (supra) of which one of us (Justice Ashok Bhushan) was a member, is fully applicable in the facts of the present case. In the said case recovery citation was issued in the year 1998 which was challenged in the writ petition and due to interim order the recovery could not be proceeded with. Subsequently the said recovery proceedings were reactivated in the year 2009 which were challenged on the ground that after the 1993 Act the recovery proceedings cannot be initiated under the 1972 Act. The same submissions were pressed before the Division Bench which have been submitted in the present case. The Division Bench dismissed the writ petition holding the recovery permissible under the 1972 Act since it was initiated prior to notification of PICUP under the 1993 Act. The ratio of ***Pawan Kumar Jain's*** case (supra) was followed. Following was laid down by the Division Bench in the said judgment:-

"From the above pronouncement, it is clear that what has been laid down is that if the action was initiated prior to the notification dated 24.1.2004, the action could not be barred and could not be transferred to the Tribunal. In the present case the action was initiated in the year 2000, which could not be proceeded with against the guarantors due to interim order of the High Court and respondent No.1 has requested the respondent to proceed with the recovery and further informs that the amount which was earlier mentioned in the certificate has increased upto amount of Rs.13 crores and odd, as such action initiated by the letter dated 5.3.2009 cannot be said to be initiation of any fresh action. The increase of the amount was consequence of passage of time which cannot change the nature of the action which remains same and by virtue of para 4 of the judgment, such action cannot be said to be barred. The judgment of P.K. Jain (supra) fully support the contention of learned counsel for the respondents and the submission of petitioners that action is barred cannot be accepted....."

23. The Division Bench judgment in ***J.C. Dewan's*** case (supra) also fully supports the submission of the learned counsel for the respondents. The Division Bench followed ***Kailash Nath Agarwal's*** case and held that recovery against the guarantors is not prohibited. Following was laid down by the Division Bench in the said judgment:-

"Submission is that the liability of the guarantor and the borrower being co-extensive, complaint by petitioners is totally misconceived.

Lastly, it is submitted that in respect to the recovery citation, issued against similar class of petitioners of a private limited company by interpreting the personal guarantee deed about which, there is no dispute, a Bench of this Court by placing reliance on various decision given by the Apex Court dismissed the writ petition. Reference has been placed on the decision given by this Court in the case of ***Om Hari Agarwal Vs. State of U.P.*** *Reported in 2006(7) ADJ 390(DB).*

On perusal of the judgment given by this Court in the case of Om Hari Agarwal (supra), it is clear that this was the specific argument from the side of respondents that in view of execution of guarantee deed between the petitioners and the Corporation, it was open for the respondents to recover the amount as arrears of land revenue against the guarantors of the loan.

In fact, petitioners agreed and gave an undertaking in respect to the payment of loan amount and thus the guarantee given by the petitioners will have to be accepted to be enforceable, notwithstanding that any action has been taken by the Corporation against the Company/borrower or not.

In view of guarantee deed so executed, the title deed of the immovable property of the petitioners so agreed to be proceeded may not be in a position of being objected as and when, now it is being proceeded.

In respect to the aspect that guarantors do not have any protection so far as proceeding of BIFR is concerned, reference was given to the decision given by the Apex Court in the case of Kailash Nath Agrawal reported in 2003(4) SCC 305."

24. One more aspect of the case need to be noticed. In ***Pawan Kumar Jain's*** case (supra), the Apex Court observed that action against guarantors cannot be taken until the property of the principle debtor is first sold off. Following was laid down in paragraph 8 of the judgment:-

"8. *In our view, the above-set-out provisions of the U.P. Act are very clear. Action against the guarantor cannot be taken until the property of the principal debtor is first sold off. As the appellant has not sold the property of the principal debtor, the action against the appellant cannot be sustained. We, therefore, set aside the recovery notice."*

25. It is relevant to note that in ***Kailash Nath Agarwal's*** case (supra), which is a judgment of coordinate Bench of two Hon'ble Judges of the Apex Court, this very issue as to whether in view of the provisions of Section 22 of the 1985 Act recovery proceedings under the 1972 Act can be proceeded against the

guarantor was examined and decided. In paragraph 35 of the judgment in ***Kailash Nath Agarwal's*** case (supra), as quoted above, it was held that Section 22(1) of the 1985 Act prohibits recovery only against the industrial company and there is no protection afforded to the guarantors against the recovery proceeding. The judgment in ***Kailash Nath Agarwal's*** case (supra) was delivered on 14th February, 2003 whereas the judgment in ***Pawan Kumar Jain's*** case (supra) was subsequent in point of time delivered on 11th August, 2004, but has not noticed the judgment of ***Kailash Nath Agarwal's*** case (supra). It is further to be noticed that two Benches of the Apex Court consisting of two Hon'ble Judges have expressed doubt over the above proposition laid down in ***Pawan Kumar Jain's*** case and have referred it for consideration by a larger Bench. The correctness of the decision of the ***Pawan Kumar Jain's*** case has been doubted by two Judge Bench in S.L.P. (C) No.14065 of 2006 ***(Sobran Singh vs. State of U.P. and others)*** where following observations were made:-

"This Court in Pawan Kumar Jain (spra) did not consider the effect of Section 3(1)(D) of the Act. Under the general law, namely, Section 128 of the Indian Contract Act, the liability of a borrower and that of the guarantor is co-extensive. In our opinion if the State had intended to make any provision contrary or inconsistent with the said general provision it should have specifically been so stated in the Act. Furthermore, Section 4(2)(b) is an exception to Section 3 thereof. General power of recovery of dues as arrears of land revenues is provided for in Section 3. Section 4(2)(b), however, in our opinion speaks of a situation where the defaulter's immovable property is mortgaged, charged or otherwise encumbered and only in that event the same is required to be sold first and only in the event the entire amount is not recovered thereby any other proceeding may be initiated thereafter subject to the conditions laid down therein. We may, however, note that Section 4(2)(b) of the Act covers the case of a defaulter and not that of a guarantor. Even otherwise, ordinarily the property of a guarantor would not be subjected to any mortgage, charge, pledge or other encumbrance. Section 4(2)(b) of the Act, therefore, being an exception to the general provision, namely, Section 3 thereof, we are of the opinion that it may not be correct to hold that a guarantor is also covered by the said provision.

For the reasons aforementioned, we are of the opinion that the ratio in Pawan Kumar Jain (supra) case may ultimately be found not to be correct. As we doubt the correctness of the said decision, we are of the opinion that the matter should be referred to a larger Bench. We direct accordingly."

26. Subsequently another two Judge Bench in S.L.P. (C) No.9692 of 2005 ***(R.K. Dewan (Dead) by Lrs & others vs. State of U.P. and others)*** by order dated 4th January, 2008 referred the judgment of ***Pawan Kumar Jain's*** case (supra) for consideration by Larger Bench.

27. In view of the above discussions, following the judgment of the Apex Court in ***Kailash Nath Agarwal's*** case (supra), it is clear that the recovery against the guarantor is not prohibited by Section 22(1) of the 1985 although recovery against the industry concerned is prohibited by virtue of Section 22(1) of the 1985 Act. From a

perusal of the recovery certificate (Annexure-3 to the writ), it is clear that recovery certificate has not been issued against petitioner No.1, rather recovery certificate has been issued against the guarantors, who have given personal guarantee, which fact is mentioned in paragraph 5 of the recovery certificate.

28. In view of the foregoing discussions, none of the submissions raised by learned counsel for the petitioners can be accepted. The recovery proceedings, which were initiated by recovery certificate dated 26th March, 2002 against guarantors only, are not barred and there is no error in the recovery proceedings.

29. Both the writ petitions lack merit and are dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 23.03.2011

BEFORE
THE HON'BLE IMTIYAZ MURTAZA,J.
THE HON'BLE ASHWANI KUMAR SINGH,J.

Misc. Bench no. - 2218 of 2011

Ravikant Mishra and another ...Petitioner
Versus
State of U.P., Thru. Prin. Secy.,Home and others ...Respondent

Counsel for the Petitioner:
Sri A.P. Mishra

Counsel for the Respondent:
G.A.

Constitution of India, Article 226- Quashing of FIR-offence under section 147,148,149,452,323, 504, 506 IPC-from bare perusal of content of FIR Cognizable offence disclosed-No valid ground for quashing FIR made out-however in light of Lal Kamlendra Pratap Singh as well as Amrawati case-necessary guidelines issued, excluding gravious offenses.

Case law discussed:
Criminal Appeal No. 539 of 2009 Lal Kamlendra Pratap Singh v. State of U.P.; Amrawati v. State of U.P. 2005 Cr.L.J. 755.

(Delivered by Hon'ble Imtiyaz Murtaza,J.)

1. Prayer in this petition is for quashing of the F.I.R case crime no. 724-A of 2010 under sections 147, 148, 149, 452, 323, 504, 506 I.P.C. and 3(i)X of S.C./S.T. Act police station Ram Nagar district Barabankiand also for stay of arrest during pendency of writ petition.

2. From a punctilious reading of the contents of the F.I.R, it cannot be said that ex facie no cognizable offence is disclosed or that there is any legal fetters operating as an obstacle in the way of investigation and by this reckoning, there is no discernible valid ground for quashment of the F.I.R.

Our attention is adverted to a recent decision of the Apex Court dated 23.3.2009 passed in Criminal Appeal No. 539 of 2009 ***Lal Kamlendra Pratap Singh v. State of U.P.*** wherein the Apex Court quintessentially observed that in appropriate cases, the court may consider enlarging accused on interim bail pending consideration of his regular bail observing further that arrest is not a must in each case when a First Information Report of a cognizable offence is lodged. The Apex Court also relied upon with approval a decision of Full Bench of Allahabad High Court in ***Amrawati v. State of U.P.*** 2005 Cr.L.J. 755 wherein the observations made were on similar lines.

Having considered the facts and arguments advanced across the bar, we are of the view that the petition be disposed of attended with following directions.

If an application is moved before the competent Magistrate within 3 weeks, while fixing a date of about a week, the learned Magistrate may pass appropriate order directing that the petitioner be not arrested without permission of the Magistrate between the date of moving application for surrender and the date fixed for his appearance in the court. In the meanwhile, the court may call upon the prosecution to obtain instructions from the Investigating officer and thereafter, dispose of the bail application accordingly in the light of the observations made in Amarawati's case (supra). It would also be open to the learned Magistrate to pass order granting interim bail to the petitioner in appropriate cases on such terms and conditions as may be deemed necessary till next date of hearing of the bail applications in case the court is not in a position to dispose of the bail application or some further instructions are required to do justice in the matter.

However, in grave offences like murder, dacoity, robbery, rape etc or cases under the Gangsters Act or where the accused is likely to abscond and evade the process of law or where the accused is a habitual offender with lot of cases to his discredit or in an offence involving high stake scam, the court will act with restraint and in its discretion may desist from extending coverage of the said decision.

3. The petition is disposed of accordingly in terms of above directions/observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 7.03.2011

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Consolidation No. - 2413 of 1982

Ashok Kumar Singh and Others
...Petitioner
Versus
Deputy Director Of Consolidation,Kanpur Camp Unnao and another ...Respondent

Counsel for the Petitioner:
Sri K.K.Singh
Sri Suresh Sharma

Counsel for the Respondents:
C.S.C
Sri P.C.Agrawal
Sri R.K.Singh
Sri R.S Pandey
Sri T.N.Gupta

Civil Procedure Code-Section-151- Second Application to recall earlier order of dismissal in default-case shown on both court-omission of Counsel-firstly due to slip of eye could nor mark and secondly Counsel suffering from High Blood Pressure-held-the Counsel as well as party both not diligent-with warning of Counsel in future-writ Petition restored on original number subject to payment of cost of Rs. 1000/-

Held: Para 6

The Court can not restrain itself from making a comment upon the conduct of the counsel, which has not been up to the mark. Once a petition is dismissed and an application is moved by the counsel for restoration, he should be doubly vigilant that the application for restoration does not get dismissed in default. Dismissal of this application indicates that the petitioner as well as his counsel have not been diligent and

interested enough to prosecute the matter. Yet on medical ground unfortunate circumstances can happen and in the present case counsel for the petitioner has submitted that he was suffering from blood pressure and heart ailment and suddenly he went home.

Case law discussed:

2010(1) S.C. 391.

(Delivered by Hon'ble Shabihul Hasnain, J.)

C. M. Application No.92343 of 2010,(For recall of order dated 3.9.2010)

1. This is a second application for recall of the order. The petition was dismissed in default on 7.5.2010. The petitioner moved an application for restoration on 17.8.2010 on the ground that the counsel could not mark the case in the cause list and it was due to the oversight of the counsel that the matter was dismissed in default. Unfortunately, this application was again dismissed on 3.9.2010. This second application has been moved by the petitioner on 6.9.2010 on the ground that the counsel for the petitioner had developed high blood pressure on that fateful day and the petition was dismissed in default. In both the applications learned counsel has taken the responsibility on his personal conduct.

2. This second application has been vehemently opposed by Sri Suresh Sharma, who says that this second application for recall is not maintainable. He says that the lower court in the meanwhile has proceeded in the matter. He argues that if the petition is restored it will be construed by the lower courts that the proceedings thereon should be stopped, hence the application should not be allowed and it should be rejected.

3. Petitioner counsel has argued that counsels are sometimes in such a situation where mistakes and oversights are quite possible. The client, who is sitting far away may not be punished for the conduct of the counsel. In the present case, personal ground has been taken on both occasions.

4. No encouragement can be given by this Court for neglect and default of the counsels, yet, a hard reality of the situation can not also be overlooked. The argument of learned counsel for the opposite parties is quite correct that second application is not maintainable. The Court is not giving finding on this count also.

5. The petitioner counsel has referred to case law reported in *2010 (1) S.C. 391 (Ram Kumar Gupta Vs. Har Prasad and another)* in which second application for restoration was allowed by Hon'ble Supreme Court at the cost of Rs.10,000/-. Although this judgment has been passed in the peculiar circumstances of the case and it has not laid down any ratio yet the counsel for the petitioner has been able to demonstrate that in exceptional circumstances the courts can indulge to some extent in entertaining the second application for restoration. The Court feels that the present case in hand also deserves compassionate treatment.

6. The Court can not restrain itself from making a comment upon the conduct of the counsel, which has not been up to the mark. Once a petition is dismissed and an application is moved by the counsel for restoration, he should be doubly vigilant that the application for restoration does not get dismissed in default. Dismissal of this application indicates that the petitioner as well as his counsel have not been diligent and interested enough to prosecute the

matter. Yet on medical ground unfortunate circumstances can happen and in the present case counsel for the petitioner has submitted that he was suffering from blood pressure and heart ailment and suddenly he went home.

7. Under the circumstances, the Court feels that it is a fit case where application should be allowed. Accordingly, the order of dismissal of the writ petition dated 7.5.2010 as well as the order dated 3.9.2010 dismissing the application for recall of dismissal order are hereby recalled.

8. The petition is restored to its original number. However, the petitioner shall pay a sum of Rs.1000/- to the opposite party by the next date.

9. List in the next cause list.

10. It is made clear that restoration of this petition will not mean that the lower courts are barred in any manner from proceeding in the matter in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.03.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Writ Petition No. 5789 (M/S) of 1984

State of U.P. and another ...Petitioners
Versus.
Arjun Singh-(dead represented by Lrs) and others ....Respondents

<u>Indian Forest Act-Section-4</u>-against notification of Forest Act-objection filed-alleging themselves as Bhumidhar-on basis of Patta granted under section 3(4) of U.P. Land Utilization Act-from record clear that land in question never subjected to cultivation.-except Jungle and Jhari on spot as per inspection Report-neither can be 'Sirdar' nor even deposited land revenue-hence can be termed as Bhumidhar-contrary view taken be courts below beyond record-wholly perverse suffers from serious illegalities-not sustainable.

Held: Para 10 and 11

I have gone through the impugned orders passed by the courts below. It is not in dispute that the predecessors of the respondents were given 'Patta' of the land in question for cultivation under the provisions of the U.P. Land Utilisation Act, 1947. The land was never cultivated and lessee failed to fulfill the purpose for which it was given to them under the aforesaid Act. The cultivation was never done and no proof of the actual cultivatory possession was established. In Khatauni 1361F, column no.8 total land in dispute has been shown not only as uncultivated land but also as 'Banjar'. During inspection, most part of the land in dispute was found uncultivated or waste land.

It is relevant to point out that the predecessors of the contesting respondents, on abolition of zamindari, can be a 'sirdar' under Section 19 of the U.P. Zamindari Abolition & Land Reforms Act. However, there is no documentary evidence that answering respondents ever deposited the prescribed land revenue for the purposes of becoming 'Bhumidhar'.The appellate court also erred in not considering the fact that no documentary evidence was produced by Arjun Singh/Balram Singh to establish that the land in dispute was ever cultivated by them. Therefore, the finding of the learned lower appellate court about the cultivatory possession is beyond the record. In view of the fact that Ram Gupta never acquired bhumidhari rights according to law and, therefore, the alleged sale deeds

transferring the land to the purchasers cannot be said to be a valid deed and as such no legal rights were created in favour of alleged purchasers.

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

1. Case called out. Counsel for the contesting respondent is not present. This case pertains to the year 1984 and is quite old. It is listed in hearing list. On number of occasions, the case was listed but could not be heard due to non-cooperation of the Counsel.

2. Heard Counsel for the petitioner.

3. From the perusal of record, it comes out that the State Government had issued a notification dated 11.10.1952 whereby land of village Makanpur measuring about 100 acres was given under the control of Forest Department. Subsequently, the Forest Department of the State Government issued a notification under Section 4 of the Indian Forest Act, dated 5.3.1966 for constituting the aforesaid land as reserved forest. Thereafter a notification under Section-6 of the Act was issued. The contesting respondents, belatedly, filed objections under Section 6/9 of the Act against the aforesaid notification. In the objection of Smt. Rani Jasbir Singh (since deceased and her interest represented by Kr Arjun Singh) it was said that she was the Bhumidhar of plot no. 59/1 measuring 29 Acres while respondent-Balram Singh claimed sirdari rights on plot no. 58/1. Their contention was that since the time of the land having been transferred to them, they had been coming down in actual physical and cultivatory possession of the said land.

4. The Forest Settlement Officer, Lakhimpur framed following issues:-

1.Whether the objector was Bhumidhar of the land in suit?

2.Whether the land could be notified u/s 4 of the Indian Forest Act?

3.To what relief, the objector is entitled?

4.Whether the objection is within time? If not whether there existed sufficient ground for condoning the delay?

5. As the issue no. 4 was answered in negative by the Forest Settlement Officer, the objections so preferred by the contesting respondents were rejected. The appeal preferred against the said order dated 4.3.1974 was also dismissed on 27.8.1974. Legal heirs of Smt. Jasbir Kaur filed a writ petition no. 1599 of 1974 before this Court and this Court while setting aside the aforesaid orders dated 4.3.1974 and 27.8.1974, directed the Forest Settlement Officer to consider the matter afresh in accordance with law and in the light of the observations made in the judgment.

6. The Forest Settlement Officer recorded a finding that the contesting respondents are Bhumidhars and they are entitled to get the compensation and allowed the objections in part vide order dated 14.8.1982. The said judgment was assailed by the state of U.P. and the Divisional Forest Officer North-Kheri in appeals before the District Judge. The District vide judgment and order dated 31.7.1984 confirmed the findings and arrangement made by the Forest Settlement Officer.

7. Hence the petitioners have filed the instant writ petition.

8. It has been argued that the findings recorded by both the courts below are wholly erroneous and perverse. There was no zamindari with respect to the land in dispute and thus U.P. Zamindari & Land Reforms Act had no application to it, hence the question of Shri Ram Gupta or the other private respondents as Bhumidhar does not arise. The courts below committed material irregularity in not considering the fact that the land had been allotted to Shri Ram Gupta under Section 3(4) of U.P. Land Utilization Act for cultivation but Shri Ram Gupta had never cultivated the land hence the alleged allotment had no bearing particularly on the date of vesting when the disputed land remained uncultivated and continued to exist as Banjar, Jungle and Jhari. The learned I Addl. District Judge also erred in holding that the opposite party was in cultivatory possession which is not in conformity with the inspection report of the Forest Settlement officer.

9. In the counter affidavit filed by the contesting respondent it has been stated that the evidence on record fully established the fact that the land was not 'Banjar' and on the date of vesting the land did not vest in the State since the land being the holding of the respondents and their predecessors, no question could arise for notifications under Section 4 and 6 of the Act. The land is neither 'Banjar' nor 'Jungle' or 'Jhari' nor it was so at the time of vesting. The land did not vest in the State of U.P. on 1.7.1952 and as such no forest land could could be constituted under the Forest Act. Therefore, the impugned orders are perfectly justified and legal.

10. I have gone through the impugned orders passed by the courts below. It is not in dispute that the predecessors of the respondents were given 'Patta' of the land in question for cultivation under the provisions of the U.P. Land Utilisation Act, 1947. The land was never cultivated and lessee failed to fulfill the purpose for which it was given to them under the aforesaid Act. The cultivation was never done and no proof of the actual cultivatory possession was established. In Khatauni 1361F, column no.8 total land in dispute has been shown not only as uncultivated land but also as 'Banjar'. During inspection, most part of the land in dispute was found uncultivated or waste land.

11. It is relevant to point out that the predecessors of the contesting respondents, on abolition of zamindari, can be a 'sirdar' under Section 19 of the U.P. Zamindari Abolition & Land Reforms Act. However, there is no documentary evidence that answering respondents ever deposited the prescribed land revenue for the purposes of becoming 'Bhumidhar'.The appellate court also erred in not considering the fact that no documentary evidence was produced by Arjun Singh/Balram Singh to establish that the land in dispute was ever cultivated by them. Therefore, the finding of the learned lower appellate court about the cultivatory possession is beyond the record. In view of the fact that Ram Gupta never acquired bhumidhari rights according to law and, therefore, the alleged sale deeds transferring the land to the purchasers cannot be said to be a valid deed and as such no legal rights were created in favour of alleged purchasers.

12. In view of the above, the findings recorded by both the courts below are perverse and suffers from serious legal infirmities. Accordingly, the impugned judgment dated 31.7.1984 and 31.5.1982 are hereby set-aside.

13. Both the writ petitions stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2011

BEFORE
THE HON'BLE ASHOK BHUSHAN,J
THE HON'BLE A.P. SAHI,J

Civil Misc. Writ Petition No. 8512 of 2008

Shri Ram and others ...Petitioners
Versus
Deputy Director of Consolidation, Allahabad and others. ..Respondents

Counsel for the Petitioner:
Sri G.K. Maurya
Sri Ramesh Rai

Counsel for the Respondents:
Sri R.S. Chaudhary
Sri R.P. Kanaujia
Sri V.B. Srivastava
Sri V.K. Singh (A.A.G.)
Sri V.K. Chandel
S.C.

U.P. Consolidation of Holdings Act, 1953-Section-49-A-Principle of Estoppels and acquiescence-whether permissible during consolidation operation ? Held-'yes' but a person can not be debar from filling objection on assumption of bar of Section 49-A-contrary to ambit of Section 8,9 and 9-A of special enactment Law laid down in Jagdeo Case as relied by learned Single Judge-held-no good law.

Held: Para 36, 46 and 52

The Act, 1953 is a special Act. The scheme as delineated by Section 5 and 9 clearly contemplates all disputes pertaining to rights and interest in the land were to be adjudicated by consolidation authorities and pending dispute before other courts stands abated to the consolidation courts. The Act, 1953 thus provides a forum and opportunity for adjudication of claim relating to land. The scheme of the Act, 1953, does not indicate that it contemplate any express or implied bar with regard to filing of an objection of any kind. When the provision of the Act, 1953 specifically provides filing of objections by any interested person reading any implied bar on the principle of estoppel and acquiescence to an objection to be filed by a person whose name is not recorded cannot be accepted.

The bar under Section 49, does not come into play in context of consolidation proceedings itself. Section 49, cannot be read as containing any bar with regard to raising an objection under Section 9 or Section 9A of the Act, 1953. For consolidation proceedings which are under way no facet of Section 49 of the Act is attracted.

We are unable to subscribe to the above view. No public policy can be found out which does not permit a person to seek reversal of the state of affairs continuing for scores of years, if he has a right to do so. The view of the learned Single Judge "that a certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs" can also not be approved. A person who has a right to a property which right he has neither abandoned nor relinquished can be claimed even after a lapse of considerable period, provided the claim is not barred by any law of limitation.

(Delivered By Hon'ble Ashok Bhushan, J)

1. This Bench has been constituted by order of Hon'ble The Chief Justice dated 03/8/2009 to answer the following five questions as framed by referring order dated 21/7/2009, by the learned Single Judge hearing the writ petition:

(I) Whether the law laid down by the learned single Judge in the case of Jagdeo and others Vs. Deputy Director of Consolidation, Allahabad, and others, 2006 (101) RD 216, is in conflict with the other decisions of this Court referred to herein above and as noticed by the learned single Judge himself in paragraph no.32 of the said judgment?

(II) Whether the learned single Judge merely because of having arrived at a different conclusion as against the decisions cited to the contrary, on a consideration of additional aspects, could have rendered the decision himself, instead of referring the matter to a larger Bench in view of the law laid down in the case of Rana Pratap Singh and others Vs. State of U.P. and others, 1995 ACJ 200?

(III) Whether the learned single Judge in Jagdeo's case was justified in invoking the principles of the doctrine of estoppel and acquiescence for creating an implied bar merely because a co-tenant had failed to assert his rights under The U.P. Zamindari Abolition & Land Reforms Act and was, therefore, barred from raising an objection under the Uttar Pradesh Consolidation of Holdings Act, 1953 and the rules framed thereunder?

(IV) Whether the provisions of the U.P. Consolidation of Holdings Act have an over riding effect over all other Acts for the time being in force keeping in view the provisions of Section 49 and have the exclusive jurisdiction to decide right, title and interest of claimants relating to land tenures upon a notification under Section 4 or not?

(V) Whether long standing entries which are questioned in an objection filed under the Uttar Pradesh Consolidation of Holdings Act hold only a presumptory value or they can be taken to be an absolute proof in law on the principle of estoppel, acquiescence and waiver and thereby attract an automatic bar of Section 49 of the U.P.C.H. Act."

2. The facts giving rise to the writ petition necessary to be noted for answering the questions referred are; The Village Dinwapur, Mazare-Danda Amauli, Pargana-Tappajar, Tehsil-Bindki, District-Fatehpur was notified by the State Government for consolidation operation under the Uttar Padesh Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act,1953). The respondent no.3, and one Banshi filed an objection under Section 9(A) (2) of Act, 1953 with regard to Khata No. 264 and 266 claiming that the land of the aforesaid Khatas is an ancestral acquisition acquired by common ancestor Bhura in which they are co-tenants to the extent of half share. The Consolidation Officer rejected the objection of the respondent no.3, against which an appeal No. 4646 of 1998, was filed before the Settlement Officer Consolidation, by the respondent no.3. The appeal of the respondent no.3 was dismissed vide judgment and order dated 26/8/2002. Both the Consolidation Officer and the Settlement Officer Consolidation took the view that the claim of the respondent no.3

is barred by Section 49 of the Act, 1953, since the claim of co-tenancy was not raised during the earlier consolidation proceedings. The respondent no.3, filed a revision before the Deputy Director of Consolidation against the judgment and order dated 26/8/2002. The Deputy Director of Consolidation, vide judgment and order dated 16/2/2006, allowed the revision and declared the respondent no.3, co-tenant to the extent of half of the share. This writ petition has been filed by the petitioners challenging the order of the Deputy Director of Consolidation dated 16/2/2006.

3. Learned counsel for the petitioners in support of the contentions raised had relied on the judgment of the learned Single Judge reported in **Jagdeo & Anr Vs. Deputy Director of Consolidation, Allahabad & Ors, 2006 (101) RD 216,** to urge that the claim of the respondent no.3, was barred by Section 49 of the Act, 1953.

4. The learned Single Judge while hearing the writ petition expressed his disagreement with the view expressed in Jagdeo's case (supra) and has referred the above five questions for decision by this larger Bench.

5. Before we proceed to answer the above five questions, it is necessary to note the relevant observations in Jagdeo's case (supra). In Jagdeo's case (supra) the claim of co-tenancy was raised by filing an objection under the Act, 1953 by the descendants of one Sheoratan, the name of the descendants of only Sheobhik, brother of Sheoratan, were recorded in Khata No. 92. The claim of co-tenancy was raised on the ground that the tenancy was a joint tenancy of both Sheobhik and Sheoratan. The Consolidation Officer had accepted the objection and directed for recording the name of the objectors as co-tenants against which an appeal was filed and allowed in part. A revision was also filed which was dismissed. The Assistant Settlement Officer Consolidation held that right from 1320 Fasli the name of Sheobhik was recorded in revenue records and the name of Sheoratan was never recorded in the revenue records, hence the claim of the descendants of Sheoratan was barred on the principle of estoppel. For 50 years, neither the petitioner nor their ancestors took any steps for getting their names recorded in the revenue records. Even at the time of Zamindari Abolition they did not raise any objections. The learned Single Judge while deciding Jagdeo's case (supra) in the above context made the following observations in para 7 relying on his earlier decision:-

"The purpose of consolidation is taken to be resurrection of dead (buried) dispute or revival of dormant ones. In fact this is not the spirit of Consolidation Act. Under Section 9(2) of the U.P.C.H. Act only disputes of recent past may be raised. Consolidation Act provides a new Forum for adjudication of disputes, but not a new opportunity for the same.

However, independently of all these principles, such exercise is to be nipped in the bud on the doctrine of public policy. It is against public policy to permit a person to seek reversal of state of affairs continuing for scores of years. A certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs. To maintain state of affairs continuing since very long which may have some elements of inaccuracy is better than to thoroughly analyse the

inaccuracy after expiry of long time since inception of the said affairs and reverse the same after thorough discussion of attending circumstances at the time of start of said state of affairs."

6. In the aforesaid case, while considering the scope and ambit of Section 49 of the Act, 1953 following observations were made in paragraphs 14 and 15 which are quoted below:

"14. As far as the first part of the bar created by section 49 of U.P.C.H. Act is concerned, it is more or less the doctrine of res-judicata as incorporated in section 11 of CPC. As far as the second bar (could or ought bar) is concerned, it is also not an altogether new doctrine for the first time introduced by U.P. Legislature. It is merely an express provision based upon several other doctrines particularly the doctrine of estoppel. What is expressed in the second type of bar provided under section 49 of U.P.C.H. Act is already implied in the principles of estoppel etc. the underlying principle of doctrine of estoppel is that if a person has got an opportunity to assert his right but he fails to do so then he is precluded in future from asserting the right.

15. If revenue entries are continuing since long and much before Zamindari Abolition then independently of section 49 of U.P.C.H., unrecorded tenure holder is estopped from asserting his right on the basis that the revenue entries are benami in nature and at the time of acquisition of the tenancy or Zamindari his ancestor was joint with the original tenant/Zamindar."

7. Another notable observation which was made by the learned Single Judge was that a person who remained silent at the time of Zamindari Abolition and did not seek correction of revenue entries is subsequently estopped from seeking declaration of his rights in consolidation proceedings. Following was laid down in paragraph 18.

"18. In view of this a person who remained silent at the time of Zamindari Abolition and did not seek correction of revenue entries on the basis of joint tenancy or did not initiate legal proceedings immediately after Zamindari Abolition for declaration of his right and correction of revenue entries is subsequently estopped from seeking declaration of his right in consolidation proceedings. In fact Zamindari Abolition was much more important phenomenon in respect of agricultural lands than survey conducted before Zamindari Abolition or consolidation proceedings after Zamindari Abolition."

8. Considering the doctrine of estoppel the following proposition was laid down in paragraph 20 which is quoted below:

"20. The doctrine of estoppel basically deals with relinquishment or extinction of rights. Acquisition of right through estoppel is an extension of or corollary to the classical doctrine of estoppel. Accordingly, if through estoppel co-tenancy can be acquired then all the more reason to hold that through estoppel co-tenancy can be relinquished. If the name of objector or his predcessor or ancestor was never recorded in the revenue records and that position continued for several decades then even if he or his ancestor had any right of co-tenancy, the same came to an

end on the basis of doctrine of estoppel."

9. In paragraph 24 of the judgment the learned Single Judge held that the doctrine of waiver and estoppel precludes an unrecorded person from asserting before Consolidation Courts that long standing revenue entries be reversed. Following was laid down in paragraph 24.

"24.Accordingly, the doctrine of waiver and estoppel which is also the basis of second type of bar under section 49 U.P.C.H. Act precludes an unrecorded person from asserting before Consolidation Courts that long standing revenue entries which are continuing since much before Zamindari Abolition shall be reversed and he must be declared to be Joint Bhumidhar/Sirdar on the ground that the original tenant and ancestor of claimant were joint and the acquisition was by both of them even though the name of his ancestor was not recorded in the revenue records."

10. In paragraph 29, it was held that apart from the principle of estoppel, bar of such types of claim, after the enforcement of U.P.Z.A. and L.R. Act shall come into play.

11. In view of the aforesaid background, we now proceed to consider the questions referred to above.

12. We have heard Shri Ramesh Rai, learned counsel for the petitioners, Shri V.K. Singh, learned Additional Advocate General assisted by Shri V.K. Chandel for State respondents and Shri V.B. Srivastava appearing for the respondent no.3.

Questions 1 and 2

13. The learned Single Judge while deciding Jagdeo's case (supra) himself noted in paragraph 32, that some authorities have taken a view contrary to the view which has been taken by the learned Single Judge and no authority has considered the various aspects dealt with by the learned Single Judge. Thus, according to the learned Single Judge himself the view which has been taken in the aforesaid case was contrary to some authorities which presupposes that there were judgments taking a contrary view.

14. The Constitution Bench of the Apex Court in **Central Board of Dawoodi Bohra Community & Anr. Vs. State of Maharashtra & Anr, 2005 (2) SCC 673,** laid down that a bench of a lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. A co-ordinate Bench cannot hold a view contrary to a view already taken, and the course open is to make a reference. Following was laid down in paragraph 12.

"12. Having carefully considered the submissions made by the learned senior counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms :-

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot doubt the correctness of the view of the

law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co- equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) The above rules are subject to two exceptions : (i) The abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) In spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of Chief Justice constituting the Bench and such listing. Such was the situation in Raghubir Singh & Ors. and Hansoli Devi & Ors.(supra)."

15. A Full Bench of this Court in **Rana Pratap Singh Vs. State of U.P. & Ors, 1995 All CJ, 200,** has laid down following in paragraphs 16 and 17 which is quoted below:

"16. On this aspect another relevant judicial pronouncement comes in Ambika Prasad v. State of U.P., AIR 1980 SC 1762. there, in the context of the U.P. Imposition of Ceilings of Land Holdings Act, 1961, while dealing with the question as to when reconsideration of a judicial precedent is permissible, Krishna Iyer, J. So aptly put it "Every new discovery of argumentative novelty cannot under or compel reconsideration of a binding precedent."

17. Further, It is wise to remember that fatal flaws silenced by earlier rulings cannot serve after death because a decision does not lose its authority 'merely because it was badly argued, inadequately considered and fallaciously reasoned' (Salmond Jurisprudence, page 215,11th Edition)."

16. In view of the above pronouncements, it is clear that having noticed the conflicting views, the learned Single Judge ought to have made a reference having found himself not to be in agreement with some earlier judgment of this Court. The observations of the learned Single Judge in paragraph 32 of Jagdeo's case (supra) that the earlier cases have not considered the various aspects dealt with by the learned Single Judge therein, makes no difference, since the learned Single Judge has not held that the earlier decisions were not binding precedent being per incurium.

17. The Apex Court in **Ambika Prasad Vs. State of U.P. & Ors, AIR 1980 SC 1762,** has laid down that every

new discovery or argumentative novelty cannot undo or compel reconsideration of a binding precedent.

18. In view of the foregoing discussions, it is held that the law laid down by the learned Single Judge in Jagdeo's case (supra) was in conflict with other earlier judgments as noticed by the learned Single Judge in paragraph 32, and merely because the learned Single Judge had arrived at a different conclusion was not sufficient for taking a divergent view. In such circumstances the learned Single Judge ought to have made a reference to be considered by a larger Bench as laid down by the Full Bench in Rana Pratap Singh's case (supra).

Question Nos.3,4 and 5

19. The above questions being inter related are being take up together.

20. The principle of estoppel and acquiescence which has been relied on by the learned Single Judge in Jagdeo's case (supra) for construing an implied bar in raising an objection of a co-tenancy right needs to be considered first.

Estoppel is defined in Section 115 of the Evidence Act, 1872 which is as follows:

"115.Estoppel.-When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

21. A party to a proceeding is said to be estopped where he is not allowed to say that a certain statement of fact is untrue, whether in reality it is true or not. Estoppel can also be defined as a disability whereby a party is precluded from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear by the matter giving rise to that disability. Estoppel is often described as a rule of evidence, but the whole concept is more correctly viewed as a substantive rule of law.

22. **Mercantile Bank of India Vs. Central Bank of India Ltd, AIR 1938 Privy Council 52,** had occasion to consider the principle of estoppel by conduct, neglect or representations. Following was laid down by the Privy Council at page 55:-

"The estoppel is relied on as giving to the appellants the substantive right of claiming a valid pledge of the goods, taking priority over the pledge to the respondents, since though estoppel has been described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. Of the many forms which estoppel may take, it is here only necessary to refer to that type of estoppel which enables a party as against another party to claim a right of property which in fact he does not possess. Such estoppel is described as estoppel by negligence or by conduct or by representation or by a holding out of ostensible authority."

Before the doctrine of estoppel can be invoked there must be:

1)Representation by a person to another,

2)The other should have acted upon the said representation,

3) Such action should have been detrimental to the interest of the person to whom the representation is made.

23. The above three conditions must co-exist for successfully pressing the plea of estoppel. The onus of establishing facts giving rise to estoppel is upon the person who pleads it.

24. The Apex Court in **B.L. Sreedhar & Ors. Vs. K.M. Munireddy, (Dead) & Ors, AIR 2003, SC 578,** had elaborately considered the doctrine of estoppel. The apex Court in the said judgment has laid down that though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped.

Following was laid down in paragraphs 22,25,26 and 27.

"22. "The essential factors giving rise to an estoppel are, I think-

"(a) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation was made.

"(b) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation was made.

"(c) Detriment to such person as a consequence of the act or omission where silence cannot amount to a representation, but, where there is a duty to disclose, deliberate silence may become significant and amount to a representation. The existence of a duty on the part of a customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question was rightly admitted." (Per Lord Tomlin, Greenwood v. Martins Bank (1933) A.C.51.) See also Thompson v. Palmer, 49 C.L.R. 547; Grundt v. Great Boulder, 59 C.I.R.675; Central Newbury Car Auctions v. Unity Finance (1957)1 Q.B.371SD.MN

25.Though estoppel is described as a mere rule of evidence, it may have the effect of creating substantive rights as against the person estopped. An estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority.

26.Estoppel, then, may itself be the foundation of a right as against the person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. Where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. It would be useful to refer in this connection to the case of Depuru Veeraraghava Reddi v. Depuru Kamalamma, (AIR 1951 Madras 403) where Vishwanatha Sastri, J., observed:

"An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights

which would not exist and be taken away but for that doctrine."

27.Of course, an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it."

25. In the context of Agra Tenancy Act, 1926, and U.P. Tenancy Act, 1939, whether the principle of estoppel in co-tenancy can be created, there are several decisions of this Court.

26. The judgment in D**udh Nath Kori & Anr. Vs Smt. Dhamrajja & Anr, 1964 RD, 324,** this Court had an occasion to consider whether a person can become co-tenant by estoppel.

Following was laid down in the aforesaid judgment.

"The next question to be considered is whether a person can become a co-tenant by estoppel. It is sometime thought that an estoppel is only a rule of procedure precluding a party from asserting or denying the existence of certain state of facts and it cannot form the basis of any substantive right. This does not, however, represent the full scope of the principle of estoppel, as has been clearly laid down by their lordships of the Privy Council in ***Mercantile Bank of India Vs. Central Bank of India (1)***:-

"Though estoppel is described as a mere rule of evidence, it may hve the effect of creating substantive rights as against the person estopped. In estoppel, which enables a party as against another party to claim a right of property which in fact he does not possess is described as estoppel by negligence or by conduct or by representation or by holding out ostensible authority."

27. Estoppel, then, may itself to be the foundation of a right as against person estopped, and indeed, if it were not so, it is difficult to see what protection the principle of estoppel can afford to the person by whom it may be invoked or what disability it can create in the person against whom it operates in cases affecting rights. It appears to me that where rights are involved estoppel may with equal justification be described both as a rule of evidence and as a rule creating or defeating rights. I may refer in this connection to the case of *Depuru Kamalamma and another v. Depuru Kamalamma and another (2) where Vishwanatha Sastri, J. observed:-*

"An estoppel though a branch of the law of evidence is also capable of being viewed as a substantive rule of law in so far as it helps to create or defeat rights which would not exist and be taken away but for that doctrine."

Of course an estoppel cannot have the effect of conferring upon a person a legal status expressly denied to him by a statute. But where such is not the case a right may, be claimed as having come into existence on the basis of estoppel and it is capable of being enforced or defended as against the person precluded from denying it. I may here mention that in the cases reported in 1949 R.D. 218 and 1942 A.W.R. (B.R.) 276 it was held by the Board of Revenue that co-tenancy could

arise by estoppel. If, as I have held, Section 23 of Act III of 1926 and Section 33 of Act XVII of 1939 did not exhaustively lay down the modes in which a person could have become a co-tenant the acquisition of co-tenancy rights by estoppel was not opposed to the provisions of any statute. the requisite conditions for the operation of the doctrine of estoppel having been found to be present in the instant case by the courts below and it being not challenged that the facts and circumstances of the case did attract the doctrine of estoppel, it must be held that as against the plaintiffs Dubar acquired the rights of a co-tenant."

28. There are several other judgments in which this Court held that acquisition of co-tenancy rights is permissible by estoppel namely; **Bhagan Ram & Ors. Vs. State of U.P. & Ors, 1967 RD 396; Kalawati Vs. Consolidation Officer, Agra & Ors, 1968,RD, 45; Gaya Singh Vs. Deputy Director of Consolidation of Etah & Ors, 1976 (2) RD 142; Mewa Ram & Ors Vs. Shankar & Ors,1970 ALJ 1019 and Babu Singh & Anr. Vs. Deputy Director of Consolidation, 1976 (2) ALR 203.**

29. This Court in a Division Bench judgment reported in **Budhlal & Anr. Vs. Deputy Director of Consolidation, 1982 RD 324**, considered the issue of right acquired by way of estoppel under the Act, 1950. It was held that a person could not become co-tenant by co-option, acquiescence or estoppel under the Act, 1950 insofar as Sirdari rights are concerned.

30. In view of the foregoing discussion, it is thus clear that although estoppel is a rule of evidence, it may have the effect of creating substantive rights or defeating substantive rights. The applicability of the principle of estoppel may have difference where the rights claimed are right related to the period before abolition of zamindari and after abolition of zamindari and further with regard to the nature of tenure.

31. The question which is to be considered is as to whether or not estoppel and acquiescence can create an implied bar in filing an objection by a person claiming co-tenancy right under the Act, 1953 and as to whether the person who has failed to assert his rights under the Act, 1950 is barred from filing an objection.

32. The respective scheme of the Act, 1950 and the Act, 1953 needs to be noticed. The Act, 1950 was enacted to provide for the abolition of the Zamindari System which involves intermediaries between the tiller of the soil and the State in Uttar Pradesh and for the acquisition of their rights, title and interest and to reform the law relating to land tenure.

33. The Act, 1953, was enacted with the object of ensuring compactness of holdings and also to provide a forum for settlement of disputes of all nature including rules in relation of land, mistakes in the revenue records and shares of tenure holders etc.

34. Section 4 of the Act, 1953, empowers the State Government to issue declaration, notification notifying a district or part thereof for consolidation operations. Section 5 provides for effect of notification issued under Section 4(2)

of the Act. Section 5(2) of the Act, 1953, provides as follows:

[5.Effect of [notification under Section 4(2)].-

[(2) Upon the said publication of the notification under sub-section (2) of Section 4, the following further consequences shall ensue in the area 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:

Provided further that on the issue of a notification under sub-section (1) of Section 6 in respect of the said area of part thereof, every such order in relation to the land lying in such area or part as the case may be, shall stand vacated;

(b) such abatement shall be without prejudice to the rights of the persons affected to agitate the right or interest in dispute 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.]"

35. Section 5(2) of the Act clearly contemplates all proceedings for the correction of records and every suit and all proceedings 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, shall stand abated. However, such abatement shall be without prejudice to the rights of the person affected to agitate the right or interest in dispute in the said suits or proceedings before the appropriate consolidation authorities.

Section 9(2) and 9A(1) contemplates of filing an objection and disposal of cases relating to claim. Section 9(2), 9A(1) and 9A(3) are quoted below:

"9. Issue of extracts from records and statements and publication of records mentioned in Sections 8 and 8-A and the issue of notices for inviting objections.-

(1).....

9(2) Any person to whom a notice under sub-section (1) has been sent, or any other person interested may, within 21 days of the receipt of notice, or of the publication under sub-section (1), as the case may be, file, before the Assistant Consolidation officer, objections in respect thereof disputing the correctness or nature of the entries in the records or in the extracts furnished therefrom, or in the Statement of Principles, or the need for partition.

9-A(1). Disposal of Cases relating to claims to land and partition of joint holdings.(1) The Assistant Consolidation Officer shall-

(i) where objections in respect of claims to land or partition of joint holdings are filed, after hearing the parties concerned, and

(ii) where no objections are filed after making such enquiry as he may deem necessary, settle the disputes, correct the mistakes and effect partition as far as may be by conciliation between the parties appearing before him and pass orders on the basis of such conciliation:

[Provided that where the Assistant Consolidation Officer, after making such enquiry as he may deem necessary, is satisfied that a case of succession is undisputed, he shall dispose of the case on the basis of such enquiry.]

(3) The Assistant Consolidation Officer, while acting under sub-section (1) and the Consolidation Officer, while acting under sub-section (2), shall be deemed to be a Court of competent jurisdiction, anything to the contrary contained in any other law for the time being in force notwithstanding."

36. The Act, 1953 is a special Act. The scheme as delineated by Section 5 and 9 clearly contemplates all disputes pertaining to rights and interest in the land were to be adjudicated by consolidation authorities and pending dispute before other courts stands abated to the consolidation courts. The Act, 1953 thus provides a forum and opportunity for adjudication of claim relating to land. The scheme of the Act, 1953, does not indicate that it contemplate any express or implied bar with regard to filing of an objection of any kind. When the provision of the Act, 1953 specifically provides filing of objections by any interested person reading any implied bar on the principle of estoppel and acquiescence to an objection to be filed by a person whose name is not recorded cannot be accepted.

37. The Apex Court in the case of **Sita Ram Vs. Chhota Bhondey, 1990 RD 439**, by noticing Clause (b) of sub-section 2 of Section 5, laid down that such abatement shall be without prejudice to the rights of the persons affected to agitate the right of interest in dispute in the said suit or proceedings before the appropriate consolidation authorities.

38. This Court in **Brij Bahadur Lal Vs. Deputy Director of Consolidation,U.P. & Ors, 1968 RD 187**, held that the Act, 1950 does not prevail over the Act, 1953. In the said case following was laid down.

" The Consolidation of Holdings Act was passed in 1953, whereas the Zamindari Abolition was enacted in 1950. The former would prevail over the latter. Former would prevail over the latter. Further, the Consolidation of Holdings Act provides for adjudication of rights in respect of the land covered by the Notification under Section4, whereas the Zamindari Abolition Act provides for adjudication of rights in respect of the agricultural land in general. The Consolidation of Holdings Act is a special Act, comparatively speaking. It is settled that a general law, even though later, does not abrogate that earlier special one by mere implication. According to Maxwell (Interpretation of Statutes, Eleventh

Edition, page 168), in such cases, the general provision would not apply to the particular cases dealt with by the special statute. It stands repealed pro tanto."

39. The view taken by the learned Single Judge in **Jagdeo's case (supra)** that a person who has not raised any objection after the enforcement of the Act, 1950 for correction of his revenue records is precluded from filing objection on the principle of estoppel under the Act, 1953 is clearly unsustainable when the Act, 1953 provides a forum for raising a claim. Thus, for filing an objection by any interested person under the Act, 1953, no kind of express or implied bar can be read against a person who had earlier not taken proceedings for correction of revenue records after enforcement of the Act, 1950.

40. In **Jagdeo's case (supra)** the learned Single Judge has relied on Section 49 of the Act, 1953 for barring objection by a person claiming co-tenancy right by principle of waiver and estoppel and has held that waiver and estoppel is the basis of second type of bar under Section 49 of the Act, 1953.

Section 49 of the Act, 1953 provides as under:

"[49. Bar to civil jurisdiction.- Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of right of tenure-holder in respect of land lying in an area, for which a [notification] has been issued [under sub-section (2) of Section 4] or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil Or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act:]

[Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 in respect of any land, possession over which has been delivered or deemed to be delivered to a Goan Sabha under or in accordance with the provisions of this Act.]"

41. As noted above, Section 5(2) of the Act, 1953 provides for abatement of all proceedings for the correction of records and every suit and proceedings in respect of declaration of rights or interest in any land laying in the area, or for declaration or adjudication of any other right in regard to which proceeding can or ought to be taken under this Act, pending before before any Court or authority whether of the first instance or of appeal, reference of revision.

42. A plain reading of Section 49, indicates that after the issuance of notification under sub-section (2) of Section 4 for declaration and adjudication of right of tenure-holder or adjudication of any other right, the forum is the consolidation court and no Civil or Revenue Court shall entertain any suit or proceedings with respect to rights in such land.

43. Section 49 of the Act, contains two prohibitions, firstly for an area which has been notified under sub-section (2) of Section 4, no Civil or Revenue Court shall entertain any suit or proceedings during currency of notification under Section 4(2) and secondly, even after consolidation proceedings are over, no civil or revenue court shall entertain any suit or proceedings in respect of rights in such land for which a proceeding could or ought to have been taken under this Act.

44. Section 49 of the Act, 1953 came up for consideration before this Court and the Apex Court in several cases.

45. The judgment of the Apex Court in **Sita Ram Vs. Chhota Bhonde, 1990 RD, 439** had elaborately considered Section 49 of the Act, 53. Following was laid down by the apex Court in the aforesaid judgement.

"From a perusal of Section 49 it is evident that declaration and adjudication of rights of tenure-holders in respect land lying in an area for which a notification has been issued under Section 4(2) and adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act, had to be done in accordance with the provisions of the Act only and the jurisdiction of the civil or revenue courts to entertain any suit or proceeding with respect to any other matter for which a proceeding could or ought to have been taken under the Act, has been taken away. The language used in Section 49 is wide and comprehensive. Declaration and adjudication of rights of tenure-holders in respect of land lying in the area covered by the notification under Section 4(2) of the Act and adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under the Act, would cover adjudication of questions as to title in respect of the said lands. This view also finds support from the other provisions of the Act and the amendments that have been introduced therein."

46. The bar under Section 49, does not come into play in context of consolidation proceedings itself. Section 49, cannot be read as containing any bar with regard to raising an objection under Section 9 or Section 9A of the Act, 1953. For consolidation proceedings which are under way no facet of Section 49 of the Act is attracted.

47. In **Jagdeo's case (supra)** the learned Single Judge had relied on his earlier judgment in Mangroo Vs. Ram Sumer and has quoted in paragraph 7 as under:

"The purpose of consolidation is taken to be resurrection of dead (buried) dispute or revival of dormant ones. In fact this is not the spirit of Consolidation Act. Under Section 9(2) of the U.P.C.H. Act only disputes of recent past may be raised. Consolidation Act provides a new Forum for adjudication of disputes, but not a new opportunity for the same".

48. The aforesaid observations are not in conformity with the scheme of the Act of Section 9 and 9A of the Act,1953. In filing objection no kind of limitation can be read in filing objection under Sections 9 and 9A, nor there can be any classification on the ground of disputes of

recent past or dispute of remote past. When an objection can by filed by any interested person, objection can be raised on any conceivable or valid ground and to read any prohibition in the provision that objection should relate to only recent disputes is doing violence to the express provision of the Act.

49. The learned Single Judge in **Jagdeo's case (supra)** in paragraphs 15,18 and 19 further has observed that a person who remained silent at the time of Zamindari Abolitioin and did not seek correction of revenue entries on the basis of joint tenancy or did not initiate legal proceedings immediately after Zamindari Abolition for declaration of his right and correction of revenue entries is subsequently estopped from seeking declaration of his rights in consolidation proceedings. The scheme of the Act, 1953 cannot be read in the manner as held by the learned Single Judge in the aforesaid paragraphs. Although, it is true that any Bhumidhar, Sirdhar or Asami can bring a suit for declaration under Section 229B of Act, 1950, but no consequence of not filing a suit has been provided under the Act, 1950. No disability accrues to a person by not initiating proceedings under the Act, 1950. More so, when the Act, 1953, does not contain any such exclusion barring objections on the aforesaid ground, reading any such implied bar is untenable. It is useful to note the provisions of the U.P. Land Revenue Act, 1901, (hereinafter called the "Act, 1901"). Chapter 4 contains a provision for "Revision of maps and records". A record operation is contemplated under the Act, 1901, in which a dispute regarding entries are checked and corrected. The scheme of Section 54 of the Act, 1901, contemplates revision of maps and records. It further contemplates filing an objection by any interested persons and also suo motu correction of the records. There is no provision in the Act, 1950 akin to Section 54 of the Act, 1901. As observed above, the Act, 1953 being a Special Act, the provisions of the Act, 1953 had to be given a special status and the right to file an objection under the Act, 1953 cannot be inhibited or prohibited by any provisions of the Act, 1950.

50. The legislative History as extracted above, would also indicate that even though such rights by estoppel and acquiescence had been acknowledged under the U.P. Tenancy Act, the legislature did not include any such provision under the U.P. Zamindari Abolition & Land Reforms Act, 1950 or any other subsequent Act relating to land tenure. The omission can also be considered to a conscious departure and, therefore, for this reason also it will not be appropriate to construe that the bar under Section 49 of the 1953 Act would also include barring claims by estoppel and acquiescence that too merely on account of absence of entries.

51. In paragraph 7 of the judgment the learned Single Judge has placed reliance on the observations made in **Mangaroo's case (supra)** which is to the following effect.

"However, independently of all these principles, such exercise is to be nipped in the bud on the doctrine of public policy. It is against public policy to permit a person to seek reversal of state of affairs continuing for scores of years. A certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs. To maintain state of

affairs continuing since very long which may have some elements of inaccuracy is better than to thoroughly analyse the inaccuracy after expiry of long time since inception of the said affairs and reverse the same after thorough discussion of attending circumstances at the time of start of said state of affairs."

52. We are unable to subscribe to the above view. No public policy can be found out which does not permit a person to seek reversal of the state of affairs continuing for scores of years, if he has a right to do so. The view of the learned Single Judge "that a certain but some what erroneous state of affairs is better than almost correct but uncertain state of affairs" can also not be approved. A person who has a right to a property which right he has neither abandoned nor relinquished can be claimed even after a lapse of considerable period, provided the claim is not barred by any law of limitation.

53. Law pertaining to land tenure is principally for determining rights of peasants of this country who earn their livelihood from agriculture. Most of them are not literate enough to know their rights and vigilantly assert their rights. Unless the claim of such person is barred by any law, barring their objection on the principle of estoppel and acquiescence is not in accordance with the purpose and object of that Act.

54. The interpretation put by the learned Single Judge in Jagdeo's case (supra) is also not supportable from the scheme as delineated by Sections 8,9 and 9A of the Act, 1953. Under Section 8 of the Act, 1953, a share of an individual tenure-holders in joint holding for the purpose of effecting partition can be ascertained.

55. The Assistant Consolidation Officer, under Section 9A of the Act, 1953, is entitled to settle the disputes even in cases where any objection is not filed on the basis of conciliation for eg. with regard to a plot, name of one branch of a family is recorded and the name of two other branches are not recorded. A dispute is raised at the time of partal (survey) which is noticed by the consolidation officials and if no objection is filed by the person claiming co-tenancy right, the Assistant Consolidation Officer is fully empowered under Section 9A, of the Act, 1953 to decide the dispute on the basis of conciliation between the parties in accordance with the rules.

56. Taking a case, where the parties agree for conciliation and by conciliation, shares are allotted and the dispute is decided according to rules, the same shall be perfectly in accordance with the scheme of the Act.

57. Taking a converse case, i.e. if objections are filed claiming co-tenancy rights by a branch of a family whose name is not recorded for the last say 50 years, if the interpretation put by the learned Single Judge is accepted, such objections are to be treated as barred.

58. Thus for the same dispute although by conciliation it can be decided, but on objection it cannot be decided would lead to anomalous results, which cannot be the intention of the legislature. Thus no such implied bar for filing objections can be read into the provisions of Section 49.

59. The entries in the revenue records raise only a presumption which is a rebuttable presumption. There is one more principle i.e. presumption of correctness of entries can apply to only genuine not forged or fraudulent entries. If the bar is read in filing objections against such entries it would lead to injustice.

60. The Apex Court in **Vishwa Vijai Bharti Vs. Fakhrul Hasan & Ors, (1976) Supp SCR 519,** laid down following.

"It is true that the entries in the revenue record ought, generally, to be accepted at their face value and courts should not embark upon an appellate inquiry into their correctness. But the presumption of correctness can apply only to genuine, not forged or fraudulent, entries. The distinction may be fine but it is real. The distinction is that one cannot challenge the correctness of what the entry in the revenue record states but the entry is open to the attack that it was made fraudulently or surreptitiously. Fraud and forgery rob a document of all its legal effect and cannot found a claim to possessory title."

61. It is relevant to note that even the records prepared in consolidation proceedings raise only a rebutabble presumption. Sections 27(1) and 27(2) of the Act, 1953 are quoted below:

"27.(1) As soon as may be, after the final Consolidation Scheme has come into force, the district Deputy Director of Consolidation shall cause to be prepared for each village, a new map, field-book and record of rights in respect of the consolidation area, on the basis of the entries in the map, as corrected under Section 7, the Khasra chakbandi, the annual register prepared under Section 10 and the allotment orders as finally made and issued in accordance with the provisions of this Act. The provisions of the Uttar Pradesh Land Revenue Act, 1901, shall, subject to such modifications and alterations as may be prescribed, be followed in the preparation of the said map and records.

(2). All entries in the record of rights prepared in accordance with the provisions of sub-section (1) shall be presumed to be true until the contrary is proved."

62. Thus, when the revenue entries raise only a rebuttable presumption a party objecting to the said entry can always by sufficient evidence rebut the presumption. Shutting out such objections at the very threshold cannot be said to be in accordance with the provisions of the Act, 1953.

63. However, it is observed that the plea of estoppel, acquiescence if applicable in any particular case can be taken and proved in accordance with law during consolidation proceedings, but no kind of bar in filing objection or raising a dispute can be read in Act, 1953, nor Section 49 can be said to have any application with regard to such pleas raised by any person who is not recorded in the revenue records.

64. In view of the foregoing discussions, we answer the Question Nos.3,4 and 5 as follows:

3)The learned Single Judge in Jagdeo's case (supra) was not justified in invoking the principles of doctrine of estoppel and acquiescence for creating an implied bar merely because a co-tenant had failed to assert his rights under the Act, 1950, and a

co-tenant is not barred in raising objections under the Act, 1953.

4)The provisions of the Act, 1953, being a special Act has an overriding effect over other Acts for the time being in force relating to adjudication of rights by tenure holders contemplated under the Uttar Pradesh Consolidation of Holdings Act, 1953 and it is the consolidation courts that have exclusive jurisdiction to decide the right, title and interest of claims relating to land tenure upon a notification under Section 4 of the Act.

5)Long standing entries which are questioned in an objection filed under the Uttar Pradesh Consolidation of Holdings Act, 1953 hold only a presumptory value and they cannot be taken to be an absolute proof for pressing the principle of estoppel, acquiescence and waiver and no automatic bar of Section 49 of the Uttar Pradesh Consolidation of Holdings Act, 1953 is attracted.

65. The reference dated 21/7/2009 is answered accordingly.

66. Let the answers be placed before the learned Single Judge for hearing the writ petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2011

BEFORE
THE HON'BLE SATYA POOT MEHROTRA,J.
THE HON'BLE RAJESH CHANDRA,J.

Civil Misc. Writ Petition No. 11792 of 2011

Chandrika Prasad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.K. Asthana
Sri Harish Kumar Tripathi

Counsel for the Respondents:
C.S.C.,
Sri Ashok Kumar Yadav
Sri Mahesh Narain Singh

Constitution of India-Article 226-Locus-Standee-Petitioner ex Fair Price Shop dealer-after cancellation of license - alloted to R-6-who claimed to be Schedule cost (Gond)-actually a Backward cost being 'Kahar'-admittedly Petitioner not one of applicant after cancellation-prayer to expedite the hearing objection/complaint-held can not be issued-in absence of locus-standee.

Held: Para 6

Sri H.K.Asthana, learned counsel for the petitioner has fairly stated that the petitioner is not one of the applicant in the fresh exercise of allotment of fair-price shop in question whereby the said shop was allotted in favour of the respondent no.7 (Smt. Sumitra Devi).

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The petitioner has filed the present Writ Petition making the following prayer:

i. Issue a writ , order of direction in the nature of mandamus directing the concerned authority to decide the matter pending regarding cancellation of Caste Certificate dated 24.2.2010 (Annexure No. 4 to this Writ Petition), which has been obtained by the respondent no.7, Smt. Sumitra Devi , wife of Sri Ramesh Chandra by fraud and misrepresentation.

ii. Issue a writ , order or direction in the nature of mandamus commanding the District Magistrate Maharajganj (Respondent no. 3) to take an appropriate action in the matter, so that the illegality prevailing regarding allotment of Fair Price Shop in favour of respondent no. 7, Smt. Sumitra Devi may be removed, which has been allotted in her favour by Sub. Divisional Magistrate , Maharajganj vide order dated 22.12.2011 (Annexure no. 5 to the Writ Petition) relying on the Scheduled Caste Certificate (Anneuxre no. 4 to the Writ Petition) as Smt. Sumitra Devi, wife of Sri Ramesh Chandra (respondent no. 7) belongs to the caste "Kahar" (O.B.C.) and not the " Gond" (Scheduled Caste).

iii. Issue any other suitable writ and just order which this Hon'ble Court may deef fit and proper under the facts and circumstances of the case.

iv. Allow the Writ Petition with costs."

2. As per the averments made in the Writ Petition, the petitioner was Ex-Fair Price Shop dealer in question. The agreement of the petitioner regarding the Ex-Fair Price shop dealership was cancelled. Thereafter, the said shop was allotted to the respondent no.7 (Smt. Sumitra Devi).

3. The petitioner has , thereupon , filed the present Writ Petition seeking the reliefs mentioned above.

4. The grievance of the petitioner is that the Caste Certificate submitted by the respondent no.7 (Smt. Sumitra Devi) showing herself to be Caste 'Gond' (Scheduled Tribe) was not correct. In fact , the respondent no.7 (Smt. Sumitra Devi) belong to the caste 'Kahar ' (Other Backward Classes).

5. We have heard Sri H.K.Asthana, learned counsel for the petitioner , learned Standing Counsel appearing for the respondent nos. 1 to 5 and Sri Gulab Chandra holding brief for Sri Ashok Kumar Yadav, learned counsel for the respondent no.7.

6. Sri H.K.Asthana, learned counsel for the petitioner has fairly stated that the petitioner is not one of the applicant in the fresh exercise of allotment of fair-price shop in question whereby the said shop was allotted in favour of the respondent no.7 (Smt. Sumitra Devi).

7. In the cirumstances, we are of the opinion that petitioner has no locus-standi to file the present Writ Petitioner seeking the reliefs mentioned above.

8. The Writ Petition is liable to be dismissed on the said ground

9. The Writ Petition is accordingly dismissed on the said ground.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 17.03.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Writ Petition No. 11959 (MB) of 2009

M/s Triveni Engineering & Industries Ltd. and another ...Petitioners
Versus
State of U.P. and another ...Respondents

U.P. Sheera Adhiniyam Amended by U.P. Act No. 10 of 2009-Section 2(d) (I), 8(4) and 8(5)-imposition of regular tax on captive consumption-ignoring the judgment of Apex Court in Chhata Sugar Mill's case-held binding effect-statutory rules be framed in co nonce with verdict of constitutional scheme-proposed amended provision-suffers from callous experience of Power-set-a-side.

Held: Para 37,60 and 67

In our opinion, thirty percent reservation has been made in clear violation of the statutory provision enshrined in Section 7-A and Section 8 of the Adhiniyam of 1964 and Niyamavali framed thereunder, which does not empower the State government to reserve a certain percentage of molasses in favour of the distilleries for the manufacture of country liquor. Section 7-A and Section 8 of Adhiniyam of 1964 envisages the making of individual orders by the Respondent No.2 upon receipt of application form a distillery requiring molasses. Therefore, the order impugned in the writ petitions is wholly arbitrary and violative of the rights of the petitioners guaranteed under Article 14 and 19 (1) (g) of the Constitution of India and ultra vires the provisions of the Adhiniyam and Rules made thereunder.

The aforesaid discussions leads us to an irresistible conclusion that such a transfer cannot amount to sale as it is a company which is a person who owns both the units and that 'transfer' and 'sale' cannot be interchanged, nor 'transfer' can be read as 'sale'. The impugned legislation is also bad in law as Article 265 of the Constitution of India prohibits the imposition of tax and says that no tax shall be levied or collected except by authority of law.

In view of the above, we are of the considered opinion that the provisions of Section 2(d-1), Section 8(4) and 8(5) of the U.P.Sheera Niyantran Adhinimaym amended by U. P. Act No. 10 of 2009, reproduced hereinabove, suffer from callous exercise of power and it can safely be concluded that the State has over-stepped its limit of power.

Case law discussed:

(2004) 3 SCC 466; 2007 (8) SCC 338; AIR 2007 SC 1984; 1997 UPTC 624; 1978 UPTC 653; AIR 1985 SC 1293; AIR 1980 SC 1124; 1996 ALJ 468; 1956 SC 676; [(1998) 7 SCC 26]; (2007) 8 SCC 338; [(1983) 4 SCC 45]; AIR 2007 SC 1984; AIR 1980 SC 1124; [1997 UPTC 624]; T.Mohindra vs. Additional Commissioner Commercial Taxes (103) STC 345; KCP Limited vs. State of Andhra Pradesh 1993 Vol (88) STC 374; AIR 1958 SC 296; (2004) 5 SCC 632; (2001) 6 SCC 697; (2007) 6 SCC 317; M/s SAF Yeast Company Private Limited vs. State of U.P. and another[VSTI 2008 Vol. III December Part-23].

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

1. Heard S/Sri Bharat ji Agarwal & R.N.Trivedi, Senior Advocates assisted by Dr R.K.Srivastava, Akhilesh Kalra, Dhruv Mathur on behalf of the petitioners and Sri J.N.Mathur, Addl. Advocate General assisted by Sri H.P.Srivastava, Addl. Chief Standing Counsel on behalf of the respondents-State.

2. Petitioners are the Public Limited Companies in terms of Companies Act, 1956 and are engaged in the business of manufacturing sugar by Vacuum Pan Process and to sugar factories, distilleries are also attached. Molasses, is the bye-product of the sugar mill owned by the petitioners' company which is the raw-material for distilleries and is utilized at the distilleries for captive/own consumption.

3. In all the afore-captioned writ petitions, the petitioners have questioned the validity of Clause 2(d-1), 8(4) and 8(5) of the U.P. Sheera Niyantran

Adhiniyam [hereinafter referred to as the ***'impugned Act'*** for the sake of brevity] as amended by the U.P. Act No. 10 of 2009, therefore, all the writ petitions have been clubbed together and are being disposed of by this common judgment. By these petitions, the petitioners have assailed the levy of "Administrative Charges" on the molasses, which is carried outside the premises of the Sugar factories, maybe for own distilleries located at distinct places.

4. According to petitioners, the following amendments have been made in the principal Act, i.e. U.P. Sheera Niyantran Adhiniyam, 1964:-

(i) A new clause (d) (i) "molasses for captive consumption" has been added in Section 2 of the U. P. Sheera Niyantran Adhiniyam, 1964. The impugned Act seeks to restrict the meaning of the expression ***"molasses for captive consumption"*** *to mean and include only such transfer of molasses by an occupier of the sugar factory to a distillery or to industrial unit having the same ownership provided the distillery or industrial unit is situated within the same premises or where it is in such* ***"contiguous vicinity"*** *of the sugar factory so that the transfer or transportation of such molasses outside the premises or the gate of the sugar factory is not required to be effected by a vehicle.*

(ii) Section 8 of the Act has also been amended and by the said impugned amendment in sub-section (1) of Section 8 of the Principal Act, the words ***"sell or supply"*** *have been substituted by the words* ***"transfer or sell or supply"*** *and in sub-sections (4) and (5) of the Section 8 of the Principal Act, the words* ***"sold or supplied"*** *have been substituted by the words* ***"transferred or sold or supplied"****.*

5. Therefore, it has been strenuously argued that the effect of these amendments is that the sugar factory will be required to pay administrative charges even on molasses, which is transferred to its own distillery, although it does not involve any sale or commercial transaction and the molasses is required for captive consumption.

6. According to learned Counsel for the petitioners, the storage, gradation and control of molasses produced by the sugar factories in Uttar Pradesh including regulation of its supply and distribution is governed by the provisions of 1964 Adhiniyam. In the statutory scheme so laid in the Adhiniyam of 1964, a person requiring molasses for his distillery or for any purposes of industrial development is obliged to apply to the Controller of Molasses in terms of Section 7-A of the Adhiniyam of 1964. Sub-Section (4) of Section 8 provides that occupier of a factory shall be liable to pay to the State Government administrative charges on the molasses "sold or supplied" by him. The administrative charges are intended to be levied only in the circumstances where there is a sale or supply by the sugar factory to some other legal entity by transfer of title for valuable consideration as enshrined in the Constitution of India.

7. Every year, the Excise Commissioner and Controller of Molasses issues a Molasses Policy with regard to supply and sale of molasses by the sugar factories. Accordingly, the Molasses Policy for the year 2008-09 was issued by the respondent No.2 vide order dated 31.1.2009. As per this policy, the sugar

factories are required to supply 30% of molasses produced by them to the distilleries for the manufacture of country liquor. Prior to the year 2007-08, the Molasses Policy used to provide that sugar factories were liable to supply molasses to the distilleries engaged in the manufacture of country liquor, irrespective of their own need. This controversy has been set at rest by the Supreme Court vide its judgment dated 24.9.2007 in the case of *Dhampur Sugar Mills Ltd. Versus State of Uttar Pradesh and others* [2007 (8) SCC 338].

8. It has been vehemently argued on behalf of the petitioners that with an avowed view to negate the directions contained in the aforesaid decision of the Apex Court, the State Government brought in the legislation to amend the U.P. Sheera Niyantran Adhiniyam, 1964 and impugned Act was promulgated which is against the pronouncement of the Apex Court made in *S. R. Bharat and others Versus State of Mysore,* (1995) SCC (6) 16 that it is now well settled by a catena of decisions of this Court that a binding judicial pronouncement between the parties cannot be made ineffective with the aid of any legislative power by enacting a provision which in substance over-rules such judgment and is not in the realm of a legislative enactment which displaces the basis or foundation of the judgment.

9. It is submitted by the Counsel for the petitioners that the State by amending the impugned Act seeks to nullify the decision of the Apex Court. Pursuant to the impugned amendment in the Act, the respondents have issued draft rules, namely, Uttar Pradesh Sheera Niyantran (Fifth Amendment) Niyamavali, 2009. Under the general presumption and understanding of law, the ***"captive consumption"*** means ***"self consumption".*** Significantly this was also the meaning of the captive consumption as per the provisions of the U. P. Sheera Niyantran Adhiniyam, 1964. The State Government cannot vary from the exact meaning of the said definition, which is beyond the scope of the U.P. Sheera Niyantran Adhiniyam, 1964. Further, the definition of ***"molasses for captive consumption"*** under the new Section 2(d)(i) is contrary to the general principle of law and understood by the Apex Court in catena of judgments.

10. According to Counsels for the petitioners, the definition of "molasses for captive consumption" as sought to be introduced is clearly discriminatory and violative of Article 14 of the Constitution of India and the impugned Act is nothing but a colourable exercise of power by the State. The classification of units or distilleries within the same premises or in contiguous vicinity of the sugar factory is not a reasonable classification. The words ***"captive consumption"*** clearly mean that anything which is manufactured or produced would not go out of the hands of the manufacturer but would be consumed for his own purpose. Viewed in the light of the above, it is clear that the distance of the unit to which the molasses is dispatched is clearly immaterial and irrelevant. The impugned amendments have a direct immediate effect and impact impeding the freedom of trade and commerce guaranteed under the Constitution of India and thus is in serious violation of the Constitution of India.

11. Elaborating their arguments, it has been urged by the petitioners' Counsel

that in view of the provisions of the Constitution of India, the State Legislature is only empowered to impose tax on sale or purchase of goods (molasses) and not on the transfer of such goods (molasses) as the same does not resemble the character of ***"sale"*** as recognized by general law and/or defined in Sales of Goods Act, 1930. In such circumstance, since the State Legislature is empowered to impose tax only on sale and purchase of goods other than newspapers, therefore, the impugned amendment imposing tax (administrative charges) on such transfer of molasses is not only arbitrary and illegal but *ultra vires* to the Constitution of India and thus unsustainable.

12. The next contention of the petitioner's Counsel is that the power of the State to impose a tax stands enshrined in Entries 52-62 of List II of the Seventh Schedule to the Constitution of India; a perusal of the aforementioned entires clearly establishes that none of them could be read as empowering the State to levy a tax on stock transfer or captive consumption. The provisions of Article 366 (29A) of the Constitution of India are also not attracted. A stock transfer of molasses or captive consumption thereof is neither a sale nor a purchase of goods and therefore, the State clearly lacks the legislative competence to subject the administrative charges to tax.

13. The administrative charges levied under the Act is not in the nature of a regulatory fee but is clearly a tax as has been held by the Hon'ble Supreme Court in the case of ***CCE-Vs. Chhata Sugar*** reported in (2004) 3 SCC 466 and, therefore, the said judgment places an unimpeachable embargo on the State levying such a tax on stock transfers. Admittedly, the captive consumption or a stock transfer of molasses involves no sale or supply to another unit; the impost of administrative charges, therefore, on the same is in pith and substance a tax on manufacture; it therefore partakes the nature of a duty of excise and therefore, also is beyond the legislative competence of the State.

14. Narrating the background, it has been submitted by the learned Counsel for the petitioners that before the aforesaid amendment in Section 2, companies having more than one sugar factory and a distillery either in the premises of the sugar factory or situated at a distance, were not required to supply reserved quantity of molasses for country liquor, in view of Supreme Court judgment dated 24.9.2007 in ***Dhampur Sugar Mills Ltd. Versus State of Uttar Pradesh*** and others reported in 2007 (8) SCC 338. By the impugned amendment, the State Government has negated the judgment of the Supreme Court. The petitioners submit that the premise on which the State proceeded to promulgate the impugned Act is clearly fallacious and basically illegal and unconstitutional. The Supreme Court was merely dealing with the question of whether a sugar factory could be compelled to supply molasses to distilleries other than its own despite its own needs. In this sense, the impugned enactment neither removes the basis upon which the judgment was rendered nor is valedictory in nature.

15. It has been vehemently argued that the words ***"captive consumption"*** cannot be given a restrictive meaning of being consumed within the factory premises. What is really necessary and

essential is that the articles must be utilized by the entity/company itself as distinct from a sale or transfer for a consideration. The factory premises within which the goods are so consumed has no nexus or correlation to, nor does not it restrict the meaning of the words "captive consumption". This was the intent of the Supreme Court decision, which is purported to be negated by the said amendment and is, therefore, constitutionally invalid.

16. The definition "molasses for captive consumption" is also clearly discriminatory and violative of Articles 14, 19 (1) (g), and 300-A of the Constitution of India, inasmuch as there is no rational basis for differentiating between (i) a distillery which may be situated in the same premises as the sugar factory and a distillery which may be situated in different premises as the sugar factory and a distillery outside the premises of a sugar factory, but under the same ownership and management, i.e. belonging to one and same company. Secondly, the words sold or supplied clearly did not envisage levy of administrative charge on self-consumption and rightly so, and if the same were deemed to include transfer for captive consumption, it would have clearly transgressed the legislative competence of the State.

17. The administrative charge is a tax, as held by the Hon'ble Apex Court in the case of ***Central Excise Lucknow, U.P. v. M/s Chhata Sugar Company Ltd.*** reported in 2004 (3) SCC 466, is sought to be levied on molasses transferred or captively consumed in the distillery belonging to the same company/person, owning the sugar factory as well. Undisputedly, a sugar factory and a distillery are two units of one juristic personality i.e. the company. Therefore, the administrative charge becomes a tax on the company and is thus beyond the legislative competence of the State. Undisputedly, the Administrative charges under Section 8 (4) and 8 (5) which provide for levy of administrative charges read with Rule 23, is a tax as held by the Hon'ble Apex Court in the case of ***M/s Chhatta Sugar Company Limited*** (supra) and as such, the said tax is referable only to Entry 54 List II of 7th Schedule of the Constitution of India which authorizes the State to levy tax on the sale or purchase or goods other than newspapers. In this regard reliance on paragraphs 53,54 and 56 ***Southern Petrochemical Industries vs. Electricity Inspector and E.T.I.O. & others;*** AIR 2007 SC 1984 has been placed. Paragraphs 53, 54 and 56 read as under:-

"53. Article 245 of the Constitution of Inda vests the parliament with power of legilsation on all matters enumerated in List and also the matters enumerated in List III of the Seventh Schedule of the Constitution of India. The State Legislature, however, has the exclusive right to legilslate matters specified in the Entries contained in List II.

54.Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for

purposes of legislative competence vis-a-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifest the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. .."

56.A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields."

18. In the backdrop of the aforesaid facts, it has been argued that the impugned amendment i.e. provisions of Section 2(d-1), 8(4) and 8(5) of the Act insofar as it purports to levy tax, namely, administrative charges on the supply/transfer of molasses from the sugar factory to the distillery owned by the same person in Section 8 is bad in the eyes of law being inoperative and unworkable as the levy of such administrative charges under Section 8 (4) has to be made "in the manner prescribed" in the Rule 23 of the U. P. Sheera Niyantran Niyamavali, 1964 which does not include any transfer. The provisions of Rule 23 are as follows:-

"Every occupier of a sugar factory shall deposit the amount of administrative charges payable on molasses sold or supplied by him in the treasury or sub-treasury of the district in which the sugar factory is situated and produce the treasury challan as evidence of such payment "to Excise Officer-in-charge of the sugar factory before making the actual delivery of the molasses to the purchaser."

19. As regards the imposition of tax as per provisions of the Constitution of India, the State Legislature is only empowered to impose tax on sale or purchase of goods and not on the transfer of such goods as the same does not resemble the character of "sale" as recognized by general law and/or Sales of Goods Act, 1930. In such circumstances, since the State Legislature is empowered to impose tax only *on sale and purchase of goods other than newspapers,* therefore, the impugned amendment imposing the tax (administrative charges) on such transfer of molasses is not only arbitrary and illegal but *ultra vires* to the provisions of Constitution of India and are unsustainable. For convenience relevant provisions of Section 8 of the U. P. Sheera Niyantran Adhiniyam, 1964 prior and after the impugned amendment are reproduced here-in-below:-

SECTION 8 -PRIOR TO AMENDMENT

"8. Sale and supply of molasses - (1) The Controller may by order require the occupier of any sugar factory to sell or supply, in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2) ....
(3) ....

(4) The occupier of a sugar factory shall be liable to pay to the State Government, in the manner prescribed,

administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses sold or supplied by him.

(5) The occupier shall be entitled to recover from the person to whom the molasses is sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses.

Section 8- After Amendment

"8. Sale and supply of molasses - (1) The Controller may by order require the occupier of any sugar factory to transfer or sell or supply in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2) ....
(3) ... .

(4) The occupier of a sugar factory shall be liable to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses transferred or sold or supplied by him.

(5) The occupier shall be entitled to recover from the person to whom the molasses is transferred or sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses."

20. The impugned Act seeks to amend the provisions of the Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 which had received the assent of the President of India on 17.10.1964 under the provisions of Article 254 of the Constitution of India. The background for seeking the assent of the President of India appears to have been motivated by the fact that sugar industry is a 'Scheduled Industry', the control of which was taken over by the Union, being expedient in the public interest. The sugar industry finds mention at item No.25 in the First Schedule to the Industries (Development and Regulation) Act, 1951 likewise molasses comes under Item No. 26 in the same First Schedule. The sugar industry and its products as well as raw material are covered under the Essential Commodities Act, 1955, Sugar Control Order, 1966 and Sugarcane Control Order, 1966. Being conscious of the aforesaid facts, it appears that the said Act was reserved for and received the assent of the President of India. However, the impugned Amendment Act of 2009 has not been reserved nor it has received the assent of the President of India and is thus Constitutionally invalid.

21. According to learned Counsel for the petitioners the word 'Sale' and 'Purchase' having not been defined in Section 2 of the U.P.Sheera Niyantran Adhiniyam, one has to go to definition of sale as provided in Section 4 of the Sale of Goods Act, which provides transfer of property from one person to another person for valuable consideration. There is no dispute that both the sugar mill and distillery are owned by the same persons, namely, by the same juristic persons i.e. the petitioners, hence there is no transfer of property from one person to another for any price or valuable consideration, which are necessary ingredient for sale by one person and purchase by another person. In

support of this contention reliance has been placed on ***Vam Organics Limited and another vs. State of U.P. and another*** 1997 UPTC 624, U.P. State Cement Corporation Limited vs. CST 1978 UPTC 653. Reliance has also been placed on ***State of Orissa vs. Titagarh Paper Mills;*** AIR 1985 SC 1293 and ***Ram Chandra Kailash Kumar vs. State of U.P.;*** AIR 1980 SC 1124 wherein it has been observed that on any transaction, which is not a purchase or sale, no tax can be imposed. Thus, it has been asserted that the impugned amendments in the Act are clearly arbitrary and the State clearly lacks legislative competence to enforce the amendments contained in the impugned Act.

22. Lastly, it has been informed that after the impugned amendment, the respondents have issued an order dated 23.3.2009 to all the Excise Inspectors directing them to charge administrative charges from all the sugar factories on transfer of molasses. In compliance of this order issued by the Excise Commissioner, the Excise Inspectors have started issuing notice to the sugar factories for payment of administrative charges on molasses transferred/ supplied for captive consumption.

23. On the other hand, Sri J.N.Mathur, Addl. Advocate General has submitted that U.P. Sheera Niyantran Adhiniyam 1964 amended by U.P. Act No. 10 of 2009 has been enacted in public interest for the control of storage, gradation and price of molasses produced by sugar factories in the State and for the regulation of supply and distribution thereof. Thus the Adhiniyam is clearly referable to Entry No. 33 of List III of the Seventh Schedule to the Constitution of India. The U.P. Act No. 10 of 2009 is also squarely covered by the legislative field as provided under the aforesaid Entry No.33. Thus allegation of lack of legislative competence as alleged by the petitioners is wholly baseless and without substance.

24. Scheme of Adhiniyam would reveal that the Adhiniyam provides for regulation of supply and distribution of molasses to distilleries and other industrial establishment and all the regulatory measures are for the benefits of distilleries and industries in public interest. The regulatory nature of the Adhiniyam would be evident from reading of the relevant provisions of the said Adhiniyam, which are as under:-

(i) Section 3 of the Adhiniyam provides for constitution of Advisory Committee to advice on matters relating to the control of storage, preservation, gradation, price, supply and distribution of molasses. Rule 3 of the Uttar Pradesh Molasses Advisory Committee Rules, 1965 provides for the Chairman and the Members of the Advisory Committee which consist of representative of concerned department, representatives of distilleries and Alcohol Based Industries and Mouldering and Foundry Industries in U. P.

(ii) Section 4 provides for appointment of Controller of Molasses by the State Government for exercising powers and performing the duties of Controller of Molasses under the Adhiniyam and the Rules.

(iii) Section 5 requires every occupier of a sugar factory to make provision of molasses and to take

adequate safeguards against leakage, seepage, overflow or any other accident likely to damage the quantity of molasses stored in the factory; and to make adequate arrangements to prevent the mixing up of water or old deteriorated molasses and to provide adequate facilities for handling of molasses etc. Contravention to this provision renders the occupier of sugar factory to penalties under Section 11.

(iv) Section 6 provides for preservation against adulteration.

(v) Section 7 provides for removal of adulterated molasses. This provision directly benefit the distilleries and industries and industries using molasses so as to get quality molasses and to remove possibility of distribution or supply of adulterated molasses.

(vi) Section 7 A of the Adhiniyam enables any person who requires molasses for his distillery or for any purpose of industrial development to apply in the prescribed manner to the Controller of Molasses specifying the purpose for which it is required and on receipt of the application the Controller of Molasses may make an order under Section 8 of the Adhiniyam considering the availability of molasses, various requirements of molasses, better utilization to which molasses may be put in the public interest, genuineness of requirement etc.

(vii) Section 8 provides that Controller of Molasses may, with the prior approval of the State Government, by order require the occupier of any sugar factory to transfer, sell or supply in the prescribed manner such quantity of molasses to such persons, as may be specified in the order and the occupier shall, notwithstanding any contract, comply with the order. Sub-section (4) requires the occupier of a sugar factory to recover administrative charges at the time of transfer, sell or supply and deposit the same with the State Government.

(viii) Section 11 to 16 deals with offences and penalties, search and seizure and compounding of offences.

(ix) Section 17 mandatorily requires the maintenance of accounts and furnishing of return by the occupier of the sugar factories and the person to whom the molasses is transferred and supplied.

(x) Section 22 empowers the State Government to frame rules.

25. As regards control of Sugar Industry, it has been submitted that the 'Sugar Industry' has been included in the First Schedule of the Industries (Development & Regulation) Act, 1951. The Sugar Mills produce the molasses as a by-product. Distilleries/Chemical units buy molasses from the sugar-factories and use it as a raw material for production of rectified spirit and other organic products. The molasses and the alcohol policies affect the farmers, who supply sugarcane and get its price from the sugar factories. The State Government has to examine the accounts of all these factories pertaining to the production including the production of molasses in a given year as well. The field of Sugar Industry is having been covered within the purview of clause (a) of the Entry 33 of List III of the VII Schedule.

26. Under chapter III-B of the Industries (Development and Regulation)

Act, 1951, the provisions of control of supply, distribution and price of certain articles are given in Section 18-G of the Act, which reads as under-

"18-G Power of Control, Supply, Distribution, Price etc. of certain articles:- (1) The Central Government, so far as it appears to it to be necessary or expedient for securing the equitable distribution and availability at fair price of any article or class of articles relatable to any scheduled industry, may notwithstanding anything contained in any other provision of this Act, by notified order, provided for regulating the supply and distribution thereof and trade and commerce therein."

Section 26 empowers the Central Government to issue appropriate directions to the State Government and it reads as under:-

"The Central Government may give directions to any State Government as to the carrying into execution in the State of any of the provisions of this act or of any order or direction made thereunder."

27. According to State Counsel, Entry-33 of the Concurrent List covers the field of trade and commerce in, and the production, supply and distribution of the products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in the public interest and imported goods of the same kind products. There is no law enacted by the Union Government under this field and as such the notification issued by the State Government for the administrative charges on molasses is not repugnant to the law made by the Union Government. Moreover, a Full Bench of this Court in the case of ***M/s Shriram Industrial Enterprises Ltd. Vs. Union of India and others;*** 1996 ALJ 468, while considering the question of legislative competence and the provision of Section 18-G of the Industries (Development & Regulation) Act, 1951 observed in paragraph 69 as under:-

"69. The result of the aforesaid discussion is that Section 18-G of the Industries (Development & Regulation) Act, 1951 enacted by the Parliament being a legislation under Entry 33 of List III has not denuded the power of the State Legislature to legislate on regulating supply, distribution, and price of molasses-a product of the sugar industry. The said legislation being on a concurrent field, the State Legislature was competent to enact Section 7, 8 and 10 of the U.P. Sheera Niyantran Adhiniyam, 1964 subject to assent the President of India in terms of Article 254 of the Constitution. Since the Adhiniyam has assent of the President of India, Sections 7, 8 and 10 of the Adhiniyam are the valid piece of legislation."

28. As regards legislative competence of the State Government, the State Counsel has placed reliance on ***Ch. Tika Ramji and others v. State of U. P. and others;*** AIR 1956 SC 676 and ***SIEL Ltd and others v. Union of India and others;*** [(1998) 7 SCC 26]. In Tika Ramji's case (supra), the Apex Court observed in paragraph 34 of the report as under:-

" .... Even assuming that Sugarcane was an article or class of articles relatable to the sugar industry within the meaning of section 18-G of Act LXV of 1951, it is

to be noted that no order was issued by the Central Government in exercise of the powers vested in it under that section and no question of repugnancy could ever arise because, as has been noted above, repugnancy must exist in fact and not depend merely on a possibility. The possibility of an order under section 18-G being issued by the Central Government would not be enough. The existence of such an order would be the essential prerequisite before any repugnancy could ever arise."

Relevant paragraphs of SIEL Ltd. and others (supra), i.e. 21, 24 and 25 are reproduced hereunder:-

"21. In this connection our attention was drawn to the observations of this Court in Ch. Tika Ramji's case (supra). The Court in that case was concerned with the legislative competence of the State Government to legislate in respect of sugarcane in the light of Section 18G of the Industries (Development and Regulation) Act, 1951. This Court observed (at page 432) that even assuming that sugarcane was an article relatable to the sugar industry within the meaning of Section 18G, no order had been issued by the Central Government in exercise of the powers vested in it under that Section. Hence no question of repugnancy would arise. Repugnancy must exist in fact and not depend merely on a possibility. Ch. Tika Ramji's case (supra) has been cited with approval in the more recent case of Indian Aluminum Company Ltd. and Anr. v. Karnataka Electricity Board and Ors.,: [1992]3SCR213 where this Court again held that in the absence of any notification under Section 18G of the Industries (Development and Regulation) Act there was no question of any repugnancy on the score of tariff of electricity fixed by the State Amending Act. Section 18G per se did not take away the State's right also to legislate under Entry 33 of List III. This Court also noted the provisions of Article 254(2) of the Constitution in this connection.

24.The respondents have pointed out that the U.P. Sheera Niyantran Adhiniyam, 1964 has also received President's assent under Article 254(2). In any event, looking to the fact that the Molasses Control Order of 1961 passed by the Central Government in exercise of powers conferred by Section 18G was not extended at any point of time to the State of U.P. or the State of Bihar, the question of repugnancy between the Molasses Control Order, 1961 and the U.P. Sheera Niyantran Adhiniyam, 1964 does not arise. In fact, the present litigation has commenced after the Molasses Control Order, 1961 of the Central Government has been rescinded and the only legislation which holds the field is the U.P. Sheera Niyantran Adhiniyam of 1964 which is in legitimate exercise of power of legislation under Entry 33 of List III.

25. In the premises the U.P. Sheera Niyantran Adhiniyam of 1964 is within the legislative competence of the State Government."

29. As regards **Chhatta Sugar's** case (supra), on which reliance has been placed by the petitioners, the State Counsel has submitted that this case is not applicable in the instant matter, as the controversy involved in ***Chhata Sugar's*** case was with regard to non-inclusion of administrative charges in the value of

goods under Section 4 of the Central Excise Act, 1944. He has also pointed out, in **Chhatta sugar's** case, the State Government was not a party and as such, factual aspects of rendering of services could not be noticed by the Apex Court. Further, the interpretation of law relating to admissibility or otherwise of a deduction under the Central Excise Act, 1944 has to be confined to that Act alone and cannot be applied to the U.P. Sheera Niyantran Adhiniyam which altogether is a different statute book. Similarly, petitioners cannot derive any benefit of the judgment rendered in ***Dhampur Sugar Mills Ltd. v. State of U.P. and others;*** (2007) 8 SCC 338 as U.P. Sheera Niyantran Adhiniyam has been amended by U. P. Act No. 10 of 2009, which is well within the legislative competence of the State Government and the amendment made therein, for the reasons discussed above, cannot be said to be violative of any provision of the Constitution of India.

30. State Counsel has also submitted that in public interest and for proper control of storage, gradation and regulation of transfer, supply and distribution of molasses, which mainly and directly benefits the distilleries and industries requiring molasses, one Sub Inspector, Excise alongwith One Head Constable of Excise are posted in each and every sugar factory. There are around 157 sugar factories in the State of Uttar Pradesh. Merely, the salary and incident of pensionary benefits on such Sub Inspectors, Excise and Head Constables, the burden of expenditure comes to about Rs. 11 crores per annum. This expenditure is directly and exclusively referable to the services being rendered by the State Government for regulation of molasses mainly for the benefits of distilleries and industries in public interest. Besides above, there is an exclusive team of officers and staff posted at Headquarter of Controller of Molasses, who are exclusively devoted to the regulatory services being rendered by the State Government in relation to molasses. Also, laboratories have been set up by the Excise Department for proper regulation of quality of molasses in the interest of distillers and industries. Thus, it is imminently clear that the State incurs huge expenditure on salary of officers, technicians and staff related to the laboratories and further incurs huge expenditure on equipment, maintenance of building, electricity and chemicals.

31. From the circumstances mentioned above, the administrative charges under Section 8(4) of the Adhiniyam are in the nature of regulatory fee and has direct co-relation between the fee and services rendered by the State Government to the beneficiaries i.e. the distilleries and industries requiring molasses. The occupier of sugar factories has been required to deposit the administrative charges, which is a convenient mode of realization of the regulatory fee from the distilleries and industries requiring molasses. The administrative charges being a regulatory fee, *quid pro quo* is not required to be proved as per settled law. Thus the administrative charges being regulatory fee, the same is payable by distilleries and industries even if molasses is transferred at a distant place by an occupier of sugar factory to a distillery or industry under the ownership of the same company.

32. Clarifying the position regarding 'distillery' and the 'sugar factory, it has been strongly argued that both are

separate units. The 'sugar factory' is a separate legal unit licenced under the Industries (Development & Regulation) Act, 1951 and is controlled by the occupier of the factory whereas the distillery is controlled by the distiller holding PD-2 licence under the provisions of U.P. Excise Act, 1910. The condition nos. 1 and 9 of the licence [Form PD-2], which are relevant in the present context read as under:-

1.The licence shall be subject to -

"(1) rules relating to import, export and transport of spirit contained in Chapter VII and VIII of the Excise Manual Vol.1:

Such other rules as may, from time to time, be made by the Excise Commissioner and the Government for security of Excise Revenue and for regulating the manufacture, sale, supply and prices of Indian Made Foreign Liquor including rectified spirit, denatured spirit, power and fuel alcohols.

(9). Any contravention of the rules or conditions herein before enumerated shall involve cancellation of the license in addition to such other penalties as may be prescribed under the U.P. Excise Act."

33. As the petitioner's distillery is established under PD-2 licence and as such in view of the terms of licence, it is under an obligation to follow the terms and conditions of the licence.

34. Apart from the conditions of licence, Rule 23 of the U.P. Sheera Niyantran Niyamawali, 1974 have provisions regarding 'administrative charges' which provides that every occupier of the sugar factory shall deposit the amount of administrative charges payable on molasses transferred, sold or supplied by him in the treasury or sub-treasury of district in which the sugar factory is situated.

35. Prior to the year 2007-08, the Molasses Policy used to provide that sugar factories were liable to supply molasses to the distilleries engaged in the manufacture of country liquor, irrespective of their own need. However, the controversy was set at rest by the Supreme Court vide its judgment dated 24th September, 2007 in the case of *Dhampur Sugar Mills Ltd. v. State of Uttar Pradesh and others* [2007 (8) SCC 338] whereby it has been held that reservation applies only to the excess stock of molasses, i.e. molasses which is in excess of and not used for own consumption by the sugar mill and reservation would not apply in case there is no balance stock of molasses with any sugar mill.

36. The sugar factories including the petitioners' company, are required to maintain the above ratio of 3:7 and are not at liberty to dispose of the molasses of the unreserved quantity at their discretion and are placed at a great disadvantage for the following reasons:-

(1) The sugar factories have to maintain high stock of molasses, as a result of which their cash flow position is adversely affected and the sale proceeds what they could have realized by selling molasses of the unreserved quantity is not available to them and their cane price payment to the growers is delayed, besides non-availability of funds of their other requirements.

(2) The sugar factories are forced to sell molasses to the distilleries at much lower prices than the market price.

(3) Maintaining high stock of molasses, at time results in overflow of molasses during the season, which causes pollution problem.

(4)The storage of molasses beyond January, 2010 in the sugar units of the petitioner company will result in closure of the sugar mills as a result of non-lifting or dispatch of the produced molasses.

37. In our opinion, thirty percent reservation has been made in clear violation of the statutory provision enshrined in Section 7-A and Section 8 of the Adhiniyam of 1964 and Niyamavali framed thereunder, which does not empower the State government to reserve a certain percentage of molasses in favour of the distilleries for the manufacture of country liquor. Section 7-A and Section 8 of Adhiniyam of 1964 envisages the making of individual orders by the Respondent No.2 upon receipt of application form a distillery requiring molasses. Therefore, the order impugned in the writ petitions is wholly arbitrary and violative of the rights of the petitioners guaranteed under Article 14 and 19 (1) (g) of the Constitution of India and ultra vires the provisions of the Adhiniyam and Rules made thereunder.

38. It is also relevant to point out that the provision in the policy regarding allotment of left over molasses meant for country liquor to manufacture India Made Foreign Liquor (IMFL) is impermissible and unjustified and is a back door method of giving advantage to the distilleries making IMFL to utilize the molasses received by them against the reserved quota for country liquor. There is no justification whatsoever for allotting the molasses meant for country liquor, for the manufacture of IMFL, which is completely free, and there is no control of any kind on its manufacture and sale. The Reservation Policy is only meant for reserving molasses for country liquor. IMFL cannot fall under this category at all. Therefore, permitting the distilleries to use molasses meant for country liquor for the manufacture of IMFL is totally unjustified and malicious exercise of powers on extraneous considerations.

39. U.P. Sheera Niyantran Adhiniyam was enacted by the State of U. P. with the object to control the storage, gradation and price of molasses produced by the sugar factories in the State of Uttar Pradesh and the regulation of supply and distribution thereof. Section 2 is the definition clause. Section 2 (b) defines 'distillery' which means the premises license under the provisions of the United Provinces Excise Act, 1910, for the manufacture of power, portable or industrial alcohol; Section 2(d) defines 'molasses' and it means the heavy, dark coloured viscous liquid produced in the final stage of manufacture of sugar by vacuum pan from sugarcane or gur, when the liquid as such or in any form or admixture contains sugar; Section 2 (3) defines 'occupier in relation to a sugar factory' and it means the person, who has ultimate control over the affairs of the factory and includes a managing agent of the factory;

40. Section 2 (h) deals with 'sugar factory' or 'factory' and it means any premises including the precincts thereof, whereon, twenty or more workers are

working or were working on any day of the preceding twelve months and in any part of which a manufacturing process connected with the production of sugar by means of vacuum pans is being carried on or is ordinarily carried on with the aid of power.

Section 7-A (1) deals with the application for molasses and it reads as under:-

"Any person who requires molasses for his distillery or for any purpose of industrial development may apply in the prescribed manner to the Controller specifying the purpose for which it is required."

Section 8 deals with sale and supply of molasses which reads as under:-

"8. Sale and supply of molasses - (1) The Controller may by order require the occupier of any sugar factory to transfer or sell or supply in the prescribed manner such quantity of molasses to such person, may be specified in the order, and the occupier shall, notwithstanding any contract, comply with the order.

(2)The order under sub-section (1) -

(a) shall require supply to be made only to a person who requires it for his distillery or for any purpose of industrial development.

(aa) may require the person referred to in clause (a) to utilise the molasses supplied to him under an order made under this section for the purpose specified in the application made by him under sub-section (1) of Section 7- A and to observe all such restrictions and conditions as may be prescribed.

(b) may be for the entire quantity of molasses in stock or to be produced during the year or for any portion thereof, but the proportion of molasses to be supplied from each sugar factory to its estimated total produce of molasses during the year shall be the same throughout the State save where, in the opinion of the Controller a variation is necessitated by any of the following factors:-

(i) the requirements of distilleries within the area in which molasses may be transported from the sugar factory at a reasonable cost;

(ii) the requirements for other purposes of industrial development within such area; and

(iii) the availability of transport facilities in the area.

(3) The controller may make such modification in the order under sub-section (1) as may be necessary to correct any error or omission or to meet a subsequent change in any of the factors mentioned in clause (b) of sub-section (2).

(4)The occupier of a sugar factory shall be liable to the State Government, in the manner prescribed, administrative charges at such rate, not exceeding five rupees per quintal as the State Government may from time to time notify, on the molasses transferred or sold or supplied by him.

(5)The occupier shall be entitled to recover from the person to whom the

molasses is transferred or sold or supplied an amount equivalent to the amount of such administrative charges, in addition to the price of molasses."

Section 10(1) deals with the provision for selling of molasses by a sugar factory which reads as under:-

"The occupier of a sugar factory shall sell molasses in respect of which an order under section 8 has been made.

Provided that the distilleries of potable alcohol which have been granted licence for wholesale contract supply of country liquor shall continue to be supplied molasses in respect of which an order under section 8 has been made at a price not exceeding that for the time being prescribed in the Schedule till March 31, 1998."

In Chapter V of the Act, there are miscellaneous provisions and Section 17 deals with the maintenance of accounts and furnishing of returns, which reads as under:-

17.Every occupier of a sugar factory and every person to whom molasses is supplied by such occupier shall be bound -

(a) to maintain such registers, records, accounts, instruments and re-agents as may be prescribed;

(b) to furnish all such information and return relating to the production and disposal of molasses in such manner, to such persons and by such dates as may, by order, be prescribed by the Controller;

(c) to produce, on demand by an excise officer not below the rank of Sub-Inspector (Excise), registers, records, documents, instruments and chemical re-agents which he is required to maintain under the provisions of this Act or the rules or orders made thereunder.

41. In exercise of powers under Section 22 of the U.P. Sheera Niyantran Adhiniyam, rules were framed known as U. P. Sheera Niyantran Niyamavali, 1974. Word 'allottee' has been defined under Rule 2-b which reads as under:-

"Allottee" means a person in whose favour an order under Section 8 of the Act has been made for purposes of purchase of molasses from the occupier of a sugar factory.

Chapter III of the Rules deals with the supply and distribution. Rules 12 requires the Occupier of the sugar factory to submit estimate of molasses to be produced in sugar factory, whereas Rule 14 requires submission of consolidated statement before the Advisory Committee. The relevant provisions of Rules 12 and 14 are reproduced as under:-

"12. The occupier of every sugar factory shall submit to the Controller by August 31st each molasses year a statement in Form M.F.9 specifying an approximate estimate of the quantity of molasses to be produced in a sugar factory during the molasses year following, along with such other information as is required under the Form."

"14. A consolidated statement of the estimated availability of molasses will be drawn up and placed before the Advisory

Committee, constituted under Section 3 (1) of the Act by the Controller who may make orders regarding the sale or supply of molasses in accordance with the provisions of Section 8 of the Act."

Rule 23 deals with the administrative charges and it says as under:-

"23. Every occupier of a sugar factory shall deposit the amount of administrative charges payable on molasses sold or supplied by him in the treasury or sub-treasury of the district in which the sugar factory is situate and produce the treasury challan as evidence of such payment to the excise officer in charge of the sugar factory before making actual delivery of the molasses to the purchaser."

Rule 25 deals with the removal of molasses from sugar factory and it reads as under:-

25 (1) No molasses shall be removed from the premises of a sugar factory until it has been weighed or measures and a pass in Form M.F.4 has been issued. This pass shall be issued in pentuplicate by the occupier of the factory or by an officer authorized by the Controller in this behalf. One copy of the pass shall remain with the occupier of the sugar factory, one copy shall be handed over to the Sub-Inspector of Excise posted at the sugar factory before the removal of the molasses from the premises of the sugar factory, one copy shall be sent to the Controller, and one shall be sent to the Excise Inspector of the Circle in which the Sugar factory is situate.

(2)Verification of the receipt of consignment - On receipt of the consignment, the consignee shall verify the quantities received and note them on the back of the pass and return it to the occupier of the sugar factory concerned. The consignee shall take adequate safeguard to the see that the wastage or deficiency in transit does not exceed one per cent. In case the wastage or deficiency exceeds one per cent the consignee shall be liable to punishment imposed under the Act for the contravention of the rule:

Provided that it is proved to the satisfaction of the Controller that wastage or deficiency in excess of the prescribed limit has been caused by accident or any other unavoidable cause the consignee shall not be liable to punishment.

(3) Officers authorized for verification - Consignment destined for use in distilleries in Uttar Pradesh shall be verified by the Excise Inspector incharge of the distillery concerned or any other person authorized by the Controller in this behalf in the presence of the distilleries or their representative and result noted on the back of the pass."

Rule 31 deals with the price and molasses by the distilleries, which reads as under:-

"31 (1) The rate for payment of the price of molasses by a distillery to the occupier of a sugar factory shall be based on the grade of molasses as follows:-

(a) When molasses are transported by rail, the grade shall be the grade as determined at the distillery under rule 29 (3).

(b) When the transport of molasses is by road the grade shall be the grade as

determined by the occupier of the sugar factory and recorded in the gate pass in Form M.F.4.

(2) The Distillery shall have to pay the price and other levies on Molasses to the Occupier of the Sugar Factory immediately at the time of taking delivery of Molasses. If the Sugar Mill delays or causes other hindrances in delivery of Molasses after payment of its price by the Distillery, the Occupier of the Sugar Factory shall be liable for penal action for breach of rules.

42. By U. P. Act No. 10 of 2009 U.P. Sheera Niyantran Adhiniyam, 1964 was amended which received the assent of the Governor on 27.2.2009. The statement and objects of U.P. Sheera Niyantran (Amendment) Act, 2009 reads as under:-

"In Civil Appeal No. 4466/2007 M/s Dhampur Sugar Mills Ltd. Vs State of U.P. and others, the appellant has stated before the Hon'ble Supreme Court, that the molasses produced in his sugar mill is not sufficient for his own consumption in his distilleries and he has to purchase molasses from other sugar mills. Hence the reservation on molasses should not be imposed on them. The Hon'ble Supreme Court in the aforesaid petition has allowed the appeal and passed the direction that reservation on molasses shall not be imposed on those sugar mills that utilize their produce (molasses) for their own purpose. Meaning thereby reservation cannot be imposed on such sugar mills as have their own distilleries and consume molasses in their own distilleries. The sugar mills have also obtained stay order from the Hon'ble Courts on the administrative charges, that is charged on the sale of molasses stating that they are not selling molasses but are using it for their own purpose. There are 30 such cases pending in Hon'ble Courts and around Rs.23 crores has accrued as arrears so far which will increase in future. These sugar mills could get this benefit because there is no clear cut provisions in Molasses Uttar Pradesh Sheera Niyantran Adhiniyam, 1964 and the rules made thereunder regarding Captive Consumption (own use). In view of this, option was sought from expert lawyers who advised for modification in the said Act. According to them 'Captive Consumption' means goods not sold but consumed within factory. With the definition of captive consumption to be incorporated in the said Act and the rules only those sugar mills which have distilleries in the same campus shall be entitled for exemption from reservation/administrative charges, whereas other sugar mills of such groups shall not fall in the ambit of captive consumption. Hence reservation and administrative charges may be imposed on production of molasses in such sugar mills.

It has, therefore, been decided to amend the said Act (a) to define the words 'molasses for captive consumption "supply" and transfer':

(b) to impose the Controller to require by order, the occupier of any sugar factory to transfer such quantity of molasses to such person, as may be specified in the order;

(c) to authorize a police officer or an Excise Officer to seize every animal cart, vessel, container or other conveyance used in carrying receptacle or package."

By the aforesaid amendment, following amendments have been inserted:-

"1. This Act may be called the Uttar Pradesh Sheera Niyantran (Sanshodhan) Adhiniyam, 2009.

2.In section 3 of the Uttar Pradesh Sheera Niyantran Adhiniyam 1964, hereinafter referred to as the principal Act, -

"(d-1)Molasses for captive consumption means the molasses transferred by an occupier of a sugar factory to a distillery or to industrial unit having the same ownership as that of sugar factory, and is situated within the same premises or in such a contiguous vicinity of the sugar factory so that the transfer or transportation of such molasses outside the premises or gates of the sugar factory, by a vehicle, is not required."

(b) after clause (h) the following clauses shall be inserted, namely -

"(i) Supply shall include transfer of molasses by an occupier of a sugar factory to any distillery or industrial unit.

(j) Transfer shall include transfer of molasses by an occupier of a sugar factory to any distillery or industrial unit by way of stock transfer or for captive consumption."

3.In section 8 of the principal Act -

(a) in sub-section (1) for the words "sell or supply" the words "transfer or sell or supply" shall be substituted.

(b) in sub-sections (4) and (5) for the words "sold or supplied" the words "transferred or sold or supplied" shall be substituted.

4.In section 14 of the principal Act, in sub-section (1) after clause (b) the following clause shall be inserted, namely, -

"(bb) seize every animal cart, vessel, container or other conveyance used in carrying such receptacle or package."

5. In section 17 of the principal Act for the words "molasses is supplied" the words "molasses is transferred or supplied" shall be substituted."

43. Production, supply and distribution of goods are no doubt within the exclusive sphere of the State Legislature but it was subject to the provisions of Entry 33 of List III which gave concurrent powers of legislation to the Union as well as the States in the matter of trade and commerce in, and the production, supply and distribution of, the products of industries where the control of such industries by the Union was declared by Parliament by law to be expedient in the public interest.

44. The controlled industries were relegated to Entry 52 of List I which was the exclusive province of Parliament leaving the other industries within Entry 24 of List 2 which was the exclusive province of the State Legislature. The products of industries which were comprised in Entry 24 of List 2 were dealt with by the State Legislatures which had under Entry 27 of that list. Power to legislate in regard to the production, supply and distribution of goods, goods

according to the definition contained in Art. 366 (12) including all raw materials, commodities and articles.

45. It will also not be out of place to mention that prior to the impugned amendment, the respondents sought to levy administrative charges even on stock transfer of molasses. Aggrieved by the aforesaid action of the respondents, the petitioner had filed a Writ Petition No. 9457 (MB) of 2008 in this Court on which interim order dated 21.10.2008 was passed providing that the respondents shall not compel the petitioner to pay administrative charges in respect of the supply of molasses from own sugar mill to its distillery unit.

46. Entry 33 of the List III of Seventh Schedule to the Constitution of India deals with the subject of trade and commerce and the provision of supply and distribution of the product of an Industry, the control of which has been taken over by the Union by an appropriate declaration. Entry 33 of the List III of Seventh Schedule to the Constitution of India does not empower nor is it repository of the power of the State Government to levy a tax. It is for this reason that U.P. Act No. 10 of 2009 insofar as it seeks to impose a tax on captive consumption is not protected nor referable to Entry 33. The original power to levy an administrative charge is, infact, referable only to Entry 54 of List II of the Seventh Schedule to the Constitution of India and thus restricted to a sale or purchase of molasses. For this reason, the petitioner had questioned the competence of the State to levy and collect administrative charges on captive consumption under the provisions of Adhiniyam of 1964 as it stood prior to its amendment by the impugned enactment.

47. As averred above, Entry 33 of list III speaks of trade and commerce in, and production, and supply and distribution of the products of any industry where the control of such industry by the Union is declared by the Parliament by law to be expedient in the public interest. By upholding the constitutional validity of the Act, it cannot be presumed that the taxing authority of the State Government under the said entry has also been upheld by the Apex Court. The general entry cannot be read for imposition of tax or introducing the incidence of tax and its realization. A tax can be imposed and realized only if it falls within a given entry and there is power to legislate and make any enactment for the imposition of such a tax. This distinction has been clearly considered by the Apex Court in the following cases, where in it has been held that for imposing a tax, the general entry given in list III would not be sufficient to confer this power upon the State Government.

48. In the case of M/s Hoechst Pharmaceuticals Ltd. v. State of Bihar and others [(1983) 4 SCC 45], the Apex Court held as under:-

"76. It is equally well settled that the various entries in the three lists are not 'powers' of legislation, but 'fields' of legislation. The power to legislate is given by Article 246 and other Articles of the Constitution. Taxation is considered to be a distinct matter for purposes of legislative competence. Hence, the power to tax cannot be deduced from a general legislative entry as an ancillary power. Further, the element of tax does not

directly flow from the power to regulate trade or commerce in, and the production, supply and distribution of essential commodities under Entry 33 of List III, although the liability to pay tax may be a matter incidental to the center's power of price control."

49. In the case of *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector and E.T.I.O. and others,* AIR 2007 SC 1984, the Apex Court held as under:-

"55. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis-a-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. We, however, do not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry."

50. It appears that the main object of the amendment of Section 2 (d-1) is to make molasses available for manufacture of country liquor instead of being made available for own consumption by the Distillery owned by the same company for the purpose of over coming the judgment of Apex Court in the Dhampur Sugar Mills Limited (supra). The last part of Section 2(d-1) which defines molasses for 'captive consumption' excludes transportation of molasses by vehicle but if it is transported through Pipe line then it is covered by definition of "captive consumption". The provision regrading mode of transportation whether by pipe line from the sugar factory to the Distillery or by Tanker/Vehicle from the Sugar mill to the Distillery does not change the characteristic of captive consumption and it is wholly arbitrary and unreasonable. The affect of this amendment is that the petitioner Company shall be required to pay administrative changes even on the molasses which are transferred to its own distillery although it does not involve any sale or commercial transaction and molasses is required for own captive consumption.

51. The place of the Distillery in same premises or at different places is wholly irrelevant and unreasonable for the purpose of deciding the captive consumption/self-consumption of the molasses as was held by the Apex Court in *Dhampur Sugar Mills* (supra). In *Ram Chandra Kailash Kumar vs. State of U.P.;* AIR 1980 SC 1124 the Apex Court observed as under:-

" We now take the example of a producer trader who is an agriculturist and produces paddy in his own field but owns a rice mill also in the same market area. He mills the paddy grown by him into rice and sells it as such. It is plain that in his case no market fee can be charged on paddy because there is no transaction of sale and purchase of paddy."

In *Vam Organic Chemicals Ltd. and another vs. State of U.P. and others* [1997 UPTC 624], a Division Bench of this Court observed as under:-

"We quite agree with the view taken by the learned Single Judge in M/s U. P. State Cement Corporation Ltd (Supra). There is nothing to indicate in the charging Section 3(1)(C) of the Act of 1939 that the requirement that there should be two parties for the transaction of sale and purchase is dispensed with. In the case at hand admittedly the distillery as well as the chemical factory are owned by the petitioner company and the entire industrial alcohol manufactured in the distillery is being admittedly consumed captively in the manufacture of chemical, preparations and, therefore, there is no transfer of goods by the petitioner to any other entity."

52. Moreover, mere defining of words "distillery" and "sugar factory" independently under the provisions of 1964 Adhiniyam or required of obtaining separate licence under the different Statutes would not mean that both are different personality. In other words, it would not clothe them with a separate juristic personality. Therefore, the assertions of the State Counsel that they are separate legal units or juristic personality, is not acceptable. Sugar and Alcohol industries are governed by the provisions of IDAR Act, 1951. The sugar is listed at Entry-25 whereas Alcohol is at Entry 26 of the Schedule of IDAR Act. By virtue of the said provisions, the units/petitioners are required to obtain separate licence under the provision of IDAR Act. They are bound to take license under various State Excise Act purely for the purposes of meeting statutory requirement prescribed by the State Excise Laws. The Karnataka High Court in *T.Mohindra vs. Additional Commissioner Commercial Taxes (103) STC 345* observed that holding of two type of licence under the Excise Act in respect of two units does not make any difference and transfer of stock from one unit to another holding two different type of license does not amount to sale. Similarly,in *KCP Limited vs. State of Andhra Pradesh* 1993 Vol (88) STC 374 the Andhra Pradesh High Court took the view that transfer of cement by the Cement unit to the Sugar factory and Engineering unit cannot be treated as sale since each unit is part of the company. The unit as such cannot be treated as legal entity capable of transferring the goods to another person. Administrative charges, admittedly, are a tax which can be justified under Entry 54 of List II of the 7th Schedule of the Constitution, hence for the purposes of justifying the liability for payment of administrative charges as tax, there has to be two different persons as contemplated under Section 4 of the Sales of Goods Act. Moreover, mere issuance of bill or charging price by one unit to another unit would not amount to any sale as it is for the purposes of accounting and this method of accounting cannot alter the true character of the transaction.

53. It is not disputed that the State can charge only such tax as is permissible under law. The Constitution Bench of Hon'ble Supreme Court in the case of *State of Kerala vs. P.J.Joseph* ;AIR 1958 SC 296 has held as under:-

" Imposition of tax which is not supported by the law is violative of Article 265 of the Constitution of India and such an imposition could not be said to be supported by law even if it was by means of endorsement made by Government or a reference made to by the Board of Revenue; the levy of duty which has not been published Gazette."

54. As regard to the plea that the aforesaid tax is also covered by entry 54 of list II, we may look to the entry aforesaid as under:-

"54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92-A of List I."

55. At this juncture, it is relevant to add that the legislative competence of a State to tax sales or purchases of goods is derived from Entry 54 of List-II of Seventh Schedule of the Constitution. The term "sale" or 'sale or purchase of goods' was not defined in the Constitution. The Parliament, therefore, inserted Clause 29-A, defining the expression 'tax' on the sale or purchase of goods' in Article 366 of the Constitution. Clause 29-A reads as under:-

"29-A. tax on the sale or purchase of goods includes

(a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration ;

(b) a tax on the transfer of property in goods(whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment by installments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

56. A careful reading of Clause 29-A shows that it is an inclusive definition and has two limbs. The first limb says that tax on the sale or purchase of goods

includes a tax on transactions specified in sub-cause (a) to (f) thereof. The second limb provides that such transfer, delivery or supply of any goods referred to in the first limb shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and the purchase of those goods by the person to whom such transfer, delivery or supply is made. To constitute a transaction of sale, the three essential components are (i) an agreement to transfer title (ii) support by consideration, and (iii) an actual transfer of title in the goods. In the absence of any one of these elements, there will be no sale.

57. Here, Article 366(29-A) is not applicable for justifying the imposition of administrative charges on the transfer of molasses from sugar units to the Distillery unit owned by the same company for self consumption. In our opinion, in spite of Article 366 (29-A) which is the only enabling provisions, no tax; i.e. the administrative charges can be legally realized since it does not fall in any of clauses of 29-A. The State has wrongly relied upon clause (f) of Article 366(29-A) which also contemplates the supply of goods being food or any other article for human consumption or any drink from one person to another person for cash deferred payment or for other valuable consideration.

58. In. *T.N.Kalyana Mandapam Assn. V. Union of India and others* (2004) 5 SCC 632, the Apex Court in paragraphs 43 and 44 of the report held as under:-

"43. .... it is well settled that for the tax to amount to a tax on sale of goods, it must amount to a sale according to the established concept of a sale in the law of contract or more precisely the Sale of Goods Act, 1930. The legislature cannot enlarge the definite of sale so as to bring within the ambit of taxation transactions, which could not be a sale in law. The following judgments and the principles laid down therein can be very well applied to the case on hand:

1. J.K.Jute Mills Co. Ltd. Vs. State of U.P.
2. Gannon Dunkerley & Co. vs. State of Rajsthan
3. State of Madras vs. Gannon Dunkerley & Co.
4. STO v Budh Prakash Jai Prakash
5. George Oakes (P) Ltd. V. State of Madras.

44.In regard to the submission made on Article 366(29-A)(f), we are of the view that it does not provide to the contrary. It only permits the State to impose a tax on the supply of goods and drink by whatever mode it may be made. It does not conceptually or otherwise include the supply of services within the definition of sale and purchase of goods. This is particularly apparent from the following phrase contained in the said sub-article "such transfer, delivery or supply of any goods shall be deemed to be sale of those goods.". In other words, the operative words of the said sub-article are supply of goods and it is only supply of goods and drinks and other articles for human consumption that is deemed to be sale or purchase of goods."

59. Thus, sale or purchase of goods has a different connotation in law which cannot be effected unless there are two or more persons as there cannot be a sale or purchase of goods by one person. It is not disputed that it is one company which owns the sugar mill as well as distillery

though they are granted separate licenses and may be different units but whether a transfer of molasses from such sugar mill to its own distillery would constitute a sale, is a matter which requires consideration. Therefore, it can easily be inferred that the imposition of administrative charges on transfer of molasses by the sugar mill to its own distillery cannot be protected under entry 33 of list III nor it is governed by entry 54 of list II and is also not referable to Article 366 (29-A) of Constitution which is only an enabling provision and in the absence of any valid law having been enacted in this regard, the said provision cannot in itself be applied for imposition of tax or for realization thereof.

60. The aforesaid discussions leads us to an irresistible conclusion that such a transfer cannot amount to sale as it is a company which is a person who owns both the units and that 'transfer' and 'sale' cannot be interchanged, nor 'transfer' can be read as 'sale'. The impugned legislation is also bad in law as Article 265 of the Constitution of India prohibits the imposition of tax and says that no tax shall be levied or collected except by authority of law.

61. It is not in dispute that the molasses is a by-product generated in the course of manufacture of sugar by its factory and is used by its own distillery for manufacture of various other industrial products. Undoubtedly, as referred to above, the Entry 33 of List III of the Seventh Schedule to the Constitution, the State has a right to regulate trade and commerce in the product of an Industry. However, in the garb of the said power, the State is not conferred with the power to levy a tax on either captive consumption or a supply of a products of an Industry other than by way of sale. In order to have the legislative competence to levy a tax, specific entries are incorporated in the three lists placed in the Seventh Schedule. A general entry empowering the State to regulate trade and commerce is not and cannot be construed as conferring authority to levy a tax.

62. In the case of *Commissioner of Central Excise , Meerut vs. Kisan Sahkari Chinni Mills Ltd.;* (2001) 6 SCC 697 the Apex Court has held that administrative charges levied by the State of U.P. under the provisions of U.P. Sheera Niyantran Adhiniyam, 1964, on the sale and purchase of molasses is a tax. The Apex Court reiterated the above view in *Gupta Modern breweries vs. State of J & K and others (2007) 6 SCC 317* and held that the imposition of administrative charges is a tax and not a fee. In *CCE v. Chhata Sugar Company Limited[supra]* the question for consideration before the Apex Court was whether administrative charges collected by the sugar factory for molasses sold from the buyers/allottees on behalf of the State Government in terms of Section 8(5) of the U.P.Sheera Niyantran Adhiniyam, 1964 constituted a duty or impost in the nature of a tax. The Apex Court after analyzing Central Excise Act, 1944 and U. P. Sheera Niyantram Adhiniyam, 1964, U.P. Sheera Niyantran Niyamavali, 1974 and other provisions came to the conclusion that the administrative charge under the U. P. Act is a tax and not a fee. Paragraphs 13 and 14 of the report, Hon'ble S.H.Kapadia [now Hon'ble the Chief Justice of India] speaking for the Bench observed as under:-

"Before dealing with the foregoing issue, it may be noted that in this case, we are concerned with identification of the nature of levy of administrative charges under Section 8(4) and Section 8(5) of the U.P. Act. As stated above, the U.P. Act has been enacted with the object of regulating supply and equal distribution of molasses to distilleries and other industrial establishments. Under Section 8(4) of the U.P. Act, every sugar factory is made liable to pay to the Government administrative charges at the specified rate on sale or supply of molasses to the distillery. Under Section 8(5), every sugar factory is entitled to recover from the buyer administrative charges in addition to the prices of molasses. Under Section 10(1) of the U.P.Act, the sugar factory has to sell molasses at a price not exceeding that prescribed in the Schedule. Therefore, the levy of administrative charges is on production for sale of molasses. In the case of *Chhotabhai Jethabhai Patel and Co. vs. Union of India* the question before this Court was the nature and character of the duty of excise. It was held that the duty of excise was a tax or duty not intended by the taxing authority to be borne by the person on whom it is imposed and from whom it is collected but it is indented to be passed on those who purchased the goods on which the duty was collected. That excise duty is a tax as it is imposed in respect of some dealing with the commodities, such as their import or sale, or production for sale. It has been further held that going by the general tendency of a tax, it is capable of being passed on the consumer or the buyer. In our view, the above test is important because tax is capable of being passed on to the consumer or the buyer whereas a fee is a counter payment by the buyer who receives the benefit of the services for which he is charged and such fees are not capable of being passed on as fees to the consumer or the buyer. The above point of distinction is applicable to the facts of this case. In the present matter, as stated above, levy of administrative charges under Section 8 (4) of the U.P. Act is on the producer of molasses; it is imposed on production of molasses for sale and under Section 8(5) the same is passed on the buyer distillery. *In the circumstances, levy of administrative charges under the U.P.Act is a tax.* There is one more circumstance which indicates that the levy of administrative charges under the U.P. Act is a tax. In the case of *Matthews vs. Chicory Marketing Board(Victoria)* it has been held that customs and excise duties are indirect taxes as they are additions of definite amounts to the prices at which the goods upon which they are imposes are, in the ordinary course of business, sold by persons who have paid the duties. This test is also applicable to the present case. Under Section 8(5) of the U.P. Act, administrative charges are in addition to the prices at which goods are sold in the ordinary course of business by the sugar factory (Producer of molasses). Moreover, the predominant object of the U.P. Act is to maximize the revenue by way of tax which regulating storage and supply of molasses. The beneficiary under the said Act is the distillery. It is the distillery, which provides important source of revenue to the State. *In our view, the said levy of administrative charges is in the nature of tax.*

14.We can look at the problem from another viewpoint. One of the tests to decide whether a levy is a tax or fee is that while tax is a compulsory exaction, fee relates to the principle of quid pro

quo. This test can usefully be applied to the facts of the present case. As stated above, the beneficiary of the U.P. Act is the distillery(Buyer). All regulatory measures are for the benefit of the said buyer. The sugar factory is merely a collecting agent of administrative charges for the State Government. The administrative charge is not a component of the consideration received by the sugar factory. This is clear from the provisions of Section 8(5) which state that the administrative charges shall be collected in addition to the price of the molasses from the buyer distillery. The said administrative charges do not form part of the revenue of the sugar factory. The said administrative charges cannot be appropriated to the revenue account of the sugar factory. Therefore, there is no element of quid pro quo as far as the administrative charges in the hand of the sugar factory are concerned. On the other hand, under Section 8(4) of the U.P. Act read with Rule 23 of the said U.P. Rules, every sugar factory is required to deposit administrative charges on the molasses sold/supplied before actual delivery to the distillery(buyer), which brings in the principle of compulsory exaction. Hence, administrative charge under the U.P.Act is tax and not a fee. (emphasis supplied by us)

63. It may be noted that in the instant matter, it has been argued on behalf of the State by Sri J.N.Mathur, Addl. Advocate General that the case of Commissioner of Central Excise v. Chatta Sugar (supra) cannot be applied in the facts and circumstances of the present case and that too when the State was not the party in the said matter but the same Counsel in *M/s SAF Yeast Company Private Limited vs. State of U.P. and another*[VSTI 2008 Vol. III December Part-23] has taken a different stand. It would be useful to reproduce the relevant extract of paragraph 5 of said judgment, which reads as under:-

"5. Sri J.N.Mathur, learned Additional General appearing on behalf of the opposite parties submitted that the U.P.Sheera Niyantaran Adhiniyam, 1964 is a special enactment for the control of storage gradation and price of molasses produced by Sugar Factories in Uttar Pradesh and the regulation of supply and distribution thereof. He fairly conceded that in view of the law declared by Hon'ble the Supreme Court in the cases of *Commissioner of Central Excise, Meerut v. Kisan Sahkari Chinni Mills Ltd.(Supra) and Commissioner of Central Excise, Lucknow, U.P. vs. Chhata Sugar Co. Ltd.(supra) administrative charges is a tax and not fee."*

64. From the above statement of Sri J.N.Mathur it is clear that the State has accepted the verdict given by the Apex Court in Chhata Sugar Mills[supra] and no objections were ever raised. .

The attempt made on the part of State legislation to impose tax "administrative charges" on the transfer of molasses from Sugar unit to the Distillery unit owned by the same person is totally constitution on the principle of law laid down by Apex Court in the case of State of Orissa vs. Titagarh Paper Mills Co. ltd 1985(Supp) SCC 280 wherein the Apex Court observed that any attempt on the part of State to impose by legislation sales tax or purchase tax in respect of what would not be sale or sale of goods under Sale of Goods Act, is unconstitutional. The relevant paragraph reads as under:-

"47. As any attempt on the part of State to impose by legislation sales tax or purchase tax in respect of what would not be a sale or a sale of goods or goods under the Sales of Goods Act, 1930 is unconstitutional, any attempt by it to do so in the exercise of its power of making subordinate legislation either by way of a rule or notification would be equally unconstitutional; and so would such an act on the part of the authorities under a Sales Tax purporting to be done in exercise of powers conferred by that Act or any rules made or notification issued..."

65. Even at the cost of repetition, we may point out, as averred above, that the Apex Court in Chhata Sugar Mills[supra] after examining various provisions of the Adhiniyam of 1964 held that the administrative charges levied under the Act is not in the nature of a regulatory fee but is clearly a tax. The said judgment of the Apex Court has a binding effect and this Court is not permitted under law to take a view contrary to it merely on the assertion of the respondents that they were not party in the aforesaid decision rendered by the Apex Court. In the event, the respondents were aggrieved by the decision of the Apex Court either directly or indirectly, they should have approached the Apex Court. Moreover, the respondents are estopped from raising such a plea when in earlier writ petition, their stand is altogether different. It may be clarified that the petitioners have not questioned the validity of U.P. Sheera Niyantran Adhiniyam but have only questioned the validity of the provisions of Section 2(d-1), 8(4) and 8(5) insofar as it purports to levy tax namely, Administrative Charges on the supply/transfer of molasses from the Sugar factory to the distillery owned by the same, hence neither Entry-33 is relevant. Therefore, the judgment of this Court in the case of *Shriram Industrial Enterprises Limited* [supra] nor that of Apex Court in the case of SIEL Limited [supra] declares or recognizes a power enuring the State Government to levy a tax on captive consumption and is of no help.

66. The Constitution confers a power and imposes a duty on the legislature to make law. The essential legislative function is the determination of a legislative policy and its formulation as a rule of conduct. In order words, the State Government in exercise of its legislative powers is free to frame laws in consonance with the basic framework of the Constitution but it cannot travel beyond the power conferred upon it under the Constitution of India. In other words, a statutory rule must be made in consonance with constitutional scheme. A rule must not be arbitrary. It must be reasonable, be it substantive or a subordinate legislation. While defining the word 'captive consumption' the State Government cannot assume to itself the power to levy a tax. Taxing entries are specifically mentioned and enumerated in List III. Unless the tax is in respect of a subject, which stands enumerated in the " taxing specific entries", no levy/fees/charges can be imposed in the name of tax by the State Government. In these circumstances, various case laws relied by the State Counsel are of no avail to them. Needless to say that a taxing statute, must be made in consonance with Article 265 of the Constitution.

67. In view of the above, we are of the considered opinion that the provisions of Section 2(d-1), Section 8(4) and 8(5) of the U.P.Sheera Niyantran Adhinimaym amended by U. P. Act No. 10 of 2009, reproduced hereinabove, suffer from callous exercise of power and it can safely

be concluded that the State has over-stepped its limit of power.

68. Before concluding, we would like to point out that this Court while admitting the writ petition No. 4343 (MB) of 2009 along with other connected matters, passed an ad interim order dated 22.5.2009 providing therein that the petitioners' sugar mills shall maintain an account of molasses transferred to their own distillery and in case their petitions fail, they will deposit the amount within 30 days alongwith interest. As the amending provisions have been held to be invalid and the writ petitions are being allowed, there is no occasion for deposit of any administrative tax. However, it is provided that in case any of the petitioners had deposited the amount under the aforesaid head with the respondents, same shall be remitted to them forthwith.

69. Accordingly, all the writ petitions are allowed and the aforesaid provisions are declared invalid. Consequently, any proceedings undertaken under the amended provisions by the authorities against the petitioners are declared illegal and are set-aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.03.2011

BEFORE
THE HON'BLE A.P. SAHI,J.

Civil Misc. Writ Petition No. - 17679 of 2011

Ashok Kumar Chaubey and others ...Petitioners

Versus

Dy. Director Of Consolidation, Varanasi Camp and others ...Respondents

Counsel for the Petitioner:
Sri Triveni Shankar
Sri Ajay Shankar

Counsel for the Respondents:
C.S.C.
Sri Lalji Pandey

U.P. Consolidation of Holding Act Section-12-mutation proceedings on basis of unregistered will-executed in Tehsil Campus-consolidation officer expressed serious doubt on genuineness of will-profounder unable to explain the surroundings suspicious circumstances-S.O.C. Reversed the finding without disclosing any reason-D.D.C. Rightly restored the order of consolidation by adopting procedure under Section 171 of U.P.ZALR Act-it can not be interfered under writ jurisdiction

Held: Para 8

The Settlement Officer Consolidation simply set aside the order on the ground that the Consolidation Officer could not have discarded the Will merely because the case was not set up originally on the said basis. In the opinion of the Court a serious doubt was cast by the Settlement Officer as to why the Will was not registered . Even the execution of the Will was within the Sub Divisional Headquarters. The Settlement Officer Consolidation has been unable to upturn the findings successfully and therefore to say that since the daughter had been living with her father a power of attorney was executed in favour of the son in law, is not sufficient to prove the execution of the Will. The Deputy Director of Consolidation was justified in restoring the order of the Consolidation Officer. Accordingly in view of these conclusions it is not necessary to assess the ratio of the decision in the case of Sant Bux Singh (supra).

Case law discussed:
2010(111) RD 581.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri Triveni Shanker learned counsel for the petitioner, Sri Lalji Pandey who has filed caveat on behalf of the contesting respondent and the learned standing counsel for the respondent nos. 1 and 2.

2. The dispute relates to the succession over the land in dispute. The objections were filed before the Consolidation Officer and Savitri Devi claiming herself to be the daughter alleged that she had a Will in her favour. The Will was set up before the Settlement Officer which was disbelieved on several grounds including the ground that her original objection for mutation of her name no such will had been referred to therein. The Will is an unregistered Will. It is alleged to have been executed in the premises of the Tahsil/Sub Divisional Headquarters of the District. The executor was allegedly 80 years of age.

3. A civil suit had been filed against a third person by Yagnath and after his death a substitution application was moved by Savitri Devi where also she did not disclose the execution of the Will. The Consolidation Officer found that the Will was not proved but in view of the provision of Section 171 of the U.P.Z.A.L.R. Act accordingly directed the recording of the name of Uma Shanker and his brother.

4. An appeal was filed which was allowed and the order of the Consolidation Officer was set aside recording the name of Savitri Devi and her heirs who are the petitioners herein. Aggrieved the respondents filed a revision and the order of the Settlement Officer Consolidation was set aside and the order of the Consolidation Officer was restored.

5. Sri Triveni Shanker learned counsel for the petitioner submits that the Will could have been set up at the appellate stage as well and he relies on the decision in the case of Sant Bux Singh V. Dy. Director of Consolidation reported in 2010(111)RD 581. He further submits that most of the land in dispute was Abadi as referred in CH Form No.41 and therefore the Consolidation Courts had no jurisdiction to decide any such dispute. He further contends that the Will had been proved and in such a situation the revisional order as well as the order of Consolidation Officer deserve to be quashed.

6. Sri Triveni Shanker learned counsel for the petitioner has invited the attention of the Court to the findings recorded by the Consolidation Officer and its reversal by the Settlement Officer Consolidation. He further submits that the Deputy Director of Consolidation without reverting the findings of the appellate authority in correct perspective has passed an order which is an unreasoned order and therefore the order of the Settlement Officer Consolidation deserves to be maintained.

7. Having heard Sri Trivedni Shanker learned counsel for the petitioner and Sri Lalji Pandey for the respondents, it is apparent that an attempt was made to establish the validity of the Will by contending that the signatures on the Will ought to have been compared with the registered power of attorney as it contained signatures as

Yagnath only. Sri Triveni Shanker submits that the word surname 'Tripathi' is missing the same could not have been a ground to discard the will. The aforesaid argument of Sri Triveni Shanker has to be construed in the light of the surrounding circumstances that were taken into account by the Consolidation Officer that Savitri Devi neither in her original objection nor in the proceedings before the Civil Court had ever set up the Will and therefore the same appears to be an afterthought. The Consolidation Officer also found that the Will was allegedly executed inside the Sub Divisional Headquarters campus through the help of lawyers yet it remain unregistered. The attesting witness and his statement was unable to corroborate the exact execution of the Will. The Consolidation Officer therefore found that the Will appears to be an afterthought and surrounding circumstances do not establish the execution of the Will. The genuineness was doubted and in the opinion of the Court the Consolidation officer has given cogent reasons to support the same.

8. The Settlement Officer Consolidation simply set aside the order on the ground that the Consolidation Officer could not have discarded the Will merely because the case was not set up originally on the said basis. In the opinion of the Court a serious doubt was cast by the Settlement Officer as to why the Will was not registered . Even the execution of the Will was within the Sub Divisional Headquarters. The Settlement Officer Consolidation has been unable to upturn the findings successfully and therefore to say that since the daughter had been living with her father a power of attorney was executed in favour of the son in law, is not sufficient to prove the execution of the Will. The Deputy Director of Consolidation was justified in restoring the order of the Consolidation Officer. Accordingly in view of these conclusions it is not necessary to assess the ratio of the decision in the case of Sant Bux Singh (supra).

9. One of the issues raised by Sri Triveni Shanker is that Consolidation Courts had no authority to decide the issue relating to Abadi land.

10. Needless to mention that the Abadi which has been reflected in C.H.Form No.41 is part of the holding itself and which is an Abadi within the tenure of the cultivators. It is not an Abadi land as understood in terms of the provisions of U.P.Z.A.L.R.Act and is not even otherwise an Abadi land as understood after a declaration under Section 143 of the U.P.Z.A.L.R.Act. Accordingly the contention raised by Sri Triveni Shanker has to be rejected as the objections related to the holdings that were within the jurisdiction of the consolidation operations after the notification under Section 4 of the Act.

11. In view of the aforesaid findings this Court does not find any any reason to interfere with the impugned order.

The Writ petition lacks merits and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2011

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 21350 of 2010

Chaman Lal @ Chunni Lal and others
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.R. Maurya

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holding Act 1953, Section-6-Denotification of consolidation scheme-village inquestion brought under consolidation scheme-notification under Section 4(2) issued on 20-8-2009-when a complete procedure provided in the Act itself-Court should not interfere with task of Government stay granted earlier ignoring this aspects-liable to discharged.

Held: Para 10

Unfortunately, in the opinion of the Court, this petition amounts to a premature exercise and is otherwise an abuse of the process of court as an interim order has been passed staying the proceedings of consolidation operations until further orders of this Court without allowing the State Government to apply its mind. The stay of a notification under Section 4 amounts to staying the operation of law which in my opinion is not permissible. The State Government should be allowed to exercise his discretion before any interference is caused in the exercise of jurisdiction under Article 226 of the Constitution of India.

(Delivered by Hon'ble A.P. Sahi, J.)

1. This petition prays for a mandamus directing the respondents-consolidation authorities not to proceed with the consolidation operations in the village in question.

2. The aforesaid prayer is founded on the allegation that the consolidation operations would be against the interest of the tenure holders as 80% area of the village is covered by stones and hills which would make the consolidation operations practically impossible. The area is also full of drainage and riverbeds and a single crop is available to the farmers, therefore, a desire was expressed for not proceeding with the consolidation operations.

3. The village was brought under the consolidation operations under the provisions of Section 4(2) of the U.P. Consolidation of Holdings Act, 1953. The notification was issued on 20.08.2009.

4. Once such a notification was issued the consolidation operations have to be set into motion. The power to denotify or cancel a notification vests in the State Government under Section 6 of the U.P. Consolidation and Land Holdings Act. The same is quoted hereinbelow:

6. Cancellation of notification under Section 4. *(1) It shall be lawful for the State Government at any time to cancel the [notification] made under Section 4 in respect of the whole or any part of the area specified therein.*

[(2) Where a [notification] has been cancelled in respect of any unit under

sub-section (1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation.]

5. For exercise of of the said power certain guidelines have been given under the Rules and Rule 17 of the U.P. Consolidation of Holdings Rules, 1954 is extracted hereinunder:

17. Section 6.-The [notification] made under Section 4 of the Act, may among other reasons, be cancelled in respect of whole or any part of the area on one or more of the following grounds, viz., that-

(a) the area is under a development scheme of such a nature as when completed would render the consolidation operations inequitable to a section of the peasantry;

(b) the holdings of the village are already consolidated for one reason or the other and the tenure-holders are generally satisfied with the present position;

(c) the village is so torn up by party factions as to render proper consolidation proceedings in the village very difficult; and

(d) that a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for this purpose.

6. The aforesaid provisions, therefore, clearly empower the State Government to cancel a notification in case any such contingency exists as indicated above. It may be mentioned that the guidelines contained in Rule 17 are not exhaustive. The State Government can in its discretion proceed to cancel a notification.

7. The issue as to whether courts can enter into any such dispute was considered in the case of ***Sazid and others Vs. Commissioner of Consolidation and others*** reported in ***1999 (4) AWC 2788*** and it was held that courts should not take over the task of examining the validity of a notification issued under Section 4 of the U.P.C.H. Act.

8. However, when orders are passed under Section 6 a judicial review may be permissible to a limited extent if the action taken is arbitrary or is against the interest of public at large in view of the provisions of the U.P.C.H. Act, 1953.

9. In the instant case the petitioners contend that they have approached the State Government and, therefore, this writ petition be entertained.

10. Unfortunately, in the opinion of the Court, this petition amounts to a premature exercise and is otherwise an abuse of the process of court as an interim order has been passed staying the proceedings of consolidation operations until further orders of this Court without allowing the State Government to apply its mind. The stay of a notification under Section 4 amounts to staying the operation of law which in my opinion is not permissible. The State Government should be allowed to exercise his discretion before any interference is caused in the exercise of jurisdiction

under Article 226 of the Constitution of India.

11. Accordingly, this court does not find any good reason to continue the interim order dated 20.04.2010 or to set aside the impugned notification dated 20.08.2009 issued under Section 4 of the U.P.C.H. Act, 1953.

12. In view of this, the interim order dated 20.04.2010 is vacated the writ petition is dismissed.

13. It shall be open to the petitioners to approach the State Government for the redressal of their grievances in the light of the observations made hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2011

BEFORE
THE HON'BLE A.P. SAHI,J.

Civil Misc. Writ Petition No. 12826 of 2011

C/M Visheshwar Uchchatar Madhyamik Vidyalaya and another ...Petitioner
Versus
State Of U.P. and others ...Respondent

Counsel for the Petitioner:
Anil Bhushan

Counsel for the Respondent
C.S.C.

Payment of Salary Act, Section-6(3)- order of single operation-on ground the term of management already elasped-No right to hold office -held-order of single operation can not be passed-but in garb of amendment in scheme of administration extending period from 3 to 5 years-without approval-no right to hold the office-Regional Joint Director to allow the DIOS to act as authorized controller who shall proceed to hold election within 3 month.

Held: Para 12

Accordingly it is hereby declared that the power invoked by the Regional Joint Director of Education under Section 6(3) of the U.P.Act No.24 of 1971 was not available as there was no default in payment of salary.

Case law discussed:
2005 (1) UPLBEC 85

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri Anil Bhushan learned counsel for the petitioner and the learned standing counsel for the respondent nos. 1,2 and 3.

2. In view of the nature of the order that is proposed to be ,passed it is not necessary to issue any notice to the respondent no.4 at this stage.

3. Needless to mention that the petitioner had earlier filed Writ Petition No. 10093 of 2011 which was dismissed as withdrawn with liberty to file a fresh writ petition keeping in view the order dated 8.7.2008 and this writ petition has been filed assailing the said order dated 8.7.2008.

4. The present writ petition assails the order dated 28.1.2011 whereby Committee of Management has been superseded in exercise of powers under Section 6(3) of the Payment of Salary Act under U.P.Act No.24 of 1971 on the ground that the Committee which had been validly elected in Jan.,2006 had not been recognised and an oder has been passed on 8.7.2008 refusing to grant recognition. Accordingly the said Committee has no right to continue. The period of the Committee of Management

according to the approved Scheme of Administration is three years which has already expired, therefore an Authorised Controller has to be appointed to hold fresh elections.

5. Accordingly the complaint of the respondent no.4 has been accepted and a direction has been issued to the District Inspector of Schools , Gorakhpur to act as Prabandh Sanchalak with a further direction to hold the elections in terms of the government order dated 21.11.2008.

Sri Anil Bhushan learned counsel for the petitioner contends that the impugned order is in violation of principles of natural justice inasmuch as according to the impugned order itself the petitioner had not responded to the aforesaid claim. Learned counsel for the petitioner further submits that as a matter of fact no notice was ever served upon the petitioner therefore the impugned order deserves to be set aside on this ground alone.

6. The second submission of Shri Bhushan is that the order has been passed in exercise of powers under U.P.Act No.24 of 1971 which is totally unconnected with the ingredients that are available in the aforesaid Act for the purpose of superseding the Committee of Management. Sri Bhushan relies on the judgment in the case of Committee of Management, Shahid Sansmaran Inter College, Sherpur and another Vs. Deputy Director of Education Varanasi and another reported in 1993 ALJ 318.

7. The third submission of Sri Bhushan is that even otherwise the order dated 8.7.2008 is incorrect inasmuch as the same was passed behind the back of the petitioner. For this he submits that the petitioner no.2 has continued to pass salary bills and to function as Manager in the Institution through out and therefore the order dated 10.8.2008 was never executed. It is therefore submitted that passing of an order to appoint an Authorised Controller under the Payment of Salary Act in such circumstances is wholly unjustified.

8. On the other hand learned standing counsel submits that the position as admitted on today is that the amendment in the Scheme of Administration as alleged extending the tenure to 5 years has not been approved by any competent authority and such an amendment is invalid keeping in view the provisions of Section 16-A (5) of the U.P. Intermediate Education Act, 1921. In absence of that approval the proposal cannot be relied upon by the petitioner and the tenure of the petitioner cannot be treated to be five years. Learned standing counsel further contends that mere continuance of the petitioner and passing of salary bills does not amount to a lawful effective control of the petitioner so as to claim further continuance and the District Inspector of Schools had already rejected the the elections of 2006. In such a situation the impugned order cannot be faulted with.

9. So far as the question of violation of principles of natural justice is concerned,learned Standing Counsel contends that in view of the Full Bench decision in **Committee of Management, Pt.Jawahar Lal Nehru Inter College Vs.Dy.Director of Education and others reported in 2005(1) UPLBEC 85** the petitioner Committee has to be superseded for holding of free and fair elections as no elections had been admittedly held within time.

10. Having heard learned counsel for the parties, the contention raised by the learned counsel for the petitioner that Section 6(3) of the U.P.Act No.24 of 1971 could not have been invoked for superseding the Committee of Management, appears to be correct. There has to be default in the payment of salary as held in the case of Committee of Management, Shahid Sansmaran Inter College (supra). Learned counsel for the petitioner contends that there was no default in the payment of salary and there are decisions which hold that if there is no validly elected Committee of Management then in such circumstances an order of single operation may be passed pertaining to the salary of staff and other employees of the institution. Sri Anil Bhushan then contends that in view of the provisions relating to the tenure of the Committee of Management as contained in clause 8 of the Scheme of Administration the earlier office bearers are entitled to continue. Clause 8 of the Scheme of Administration is quoted below:

"प्रबंध समिति के पदाधिकारियों तथा सदस्यों का कार्यकाल पदेन सदस्य को छोडकर उनके निर्वाचित तिथि से उनका कार्यकाल तीन वर्ष का रहा। किन्तु पुराने सदस्य तब तक कार्य करते रहेंगे जब तक कि उनके स्थान पर नये निर्वाचन सोसाइटी द्वारा न हो जाये।"

11. This provision was also dealt with in para 38(3) by the Full Bench decision in the case of Committee of Management, Pt. Jawahar Lal Nehru Inter College (supra) . In such a situation the petitioner committee of management cannot continue perennially without holding of elections and the tenure of the Committee of Management as prescribed in the Scheme of Administration has to be honoured and respected in letter and spirit. It is the admitted case of the petitioner that no elections have been held. The proposed amendment in the Scheme of Administration has not been approved.

12. Accordingly it is hereby declared that the power invoked by the Regional Joint Director of Education under Section 6(3) of the U.P.Act No.24 of 1971 was not available as there was no default in payment of salary.

13. Nonetheless in view of the reasons recorded herein above and in view of the decision of the Full Bench of this Court as indicated above the Committee of Management could not have continued without holding elections. Accordingly the Regional Joint Director of Education shall allow the District Inspector of Schools to continue as the Authorised Controller in view of the conclusions drawn herein above and the District Inspector of Schools shall now proceed to hold elections after finalisation of the electoral college in accordance with law within a period of three months.

The writ petition is disposed of.

ORIGINAL JURISDITION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2011

BEFORE
THE HON'BLE A.P.SAHI,J.

Civil Misc. Writ Petition No.63495 of 2009

Janardan Singh and others ...Petitioner
Versus
D.M. Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri Aditya Naryan
Sri S.K. Pandey

Counsel for the Respondents:
Sri Jeevan Prakash Sharma
C.S.C.

U.P. Consolidation of Holding Act, 1953-Section-44-A-Power of Distt. Magistrate/DDC-to cancel the consolidation operation-in village in Question consolidation Proceeding almost got finality-D.D.C. At this stage only can send recommendation to the Govt.-who is competent to take decision and not beyond that-order of cancellation of consolidation proceeding by Dist. Magistrate-held-without jurisdiction.

Held: Para 26

It is no doubt true that the power vests in the Deputy Director of Consolidation or the District Magistrate to annul such proceedings in view of the decisions that have been referred to by the learned counsel for the respondent. While exercising powers on the judicial side they have to confine to the limits of exercise of such power that is available to the authorities. The Deputy Director of Consolidation under Section 44-A would therefore exercise a power to proceed to which it is permissible in law and not beyond the same.

Case law discussed:
1983 RD 249; 1984 RD 180; 1990 RD 115; 1969 RD 329; 1982 RD 142.

(Delivered by Hon'ble A.P. Sahi,.J.)

1. These two writ petitions relate to a common cause of action for quashing of the order passed by the District Magistrate/District Deputy Director of Consolidation, whereby the said authority in compliance of the judgment of this Court dated 27.9.2007, has disposed of the representation filed by the respondent No.2 Ajay Kumar Singh with a direction to the Settlement Officer Consolidation to proceed with the consolidation operations afresh from the stage of preparation of statement of principles, in so far as it relates to valuation of plots and proposals of allotment without effecting the decisions already taken in relation to the dispute of title.

2. The petitioners in both these writ petitions are the the tenure holders of Village Nuwan Pargana and Tahsil Anamat District Varanasi who have come up assailing the orders on the ground that the order impugned is against the records and without providing any opportunity of hearing to the concerned persons and that the District Magistrate while exercising powers of the Deputy Director of Consolidation has travelled beyond his jurisdiction by reviewing the earlier orders on account of illegal political pressures and to the detriment of the marginal farmers specially the Scheduled Caste and other oppressed classes. In effect the contention is that the consolidation operations that had almost attained finality was being impeded at the instance of land Mafias including the respondent no.2 to the detriment of the tenure holders at large. The impugned order being motivated and malafide also deserves to be set aside as no procedure prescribed in law has been followed for the exercise of such powers. It is urged that through an administrative fiat, the Collector has proceeded to exercise his purported powers under Section 48 of the U.P.C.H.Act,1953 without adhering to the principles that are applicable for the exercise of such powers. It is, therefore submitted that the orders passed by the District Magistrate on 7.9.2009 as also the order dated 28.2.2008 recalling the earlier order be quashed.

3. Sri S.K.Pandey was heard for the petitioner and Sri J.P.Sharma has raised his submissions on behalf of Ajay Kumar Singh and the learned standing counsel for the State authority.

4. Affidavits have been brought on record from both the sides including the State and the matter has been heard finally with the consent of the parties.

5. Learned counsel for the petitioner states that the consolidation operations had reached the level of final allotment of chak and the persons aggrieved by such allotments have filed appeals which have also been disposed of and a few revisions were pending including that filed by the contesting respondent Ajay Kumar Singh. It is therefore submitted that there was no occasion to intervene and set aside the consolidation operations reverting them back to the stage of the Assistant Consolidation Officer and preparation of statement of principles.

6. Learned counsel contends that all actions taken and exercised annulling the proceedings as aforesaid are unjustified under the garb of the judgment of the High Court dated 27.9.2007 in Writ Petition No. 47530 of 2007. Learned counsel contends that this Court in the aforesaid judgment did not issue a command for cancellation of the proceedings up to a particular stage and there was no material so as to warrant any such exercise of power by the Collector. Learned counsel for the petitioner has invited the attention of the Court to the reports submitted from time to time to contend that the land was available for consolidation to the tune of 57% in the Village and the alleged irregularity if any was subject to a judicial process as provided for under the Act itself. The aggrieved tenure holders have already adopted the said process including the contesting respondent and hence there was no occasion to set aside the entire proceedings. It is submitted that the valuation of the land having increased on account of passing of the National High Way through the Village, several Land Mafias including the respondent Ajay Kumar Singh made all efforts to somehow the other forestall the consolidation proceedings and they are also taking undue advantage of their own acts. Learned counsel for the petitioner submits that there was no occasion to adopt this method and there is no justification for the cancellation of the entire proceedings.

7. Sri J.P. Sharma learned counsel for the contesting respondent Ajay Kumar Singh contends that after the consolidation process had been notified in the year 1991, gross irregularities were committed in the preparation of statement of principles and also the provisional consolidation scheme by the officers particularly the Lekhpal and the higher officers who tried to conclude the proceedings hurriedly for which allegations have been made against the Settlement Officer Consolidation . It is on account of such gross irregularities that a majority of the villagers represented the matter before the authorities who failed to take notice of the same. As a result whereof they approached this Court and filed a Writ Petition in which directions were issued by this Court on 27.9.2007 to decide the same in accordance with law.

8. Accordingly an inquiry was conducted at the level of the Collector/District Deputy Director of Consolidation and after having received

the reports, the Collector rightly came to the conclusion that gross irregularities have been committed that has resulted in an unfair proceedings having been adopted. Hence the power was exercised under Section 48 of the U.P.C.H.Act to cancel the consolidation operations and to re-initiate the same from the stage of statement of principles. Sri Sharma has relied on the decision in the case of **Tarkeshwar Pandey Vs. DDC reported in 1983 RD 249** to contend that the Collector was well within his jurisdiction to have proceeded to invoke the powers under Section 48 of the Act and he even otherewise possesses suomotu powers to doso as well. He has further relied on the decision in the case of **Jaga V. DDC reported in 1984 RD 180** to contend that a provisional consolidation scheme can be interfered with by the Settlement Officer Consolidation under Section 21(4) of the Act which power can also be exercised by the Deputy Director of Consolidation under the provisions of Section 44-A of the Act. Sri Sharma has raised an alternative argument that the consolidation operations cannot proceed as the land has been developed to a great extent over which Abadi sites have come up and a large scale construction has already been raised. According to him this renders consolidation operations impossible in the Village and he has invited the attention of the Court to the news declaration made by the Consolidation Commissioner published in Dainik Jagran in Varanasi copy whereof is Annexure 3 to the counter affidavit filed in Writ Petition No. 4222 of 2010. The said news reporting according to him recites that proceedings have been under taken for cancellation of the notification of consolidation under Section 6 of the U.P.C.H. Act , 1953. He therefore submits that as a matter of fact no consolidation should be allowed to proceed at all in view of the changed circumstances which have been noticed in the impugned order. Another argument to support the said stand has been advanced that the area has been brought within the municipal limits of Varanasi and therefore in view of the law laid down in the case of **Maharaj Singh Vs DDC reported in 1990 RD 115** the consolidation of the area is impossible.

9. With these two alternative arguments Sri Sharma submits that the writ petition deserves to be dismissed as the petitioners have not made out any case for interference under Article 226 of the Constitution of India.

10. Learned standing counsel with the help of the affidavit filed on behalf of the State contends that a full scale inquiry has been conducted by the Collector and having found the irregularities, as well as subsequent events and changed circumstances existing on the spot, an order has been passed that does substantial justice between the parties. He further submits that the U.P. Housing Board (Awas Vikas Parishad) has also notified a Scheme in Varanasi for housing purposes and in such circumstances the entire proceedings for consolidation have to be reviewed which can be under taken only from the stage of preparation of statement of principles under Section 8 of the U.P.C.H.Act, 1953. He therefore submits that the impugned order be not interfered with at this stage.

11. Having heard learned counsel for the parties it appears from the facts on record that the consolidation operations under U.P.C.H. Act were proposed in the

year 1991. The notification under Section 4 of the 1953 Act was issued on 24.9.91. Objections were invited for settling disputes in 1994. The revised annual register and other proceedings after the preparation of statement of principles under Section 8 and 8-A was conducted in 1995 and then in the same year a proposal of the provisional consolidation scheme under Section 19 read with 19-A was also notified. The proposed allotment of chaks began with filing of objections which were disposed of under Section 21 of the Act and appeals were preferred. It is at this stage that complaints were raised and the consolidation process came to a halt on account of a criminal case having filed and at the same time spot inspections were carried out almost on four occasions. The pending appeals relating to allotment were finally decided where after revisions were filed which are pending consideration before the Deputy Director of Consolidation under the provisions of Section 48 of the U.P.C.H.Act.

12. In between the respondent Ajay Kumar Singh and some others appear to have approached the authorities at Lucknow and also the Collector by moving a representation that the consolidation operations should be concluded only in accordance with law. The first application dated 15.6.06 that was moved by the petitioner is Annexure 1 to Writ Petition No. 4222 of 2010.

13. Thereafter respondent No.2 Ajay Kumar Singh approached this Court by filing a Writ Petition No. 47530 of 2007 which was disposed of on 27.9.2007 by following order:

"Heard Sri J.P.Sharma learned Advocate, in support of this writ petition.

After hearing Sri Sharma, learned Advocate and on consideration of the prayer as made in this petition, this court is of view that straight way this court cannot intervene and cannot involve in the matter as acceptance/rejection of the petitioners claim is depended on various factual aspect which is to be better ascertained and to be taken note by the collector who happens to be District Deputy Director of Consolidation.

At this stage Sri Sharma, learned Advocate submits that the petitioner has already moved to the collector but he is not paying any heed to his grievance.

In view of the aforesaid this writ petition is being disposed of by giving direction to the learned collector to entertain petitioner's grievance and to take appropriate decision, after giving adequate to everybody, in accordance with law, with all expedition.

With the aforesaid, this writ petition stands disposed of.

14. After passing of the said order another application appears to have been filed by Ajay Kumar Singh on 8.6.2007 where, for the first time, he raised a plea before the Collector to make a recommendation to the State Government for issuing a notification under Section 6 of the U.P.C.H.Act and cancel the consolidation operations altogether. A further relief was prayed for that the appeals that were pending should not be decided by the Settlement Officer Consolidation.

15. It appears that during the said period the Settlement Officer Consolidation decided the appeals against

which revisions were filed. The Settlement Officer Consolidation submitted reports dated 31.10.2007 and 17.12.2007. The complaint of Ajay Kumar Singh came to be disposed of on 2.2.2008 and a copy of the said order has been filed as Annnexure 6 to the writ petition. The objections filed by Ajay Kumar Singh were rejected and it was held that there was no occasion to make a recommendation for cancellation of consolidation process when the consolidation operations had been completed to the extent of 75%.

16. It appears that an application was moved that the order passed on 2.2.2008 and the earlier orders were ex-pare and therefore the objections deserve to be heard again. Accordingly in exercise of suo-motu powers the District Magistrate on 28.2.2008 recalled his earlier orders dated 1.1.2008 and 2.2.2008 and restored the proceedings relating to the miscellaneous complaint afresh. Thereafter the impugned order dated 7.8.2009 has been passed taking into account the development for the past more than 10- years and the existing situation on the spot.

17. Upon having perused the records the first issue that appears to be addressed to is the power to be exercised for implementation of a Scheme under the U.P. Consolidation of Holdings Act, 1953. The Scheme commences after a notification is made under Section 4 of the Act . The revision of map has to be carried out under Section 7. Under Section 8 the field book, the annual register and the records have to be revised and while doing so a survey has to be conducted and the same is to be done in consultation with the Consolidation Committee. Needless to mention that the Consolidation Committee is a statutory authority defined under Section 2-AA which is constituted in terms of Rule 3-A and has to perform the functions with regard to the preparation of statement of principles in accordance with the procedure prescribed in Paras 88 to 94 of Chapter IV of the Chakbandi Manual. The functions to be performed by the Committee are also prescribed under Section 8 itself. Then comes the preparation of statement of principles which is the basis to be followed in preparation and carrying out of the consolidation operations in the unit. They relate to the detail of areas to be earmarked for the purposes as indicated in Section 8-A of sub section (2). Thus the role of Consolidation Committee assumes importance as the entire statement of principles have to be prepared with the consultation of the Consolidation Committee.

18. Needless to mention that the consultation of the Consolidation Committee has been held to be mandatory by this Court in the decisions in the case of **Radha Kishan Vs. Mohd. Matin reported in 1969 RD 329 (paras 3 and 7)** and in the case of **Kedar Nath Singh and other Vs. DDC reported in 1982 RD 142.**

19. After the statement of principles are prepared then the extracts and record of the statement are issued through notices inviting objections from the tenure holders. The tenure holders there after are entitled to set up their claim of title, valuation etc as per the statement of principles and all such disputes are to be decided in accordance with the provisions of Section 9-A and Section 9-B of the

Act. The partition of holdings between the co-sharers can also be effected under the provisions of Section 9-C of the Act. The revised annual registers are thereafter prepared and any party aggrieved by the proceedings before the Consolidation Officer relating to the objections has a remedy to file an appeal under Section 11. A bar under Section 11-A has been introduced not to allow objections to be filed later on if the opportunity afforded is not availed under section 9 of the Act.

20. Then a third stage arrives where during the consolidation operations any transfer effecting the rights or interest can be revised by moving an application under Section 12 of the Act and on such an application being moved any objection thereto has to be decided in the same manner as under under Sections 7 to 11 which apply mutatis mutandis.

21. Then comes the stage of preparation of the provisional consolidation scheme proposing the actual allotment of plots. This is done under Section 19 and the provisional consolidation scheme is prepared under Section 19-A. This operation brings about the stage of filing objections to the actual allotment of plots. The Consolidation Officer is authorisied under Section 21 to decide any such objections against which an appeal can be filed before the Settlement Officer Consolidation where after a revision can be preferred before the Deputy Director of Consolidation under Section 48 of the Act.

22. The powers to be exercised by the authorities are clearly defined . The Settlement Officer Consolidation can set aside a provisional consolidation scheme and issue appropriate orders for preparation of the same afresh. The powers to be exercised by the higher authorities are the same as by the authorities below them as per Section 44-A of the Act. It is in the aforesaid back ground that the exercise of power in the present case has to be understood.

23. One of the other arguments raised by the learned counsel for the contesting respondent is that the Village has fallen within the Municipal limits and therefore it should be excluded from the consolidation proceedings in view of the judgment in the case of Maharaj Singh vs DDC (supra). This has been disputed by Sri S.K.Pandey learned counsel for the petitioner by bringing on record the letter dated 13.7.2009 from the office of Nagar Nigama, Varanasi appended as Annexure RA -3 to the Second Supplementary Rejoinder Affidavit dated 10.5.2010. The said letter indicates that the Village is not within the Municipal limits of the Municipal Corporation, Varanasi but according to the notification of the Urban Development Department Govt. of U.P. dated 30.11.2006, the Village falls within Varanasi Maha Nagar area. This dispute does not appear to have been either raised or dealt with before the District Magistrate when the objection of the respondent Ajay Kumar Singh was being considered.

What is noticeable about the plea raised by the learned counsel for the respondent is that consolidation is no longer possible in the area while on the other hand he defends the impugned order which requires the consolidation operations to again commence from the stage of the Assistant Consolidation Officer. This alternative objection on the part of the respondent has to be

understood in the light of the fact that the power to cancel a notification of consolidation altogether vests with the State Govt. under the provisions of Section 6 of the U.P.C.H. Act, 1953. This power can be exercised by the State Govt. in the circumstances as indicated in Rule 17 of the Consolidation Rules. Section 6 read with Rule 17 are quoted herein below for ready reference:

"Section 6. Cancellation of notification under Section 4(1) It shall be lawful for the State Government at any time to cancel the (notification) made under Section 4 in respect of the whole or any part of the area specified therein. (2) Where (notification) has been cancelled in respect of any unit under sub-section(1), such area shall, subject to the final orders relating to the correction of land records, if any, passed on or before the date of such cancellation, cease to be under consolidation operations with effect from the date of the cancellation.

"Rule 17 - The notification made under Section 4 of the Act, may among other reasons, be cancelled in respect of whole or any part of the area on one or more of the following grounds, viz, that-

(a) the area is under a development scheme of such a nature as when completed would render the consolidation operations inequitable to a section of the peasantry;

(b)the holding of the village are already consolidated for one reason or the other and the tenure-holders are generally satisfied with the present position;

c) the village is so torn up by party factions as to render proper consolidation proceedings in the village very difficult and

(d) that a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for the purpose."

24. If the State Govt is apprised of any such inconvenience being experienced by the tenure holders, or by the consolidation authorities, then the State Govt can exercise such powers for cancelling the notification of consolidation operations. In the instant case what has happened is that the irregularities as alleged by the respondents was made the basis for forestalling the consolidation operations, thereby resulting in impeding the process for more than 10 years. During this period, according to the impugned order itself various constructions have been raised and the topography of the land has changed, and not only this a large number of brick-kilns are stated to have flourished. The allotment of land would not be convenient in the said changed circumstances. A perusal of the impugned order indicates that in this situation, the consolidation is sought to be re-initiated afresh by preparation of statement of principles reverting the entire process of allotment, which had been completed up till now to the stage of the Assistant Consolidation Officer . The revisions which had been filed against orders of allotment are stated to be pending . With the exercise of suo-motu powers under Section 48 of the Act, all such proceedings have been initiated without any decision which has been undertaken on the judicial side. In such circumstances in my opinion if the proposal is pending before the State Govt for cancellation of

notification, the State Govt at the first instance has to exercise its option of either to continue the consolidation operation, or cancel the same keeping in view the reports submitted by the authorities.

25. Needless to mention that the criteria given in Rule 17 quoted herein above is not exhaustive and the State Govt. in its discretion can cancel the notification if it comes to the conclusion that the consolidation operations are impossible in the area.

26. Coming to the next issue relating to the argument of the learned counsel for the contesting respondent that consolidation operations should commence from the stage of preparation of statement of principles, it appears from the affidavit filed by the learned counsel for the respondent that the Deputy Director of Consolidation/Collector who has passed the impugned order, should have taken this fact into account as to whether the statement of principles had been prepared with the consultation of the Consolidation Committee or without its consultation. The constitution of the Committee is defined under Rule 3-A of the Consolidation Rules. If the statement of principles have to be modified or rescinded then the view of the Consolidation Committee shall have a direct bearing, and the impugned order does not record any such consultation with the Consolidation Committee. In such a situation the District Magistrate/Collector was not justified in straight away proceeding to exercise his powers suo-motu annulling all proceedings. The District Magistrate is also exercising the power of Deputy Director of Consolidation under Section 48 of the Act and if the revisions were pending on the judicial he could have decided the same on the basis of the material before him including the subsequent events that may have been necessary for the purpose for either setting aside the order of the Settlement Officer Consolidation or carrying out of the consolidation process in accordance with the statement of principles. It was not necessary for the District Magistrate in the given circumstances to have exercised his suo-motu powers in order to annul all proceedings including the judicial process adopted by the parties. Even otherwise if the District Magistrate found that the entire process deserved to be set aside then in such a situation the District Magistrate ought to have proceeded in accordance with the procedure prescribed in law and the powers conferred under Section 48 of the Act. It is no doubt true that the power vests in the Deputy Director of Consolidation or the District Magistrate to annul such proceedings in view of the decisions that have been referred to by the learned counsel for the respondent. While exercising powers on the judicial side they have to confine to the limits of exercise of such power that is available to the authorities. The Deputy Director of Consolidation under Section 44-A would therefore exercise a power to proceed to which it is permissible in law and not beyond the same. The power of the Settlement Officer Consolidation under Section 21(4) as suggested by the learned counsel for the respondent therefore will have to be exercised on the parameters prescribed therein and not beyond that.

27. Accordingly for the reasons given above the writ petition deserves to be allowed. The impugned order dated

7.8.2009 is quashed . The District Magistrate shall now forward the entire documents relating to the plea of cancellation of notification before the State Govt. The State Govt shall on receipt of such documents proceed to take a decision objectively keeping in view the larger interest of the villagers and the reports that have been submitted from time to time as to whether it is necessary to cancel the notification under Section 4 or not. This decision shall be taken by the State Govt within two months from the date of presentation of the certified copy of this order. The Principal Secretary (Revenue), Govt. of U.P. shall proceed with he matter in the light of the observations made herein above and pass an order in accordance with law. Needless to say that this has to be done with the aid of the Consolidation Commissioner of the State and after obtaining the views of the petitioners, the concerned Gaon Sabha, and any other government department without being influenced by political considerations or undue influence of Land Mafias.

28. In the event the State Govt. holds that there is no necessity to cancel the notification then in that event the District Magistrate/Deputy Director of Consolidation shall proceed to re-assess the matter in the light of the observations made herein above and the provisions noted for the exercise of such powers.

29. Learned counsel for the respondent has contended that this Court has already invoked its power in the case of Mahendra Prasad Vs. Consolidation Commissioner decided on 22.11.2005 in Writ Petition No. 336 of 2001 and issued directions to proceed from the stage of preparation of statement of principles under Section 8. In the opinion of the Court it is not necessary for this Court to under take this exercise itself in the given circumstances of the present case as reasoned out herein above. The aforesaid decision therefore is of no avail to the contesting respondent.

30. The writ petition stands accordingly disposed of with the aforesaid directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J.

Civil Misc. Writ Petition No. 28519 of 2008

Mool Chand ...Petitioner
Versus
The Commissioner, Meerut Division & Others ...Respondent

Counsel for the Petitioner:
Rajiv Sharma

Counsel for the Respondents:
C.S.C.

U.P.Z.A.L.R. Act-Section 157-A-Permission for sale-by schedule cast tenure holder to non S.C. Candidate-rejected by the authorities-ignoring the aspect that for payment of loan-open market shall fetch better market value than auction sale-held-provision of 157-A-enacted for welfare of S.C. But not to harass them-petitioner given liberty to sell entire land or any piece of land to any one even General Candidate-but in future not entitled to claim allotment of Gaon Sabha land.

Held: Para 2

The provisions of Section157-A are for the benefit of the scheduled caste. It can not be interpreted and applied in such manner that it becomes detrimental to them. There is no finding that some non scheduled caste purchaser wanted to exploit the petitioner by purchasing his land.

(Delivered by Hon'ble S.U. Khan, J.)

1. No counter affidavit has been filed by the learned standing counsel representing the respondents. Petitioner who is member of Scheduled caste took some loan from a bank after mortgaging some of his agricultural land. He could not repay the loan. Bank threatened to start recovery proceedings. The petitioner thought that the only way of paying the loan was to sell part of his agricultural land. Accordingly, he applied on 27.12.2003 for permission to sell a part of his land to any person under Section 157-A of U.P.Z.A.L.R. Act. It is quite obvious that if something is sold in open market it fetches more price then the price which may be obtained by offering to sell the same to limited number of people. Through the impugned order dated 27.04.2005 contained in Annexure 13 to the writ petition case no.201/D.L.R.C./2005 the A.D.M. (Administration), Ghaziabad rejected the permission (communicated the rejection order of Collector dated 24.03.2004). Against the said order revision was filed in the form of revision no.71 of 2004-05. It was specifically argued that the land was mortgaged to the Syndicate Bank inspite of it the authorities below held that there was no reason to grant the permission. Judicial notice may be taken of the fact that if land is sold in auction for realisation of dues, it does not fetch adequate price. Auction purchaser is conscious that there may be lot of litigation in respect of auction, hence he does not purchase it for the price for which similar land may be purchased in open market.

2. The provisions of Section157-A are for the benefit of the scheduled caste. It can not be interpreted and applied in such manner that it becomes detrimental to them. There is no finding that some non scheduled caste purchaser wanted to exploit the petitioner by purchasing his land.

3. From perusal of Schedule 1 to the application which is Annexure 6 to the writ petition it is clear that even after sale of the aforesaid land, 1.655 hectares land will still remain with the petitioner. Petitioner is permitted to sell it any one.

4. Accordingly, writ petition is allowed impugned orders are set aside. Petitioner's application seeking permission to sell the land of khata no.534 khasra no.792 ka area 0.316 hectare to some non scheduled caste is allowed. It is made clear that after selling the land petitioner will not be entitled to claim allotment of any gaon sabha land.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2011

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 29406 of 1996

Rajendra Kumar ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Subodh Kumar

Counsel for the Respondents:
C.S.C.

Stamp Act-Section 47-A-stamp duty-purchase of agricultural land-subsequently on basis of report by Tehsildaar-it was found that small piece being used as Dharam-Khata-Atta Chakki-unless the nature of land declared otherwise-can not be treated for commercial purpose-nor any finding is there regarding use of land for non agricultural purpose-prior to date of purchase-demand of additional stamp duty-held-not legal.

Held: Para 15

In these circumstances I am of the view that the future use of the land is irrelevant for the determination of the market value and payment of stamp duty. The valuation of the land has to be assessed on the basis of existing circle rate/market value of particular category of the land on the date of execution of sale deed and its registration considering the other criteria as discussed above, if any deviation is there.

Case law discussed:
2008 (8) ADJ 748; 2008 (104) RD 725; 2010 (4) AWC 4232; 2008 (8) ADJ 48; 2009 (2) ADJ 481

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

1. Through this writ petition the petitioner has prayed for issuing a writ of certiorari quashing the impugned order dated 28.09.1993 and 26.06.1996 passed by Additional District Magistrate (Finance & Revenue), Shahjahanpur and Chief Controlling Revenue Authority, U.P., at Allahabad respectively. Vide order dated 28.09.1993 the respondent no.2 has found the deficiency of stamp of Rs.1,47,561.50 and imposed penalty of the same amount along with Rs. 90/- registration fee, the total amount comes to Rs.2,95,213/-,whereas by the subsequent order the petitioner's revision filed against the said order was dismissed by the Chief Controlling Revenue Authority, U.P.,Allahabad.

2. The facts giving rise to this case are that the petitioner has purchased the land measuring about 0.438 aire from plot nos. 143,144, 145,146/1, 147/1, 148,149 situated at village Hindu Patti, Tehsil Tilhar, District Shahjahanpur for consideration of Rs.9000/- and paid stamp duty worth Rs.1876/-. It appears that the matter was referred under Section 47 A(1) of the Stamp Act by the Sub Registrar before the Collector Stamps. Thereafter a spot inspection was made by Tehsildar Tilhar District Shahjahanpur on two occasions in February, 1993, and in August, 1993 and following that a show cause notice was issued to the petitioner disclosing therein that although the petitioner has purchased the land of commercial use but has paid the stamp duty on agricultural rate. The petitioner has filed reply to the said notice stating therein that petitioner has purchased the agricultural land and it is being used for agricultural purposes. The Additional

District Magistrate (Finance & Revenue) after going through the reply of the petitioner and the report of Tehsildar has came to the conclusion that the land purchased by the petitioner was commercial land but petitioner, instead of paying the commercial rate has paid the stamp duty treating it as agricultural land. While passing this order the respondent no.2 has based his order on the report of Tehsildar, where it is reported that although the land in the revenue record is recorded as agricultural land but it is being used for commercial purposes. It appears Additional District Magistrate (Finance & Revenue) has placed reliance upon the report of Tehsildar Tilhar, District Shahjahanpur dated 25.2.1993 whereas he has overlooked the subsequent report of Tehsildar dated 16.8.1993 which mentions that plot nos. 143,144,145,146/1/147/1 are Kachiyana category of which circle rate happens to be Rs.30,000/-per acre whereas plot nos. 148 and 149 are Doem (Doyam) category land and circle rate of which happens to be Rs.24,000/- per acre. He has also reported that at the time of inspection on the aforesaid plots a Saw Mill, Atta Chakki and Dharm Kanta was found. The Additional District Magistrate Finance & Revenue (hereinafter referred to as A.D.M.(F & R) came to the conclusion that as the land is being used for commercial purpose, therefore, the petitioner has paid less stamp duty. According to the A.D.M.(F & R) the circle rate for commercial land is Rs. 800/- per square meter and since 1494 square metre land has been purchased, he has calculated the value of the land Rs.11,95,200 (1494 x 800) and assessed the stamp duty as per schedule 1-B of Article 23 Rs.1,49,437.50 and after reducing the duty which has already been paid by the purchaser, Rs.1,876/- he found the deficiency of Rs.1,47,561.50 and also imposed the penalty of the same amount along with Rs.90/- as registration fee.

3. Aggrieved by the order of A.D.M.(F& R) 28.09.1993 the petitioner filed Revision before the Chief Controlling Revenue Authority (hereinafter referred to as C.C.R.A) U.P., Allahabad which was numbered as Stamp Revision No. 1091 of 1993-94 district Shahjahanpur (Rajendra Kumar vs State of Uttar Pradesh) and was partly allowed by the C.C.R.A. vide order dated 26.6.1996. The C.C.R.A. has held that the penalty upon the petitioner has been imposed against the provision of law, therefore, he set aside the order with respect to the imposition of penalty but for other purposes he decline to interfere with the order passed by the A.D.M.(F& R).

4. Aggrieved by these orders the present writ petition has been filed.

5. Sri Udit Chandra holding brief of Sri Subodh Kumar learned counsel for the petitioner while assailing these orders has submitted that for the purposes of determination of market value and payment of Stamp duty the entry in the revenue record and the nature of the land on the date of execution of sale deed is material and the stamp duty cannot be fixed on the basis of future user of the land. In support of his submissions he has placed reliance upon few judgnemts of this Court;

6. **Ashok Kumar Dubey Vs State of U.P. and others 2008 (8) ADJ 748, Smt. Anasuya Singh Vs Commissioner, Faizabad Division Faizabad and another 2008 (104) RD 725, Veer Bal Singh Vs State of U.P. and others 2009 (2) ADJ 481 and Sumant Lal Tiwari Vs. State of U.P. and others 2010 (4) AWC 4232.**

7. Refuting the submissions of learned counsel for the petitioner learned Standing Counsel has submitted that from the perusal of the report of Tehsildar dated 16.8.1993 it is apparent that the part of the land is being used for commercial purposes as the Tehsildar at the time of inspection has found functioning of one Dharm Kanta and Atta Chakki on the aforesaid land. In the submissions of learned Standing Counsel the entire land is of commercial nature, therefore no infirmity or illegality can be attached with the view taken by the respondent authorities and the writ petition deserves to be dismissed.

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

It is not in dispute that the petitioner has purchased 1/3 part of the land of plots no. 143,144,145,146/1,147/1,148 and 149 through sale deed, executed by Sri Ram Kishore, Sri Naiku and Sri Gulab who were the joint owners of the plots ,on 29.07.1991. The petitioner has brought on record the extract of the Khatauni from which it transpires that the erstwhile owners were recorded as Bhoomidhar with transferable right of the aforesaid plots. The Tehsildar Tilhar in his report dated 16.8.1993 has mentioned that in Khasra of the year 1395 and 1396 Fasli in Ravi & Kharif (both Fasli) crops were mentioned and came to the conclusion that at the time of the execution of the sale deed, the land was used for agricultural purpose. He further observed that the plot numbers 143, 144, 145, 146/1,147/1 are Kachiyana and the circle rate of which happens to be Rs.30,000/- per acre whereas plot numbers 148,149 were found Goyad/Doyam, circle rate of which happens to be Rs.24,000/- per acre and on the basis of above rate he valued the land worth Rs.10,320/-.

9. From the perusal of the impugned orders it do not transpires that at the time of execution of sale deed the land was not used for agricultural purposes and Dharm Kanta and Atta Chakki were existing or the land was used at the relevant time for commercial purpose. It is no where mentioned that the land is not recorded in the revenue record as agricultural one. The factum of existence of Dharm Kanta for the first time came in the year August 1993 whereas the sale deed is of the year 29.7.1991.

10. It is well settled that stamp duty on an instrument is being paid normally on the basis of market value fixed on the basis of circle rate fixed by the Collector and when the market value on an instrument is being doubted either by the registering authority or under suo moto action of the State Government through its officers then in that situation there must be a definite proof on the basis of material available on record before the authority for enhancing the market value of the property.

11. While fixing the circle rate with respect to land,building,road, etc., various things are to be taken into consideration like in case of land the classification of soil,irrigation facility,proximity of road,market, bus station, railway station, factories, hospitals and government offices, and location with reference to its situation in urban area, semi urban area or country side. Likewise in the case of non-commercial building, there are other ingredients which are taken into consideration. Therefore, in the case where the authorities have raised doubt on

the determination of market value and payment of deficient of stamp duty, then before arriving to this finding those things have to be taken into consideration on the basis of material available on record.

12. Here in the present case the market value of the land has been calculated treating it as commercial one but in both the judgements there is no discussion with regard to the commercial activity in the area and prevailing rent and nature of economic activity in the locality etc., which happens to be relevant critaria for fixing rate for commercial purposes, merely on the basis of report of the Tehsildar which mentions that there is one Dharam Kanta & Atta Chakki on the land, the land has been treated as of commercial use and the market value has been determined on that basis, which to my opinion is unsustainable as there can be no roof without there being any foundation pillar/wall, as in this case the finding with respect to existence of Dharam Kanta and Ata Chakki on the date of execution of sale deed is missing, which in fact has been made basis for treating the land as commercial one. On the basis of material available on record, it appears that Dharam Kanta and Ata Chakki, on the disputed land, have been constructed only after execution of sale deed.

13. This Court in the case of **Ashok Kumar Dubey vs. State of U.P. And others 2008 (8) ADJ 48** has held that market value of the land could not be determined with reference to use of the land to which the buyer intends to put in use. Here in this case, it appears the authorities have enhanced the stamp duty on the ground that land is situated in urban area but the Court took the view unless the nature of the land is changed from agricultural one to abadi the respondents could not have assessed the market value of the land on the basis of the future potential of the land because of its situation nearby the urban area. The same view has been taken in the case of **Smt.Anasuya Singh Vs Commissioner, Faizabad Division, Faizabad and another 2008 (104) RD 725** where this Court has held that the agricultural land situated at road side in semi urban area cannot be treated as commercial or residential unless the area is declared as commercial or residential in the master plan prepared by the State Government. Again reiterating the same principle this Court in the case of **Veer Bal Singh Vs. State of U.P. And others 2009 (2) ADJ 481** has held that on date of execution of sale-deed, land was an agricultural land and the market value and consequential stamp duty cannot be fixed on the basis of its future potential. The same view has further been taken by this Court in **2010 (4) AWC 4232 Sumant Lal Tiwari Vs. State of U.P. & others.**

14. In this case as has been noticed after hearing learned counsel for the parties and perusing the record that there was no material before the respondents to arrive at finding that the land in question is not agricultural land and commercial one, on the contrary, there is a report of Naib Tehsildar dated 16.08.1993 mentioning the nature of land agricultural one, as in his report the Naib Tehsildar has reported that at the relevant time in the khasra of the year 1395 and 1396 in both fasli Ravi and Kharif crop has been mentioned. Merely because on the small piece of land Dharm Khata and Atta Chakki is existing, it cannot be inferred that the land in question is not agricultural

land and commercial one particularly in the circumstances without there being any proof on record that Dharam Kanta and Atta Chakki were existed before the date of execution of sale deed or on the date of execution of sale deed. Further without taking into consideration the economic activity and prevailing rent etc. in the vicinity of land. No provision under the Stamp Act could be shown to the Court by the learned Standing Counsel containing that the stamp duty may also be charged on the future use of the land or the purchaser can not use agricultural land for any other purposes except the agriculture in future.

15. In these circumstances I am of the view that the future use of the land is irrelevant for the determination of the market value and payment of stamp duty. The valuation of the land has to be assessed on the basis of existing circle rate/market value of particular category of the land on the date of execution of sale deed and its registration considering the other criteria as discussed above, if any deviation is there.

16. In view of the foregoing discussions I am of the opinion that impugned orders are unsustainable in the eye of law and deserves to be quashed.

17. In the result the writ petition succeeds and is allowed. The impugned orders dated 28.09.1993 and 26.06.1996 are hereby quashed.

18. It is also provided that the security if any furnished by the petitioner pursuant to the order dated 11.09.1996 passed by this Court be released.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Crl. Misc. Application No. 4761 of 2011

Santosh Chauhan and others ...Petitioner
Versus
State Of U.P. and another ...Respondent

Counsel for the Petitioner :
Sri M.S. Chauhan

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section 205-Exumption from personal appearance-sale discretion of magistrate-to consider whether or not the trail affected in absence of accused-No direction can be issued by High Court-Application dismissed.

Held: Para 7

Therefore, the Magistrate while considering an application under section 205 of the Code, has to see whether or not any useful purpose would be served by requiring the personal attendance of the accused in the court. He is further required to see whether or not the progress of the trial is likely to be hampered on account of absence of the accused. As held in the case of Bhaskar Industries (supra), the discretion under section 205 of the Code should be exercised in a judicious manner and the personal presence of the accused should be required only when the trial cannot proceed further without the presence of the accused. If the trial can be held conveniently in absence of the accused, it would be just and expedient to exercise the discretion in favour of the accused and dispense with his personal attendance in the court.

Case law discussed:
(2001) 7 SCC 401; (2001) 2 SCC 772.

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard the learned counsel for the applicants and the learned AGA and perused the record.

2. Keeping in view the facts of the case, it appears that all the offences are bailable.

3. The learned Magistrate, keeping in view the materials on record, arrived at the conclusion that there were sufficient material on record to summon the accused. The finding of the learned Magistrate is based on proper appraisal of the relevant material. The petition has no merit and is liable to be dismissed.

4. The learned counsel for the applicants submitted that the personal attendance of the applicants in the court may be directed to be exempted. This type of direction cannot be issued by this Court in exercise of inherent power, however, the learned Magistrate has power under section 205 Cr.P.C. to grant exemption from the personal attendance of the accused and in appropriate cases that power should be exercised so that the accused persons, particularly, where a large number of persons have been made accused, are not unnecessarily harassed.

5. In the case of Bhaskar Industries Ltd Vs. Bhiwani Denim and Apparels Ltd.[(2001) 7 SCC 401, the Apex Court has propounded the principles regarding the ambit and scope of section 205 of the Code. Paragraph 19 of the judgement seems to be relevant, which is as follows:

"19.....It is within the powers of a magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course."

6. The aforesaid principles have been followed with approval in the subsequent case of TGN Kumar v State of Kerala, (2011) 2 SCC 772. Paragraphs 8 & 10 of the judgement rendered in TGN Kumar (supra) case seem to be relevant, which are reproduced as follows:

"8. The Section confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application under Section 205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be

hampered on account of his absence. (See: S.V. Muzumdar & Ors. Vs. Gujarat State Fertilizer Co. Ltd. & Anr.7) . Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and none else.

.....

10. We respectfully concur with the above guidelines and while re-affirming the same, we would add that the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial."

7. Therefore, the Magistrate while considering an application under section 205 of the Code, has to see whether or not any useful purpose would be served by requiring the personal attendance of the accused in the court. He is further required to see whether or not the progress of the trial is likely to be hampered on account of absence of the accused. As held in the case of Bhaskar Industries (supra), the discretion under section 205 of the Code should be exercised in a judicious manner and the personal presence of the accused should be required only when the trial cannot proceed further without the presence of the accused. If the trial can be held conveniently in absence of the accused, it would be just and expedient to exercise the discretion in favour of the accused and dispense with his personal attendance in the court.

8. In view of the aforesaid, it will be open to the applicants to move an application under section 205 of the Code for dispensing with their personal attendance in the court. If any such application is moved, the same may be considered and disposed of in accordance with the observations made herein before.

9. The petition is, therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHAABD 0.3.03.2011

BEFORE
THE HON'BLE F.I.REBELLO,C.J.
THE HON'BLE VINEET SARAN,J.

Civil Misc. Writ Petition No. 1766 of 2011

Smt. Raj Kumari Singh ...Petitioner
Versus
State Of U.P. And Others ...Respondent

Counsel for the Petitioner:
Sri Purendu Kumar Singh
Sri Ajai Shankar Pathak
Sri Umesh Narain Sharma

Respondent Counsel:
C.S.C.

Constitution of India-Article 226-cancellation of Fair Price Shop License-on ground of pendency of criminal case-earlier it was suspended-subsequently on ground of hardship of consumer during period of attachment-cancellation order passed-inspite of time granted no counter affidavit filed-in absence of provisons of suspension or cancellation of on pendency of criminal case-order without authority of law.

Held: Para 8

Even otherwise we may point out that a reading of the order dated 10.8.2010 discloses total non application of mind. The said order purports to cancel the license merely on the ground of lodging of an F.I.R. and that suspension is going on for a long time thereby causing inconvenience in distribution of essential commodities to the card holders. The said reasons cannot be justified in law to cancel the dealership.

Case law discussed:

Jagdish Narain Mishra vs. State of U.P. (Civil Misc. Writ Petition No. 28051 of 2008)

(Delivered by Hon'ble F.I. Rebello,C.J.)

1. The petitioner is a fair price shop dealer. An FIR had been lodged under Section 3/7 of the Essential Commodities Act on 1.9.2009 against the petitioner whereby her fair price shop dealership was placed under suspension on 3.9.2009. On 10.8.2010, the dealership of the petitioner has been cancelled by the Sub-Divisional Officer on the ground of lodging of FIR under Section 3/7 of the Essential Commodities Act against the petitioner. It has been stated in the said order that since the shop of the petitioner is continuing under suspension for about a year and the card holders attached to the shop of the petitioner are facing difficulty, the dealership is being cancelled. The same ground has been reiterated in the order dated 20.12.2010 for cancelling the dealership of the petitioner. Challenging the said orders dated 10.8.2010 and 20.12.2010, this writ petition has been filed.

2. We have heard Sri Ajay Shankar Pathak, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the record.

3. Earlier on 13.1.2011 time was granted to the learned Standing Counsel to file counter affidavit and the matter was adjourned for 17.2.2011. However, no counter affidavit was filed and the matter was again adjourned to 1.3.2011and it was made clear that no further time would be granted to file counter affidavit. Till date no counter has been filed and today again a request has been made on behalf of the respondents for adjournment, which is refused. We thus proceed to dispose of this writ petition on the averments as they now stand.

4. Ordinarily we would not have entertained this writ petition as an appeal is available in a case of cancellation of licence. However, we find over here that the Judgment of this Court dated 30.10.2009 in Jagdish Narain Mishra vs. State of U.P. (Civil Misc. Writ Petition No. 28051 of 2008) has not been followed wherein the learned Judge observed as under:-

"Despite advancing lengthy arguments, learned standing counsel has failed to bring to the notice of the Court any provision either under the Essential Commodities Distribution Order, 2004 or under any other Government Order issued either under the 2004 order or 1990 order empowering the Licensing Authority to cancel a fair price shop agreement merely on account of a dealer being involved in a criminal case. Hence the cancellation of the petitioner's agreement on the ground of his involvement in aforesaid criminal case

under the Essential Commodities Act is also unsustainable."

5. Nothing has been brought to our attention that the said judgment has been overruled. Even otherwise, we are of the opinion that the said conclusion cannot be faulted for the reason that mere filing of a F.I.R. cannot result in holding a fair price shop owner guilty of the offences charged. If there be a conviction, then it is possible to proceed, based on the conviction and not otherwise. In case if the F.I.R. is lodged, it is still open to the respondents to proceed by leading independent evidence and statements of the persons recorded.

6. In the instant case that has not been done. It is not possible to countenance a situation where a judgment, which is binding on the authority, is not being followed and the parties are made to seek a remedy which ordinarily they need not have to resort to if the law laid down by this Court was followed by the respondents.

7. Considering what we have set out earlier and the Judgment of this Court in *Jagdish Narain Mishra* (supra), which we approve, the cancellation of the licence of the petitioner is without authority of law.

8. Even otherwise we may point out that a reading of the order dated 10.8.2010 discloses total non application of mind. The said order purports to cancel the license merely on the ground of lodging of an F.I.R. and that suspension is going on for a long time thereby causing inconvenience in distribution of essential commodities to the card holders. The said reasons cannot be justified in law to cancel the dealership.

9. Consequently the orders dated 10.8.2010 and 20.12.2010 are set aside. The respondents are directed to resume the supply of the food grains to the petitioner if there be no other contrary order. However, it shall be open to the respondents to hold an enquiry and proceed according to law.

10. With the aforesaid observation, this writ petition stands disposed of.
