REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.10.2012

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Civil Revision No. - 102 of 2012

Vipul Bhatia ...Petitioner
Versus
Prem Kumar ...Respondents

Counsel for the Petitioner:
SriRahul Agnihotri

Counsel for the Respondents:
Sri H.N.Tiwari

Small Causes Courts Act-Revision against order of striking out of defence-inspite of repeated opportunity-non compliance by revisionist for seeking benefit under Section 20 (4)-instead of depositing entire amount of rent, damages and other expenses on first date of hearing-moved frivolous application about payment of earnest money of Rs. 4 lac and sale transaction-without any registered deed-only for purpose to continue the illegal possession by hook or crook-which resulted to impugned striking out of the defence-present revision is nothing but an attempt to dragged other party on frivolous and fictitious litigation-revision dismissed with cost of Rs. 20,000.

Held: Para-9

The learned trial Court has rightly struck off the defence of the defendant-revisionist. This revision demonstrates how a determined and dishonest litigant can interminably drag on litigation to frustrate the results of a judicial determination in favour of the other side. The history of this litigation shows nothing but cussedness and lack of bona fides on the part of the defendant-revisionist. This is distressing and deserves to be deprecated by imposition of exemplary costs of Rs.20,000/- on the revisionist. This is not a mere revision, but an attempt of the tenant to protract the litigation by raising frivolous and fictitious contention. This is nothing but another chapter in the litigative acrobatics of the revisionist, who has determined to dupe and defy the process of the Court to cling on to the apartment. The trick he (defendant-revisionist) has adopted deserves to be nipped in the bud.

Case Law discussed:
(2011) 8 SCC 249; 2000 SCFBRC 321

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. This revision has been preferred by the revisionist-defendant against the judgment and order dated 23.08.2012, passed by learned Special Judge (Ayodhya Prakran)/Additional District Judge, Lucknow in SCC suit no.50 of 2011, by which the defence of the defendant/tenant/revisionist has been struck off in compliance of provision contained under Order XV, Rule 5 of the Code of Civil Procedure.

2. The plaintiff-respondent has put in appearance and filed counter affidavit, which is taken on record. No rejoinder affidavit was sought for by the revisionist-defendant.

3. I have heard both learned counsel for the parties and have gone through the records.

4. The brief facts, relevant for the purposes of deciding this revision, are that the plaintiff-respondent filed a suit (SCC) for recovery of arrears of rent, damages for use and occupation and for eviction. The notices were issued to the defendant-

revisionist, which were sufficiently served upon him on 30.07.2011. The learned trial Court held service of notice sufficient upon the defendant-revisionist vide order dated 09.11.2011 and the defendant-revisionist was required to file written statement within fifteen days. The defendant did not file any written statement, hence the suit was directed to proceed ex-parte against him vide order dated 01.12.2011. The defendant, then, put in appearance and moved an application under Order IX, Rule 7 of the Code of Civil Procedure, which was allowed and the order dated 01.12.2011 to proceed ex-parte against the defendant-revisionist was set aside on 12.01.2012. The defendant filed his written statement on 21.02.2012. The points of determination were determined and the suit was fixed for 13.03.2012 for final hearing. The defendant did not deposit any amount of rent, taxes etc. in compliance of Section 20(4) of U.P. Act No.13 of 1972, nor made any deposit as required under Order XV, Rule 5 of the Code of Civil Procedure.

5. The plaintiff-respondent moved an application 29-C before the learned trial Court supported with an affidavit paper no.30-C. The defendant-revisionist filed objection paper no.36-C and took a plea that he has entered into an agreement with the plaintiff-respondent to purchase the tenanted premises for Rs.10,00,000/- (ten lac) and the plaintiff-respondent has received Rs.4,00,000/- (four lac) from the defendant. But neither the plaintiff executed the sale deed, nor did refund the earnest money of Rs.4,00,000/- lacs. The poor plaintiff filed his statement of account of the Bank, but the defendant did not file any documentary evidence to even prima facie establish that there was any agreement between the parties regarding sale and purchase of the disputed premises.

6. The learned trial Court has specifically mentioned that the defendant-revisionist did not make any payment in compliance of the provision contained in Section 20(4) of U.P. Act No.13 of 1972. An agreement to sell must necessarily be registered and reduced to writing; such heavy transaction cannot take pleas orally. An agreement to sell for Rs.10,00,000/- lacs and giving of Rs.4,00,000/- lacs, as earnest money, is nothing but a fraud on the part of the defendant-revisionist.

7. It was correctly argued by learned counsel for the plaintiff-respondent that his client (respondent) is residing at Kolkata and he has let out his apartment to the defendant-revisionist, who is not paying any rent and is continuing his occupation in illegal manner and is not depositing even a single pie before the learned Court. Not only this, the defendant-revisionist has manufactured the false story, which is nothing but sort of a fraud.

"Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago.

8. The Courts of law should be careful enough to see of such diabolical plans of the mischievous litigants should not encourage frivolous and cantankerous litigations causing law's delay and bringing bad name to the judicial system. The dispute being raised by the defendant-revisionist has been raised for the sole purpose of remaining in

possession of the disputed accommodation somehow or the other.

9. The learned trial Court has rightly struck off the defence of the defendant-revisionist. This revision demonstrates how a determined and dishonest litigant can interminably drag on litigation to frustrate the results of a judicial determination in favour of the other side. The history of this litigation shows nothing but cussedness and lack of bona fides on the part of the defendant-revisionist. This is distressing and deserves to be deprecated by imposition of exemplary costs of Rs.20,000/- on the revisionist. This is not a mere revision, but an attempt of the tenant to protract the litigation by raising frivolous and fictitious contention. This is nothing but another chapter in the litigative acrobatics of the revisionist, who has determined to dupe and defy the process of the Court to cling on to the apartment. The trick he (defendant-revisionist) has adopted deserves to be nipped in the bud.

10. I have no hesitation in holding that the tenant-revisionist exhibits the growing tendency of tenants to dilly delay the eviction and, thereby, causing an impression that civil law remedies are time consuming and do not protect the interest of the landlords.

11. On the basis of the discussions made above, the revision deserves to be dismissed with costs. While imposing costs, I have to take into consideration pragmatic realities and be realistic as to what the plaintiff-respondent had to actually incur in contesting the litigation before different courts. This Court is to also broadly take into consideration, the prevalent fee structure of the lawyers and other miscellaneous expenses which have to be incurred towards drafting and filing of the counter affidavit, miscellaneous charges towards typing, photocopying, court fee etc. These realities were taken into consideration reasonably by Hon'ble Apex Court in the case of ***Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 SCC, 249.***

12. In similarly situated cases, the Hon'ble Apex Court has also taken into consideration this aspect of the matter; in ***Gayatri Devi and others Vs. Shashi Pal Singh 2005 AIR SCW 2070 and Rajappa Hanamantha Ranoji Vs. Mahadev Channabasappa and others 2000 SCFBRC 321***, and imposed the costs upon the litigant, who has dragged the other party to different Courts, due to malpractices.

13. Some cantankerous and unscrupulous litigants, on one ground or the other, do not permit the Courts to proceed further in the matter, therefore, in order to curb uncalled for and frivolous litigation, the Courts have to ensure that there is no incentive or motive for uncalled for litigation. The credibility of the entire judiciary is at stake unless effective remedial steps are taken without further loss of time.

14. In the result, the revision is accordingly dismissed with cost of Rs.20,000/- (twenty thousand) payable to the landlord, which shall be paid/deposited before the learned trial Court on the next date of hearing, failing which the learned trial Court shall get it realized as arrears of land revenue. The impugned order is confirmed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.10.2012

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

SECOND APPEAL No. - 262 of 2012

Km. Reshma Khatoon ...Petitioner
Versus
Gufran Ahmad and others ...Respondents

Counsel for the Petitioner:
Sri Manoj Kumar Srivastava
Sri M. Waris Faroqi

Counsel for the Respondent:
Sri Adnan Ahmad

Code of Civil Procedure-Section-100-Second Appeal-Substantial Question of law-what is ?-explained-revocation of licence-established from the findings of Court below-no substantial question of law involves-can not be interfered in Second Appeal.

Held: Para 9 and 10

Admittedly, ancestors of the plaintiff were jamindars of the area and not only the disputed premises but the entire surrounding areas are still in the ownership and possession of the plaintiff which is evident from the site plan prepared by the Commissioner, which is mentioned in the decree sheet.

A detailed hearing and perusal of the judgment and orders of both the Courts below made it abundantly clear that no substantial question of law is involved in this appeal. Even appreciation of evidence by the two Courts below has not been assailed before this Court.

Case law discussed:
RSA No. 3166 of 2007 (O&M) 1; 2005 (23) LCD 466; 2006 (3) SCC 224; A.I.R. 1962 S.C. 1314; (2005) 7 S.C.C. 60; A.I.R. 1947 PC 19; (2011) 1 S.C.C. 673; Union of India Vs. Ibrahim & Another in Civil Appeal No.1374 of 2008, decided on July 17, 2012

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. Heard learned counsel for the parties and gone through the records.

2. This second appeal has been preferred by the appellant against the judgment and decree dated 03.01.2010, in original suit no.104 of 2005, by which the plaintiff's suit for permanent, mandatory and prohibitory injunction was decreed, which has been confirmed by the learned First Appellate Court in regular civil appeal no.11 of 2010, vide judgment and order dated 28.08.2012.

3. This is a suit regarding the disputed premises which is surrounded from all the sides by the property of the plaintiff, in which the defendants were granted license which has since been revoked.

4. In view of Section 54 of Easement Act, the licence can be expressed or implied. The provision is reproduced below:-

"Grant may be express or implied.- The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license."

5. Not only this, Section 61 of Easement Act provides as under:-

"Revocation express or implied.- The revocation of a license may be express or implied."

6. In view of these provisions, grant and revocation of license has been established and the courts below have rightly discussed the evidence and reached to the correct conclusions. No substantial point of law or fact is involved in this appeal.

7. Learned counsel for the appellant relied upon the law laid down by Punjab and Haryana High Court in the case of ***Surjit Singh and others v. Gurmit Singh and others***, passed in ***RSA No.3166 of 2007 (O&M) 1*** and the law laid down by this Court in ***Vishwanath Singh v. Jogendra Singh, 2005 (23) LCD 466.*** Both these judgments have no relevance to the controversy in the suit.

8. The Hon'ble Apex Court in the case of ***G.Amalorpavam & ors. v. R.C. Diocese of Madurai & ors., 2006 (3) SCC 224*** has held as under:-

"Where the appellate court has considered the entire evidence on record and discussed the same in detail, come to any conclusion and its findings are supported by reasons even though the point has not been framed by the appellate Court there is substantial compliance with the provisions of Order 41 Rule 31 CPC and the judgment is not in any manner vitiated by the absence of a point of determination. Where there is an honest endeavour on the part of the lower appellate court to consider the controversy between the parties and there is proper appraisement of the respective cases and weighing and balancing of the evidence, facts and the other considerations appearing on both sides is clearly manifest by the perusal of the judgment of the lower appellate court, it would be a valid judgment even though it does not contain the points for determination."

9. Admittedly, ancestors of the plaintiff were jamindars of the area and not only the disputed premises but the entire surrounding areas are still in the ownership and possession of the plaintiff which is evident from the site plan prepared by the Commissioner, which is mentioned in the decree sheet.

10. A detailed hearing and perusal of the judgment and orders of both the Courts below made it abundantly clear that no substantial question of law is involved in this appeal. Even appreciation of evidence by the two Courts below has not been assailed before this Court.

11. In ***Sir Chunnilal V. Mehta & & Sons Ltd. Vs. Century Spinning and Manufacturing Co. Ltd.,*** reported in ***A.I.R. 1962 S.C., 1314,*** the Hon'ble Apex Court for the purposes of determining the issue has held :

"The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties."

12. Further in ***Rajeshwari Vs. Puran Indoria, reported in (2005) 7 S.C.C., 60,*** it was held :

"The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the

existence of a substantial question of law is a sine-quanon for the exercise of jurisdiction under the provisions of Section 100 C.P.C. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence."

13. In ***Smt. Bibhabati Devi Vs. Ramendra Narayan Roy & amp; Ors***., reported in ***A.I.R. 1947 PC 19,*** it has been held :

"the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing .... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word a judicial procedure at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law."

14. In ***Vijay Kumar Talwar Vs. Commissioner of Income Tax, New Delhi,*** reported in ***(2011) 1 S.C.C. 673,*** it has been held :

"a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstances of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.""

15. In the case of ***Union of India Vs. Ibrahim & Another in Civil Appeal No.1374 of 2008***, decided on July 17, 2012, the Hon'ble Apex Court has held :

"There may be exception circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100 CPC. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of

law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal."

16. In view of the law as discussed above, the second appeal is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2012

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 267 of 2010

Manoj Kumar Saxena ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Lokendra Kumar
Sri A.K.Shukla
Sri Ram Pratap Yadav

Counsel for the Respondents:
C.S.C.

U.P. Government Dying in Harness Rules 1974-Rule 5-Compassionate appointment-petitioner's father died in the year 1987-being 12 years old after getting majority claimed compassionate appointment-State Government rejected on ground of delay-quashed by High Court-on second inning inspite of direction of Court-rejection by District Magistrate on ground of delay-held-unsustainable-order quashed with cost of Rs. 20,000/-further direction to consider appointment within 6 weeks.

Held: Para-5

In the instant case, admittedly, the petitioner was a minor and was only 12 years of age. The application was moved upon attaining the age of majority. The Rule provides that the application can be filed within five years from the date of the death of the Government employee. In the instant case, the application was filed after six years from the date of death of the father and consequently the delay, if any, is of one year only. In the opinion of the Court, the delay was not such which could be said to be belated and, such delay can be condoned in the circumstances of the given case.

Case Law discussed:
2010 (7) ADJ

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

1. Heard Sri R.P. Yadav, learned counsel for the petitioner and the learned Standing counsel.

2. The petitioner's father died in the year 1987. At that time, the petitioner was a minor, being 12 years old and, consequently upon reaching the age of majority, applied for appointment on compassionate grounds under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules,1974 (hereinafter referred to as the Rules of 1974), in the year 1993. Since there was a delay in moving the application, the matter was referred to the State Government. The State Government, after considering the matter, rejected the petitioner's application on the ground that it was belated. The petitioner, being aggrieved, filed a writ petition, which was allowed by a judgement dated 23rd February, 2000. The writ court held that the delay could be condoned under the Rules and accordingly quashed the impugned order and remitted the matter again to the Authority concerned to redecide the matter. The District Magistrate, by the impugned order dated 20th August, 2003, has again rejected the application on the ground of delay. The petitioner, being aggrieved, has filed the present writ petition.

3. Having heard learned counsel for the parties, the Court is of the opinion that the District Magistrate had no authority to reject the application on the ground of delay. The application can be condoned under Rule 5 of the Rules of 1974 which provides that the delay can be condoned only by the State Government. In the instant case, the matter was earlier referred to the State Government, which it refused to condone the delay and the same was questioned by the High Court. The High Court had categorically stated that there was no undue delay and that the rejection of the application for appointment had caused undue hardship to the petitioner. In spite of these specific directions being issued by the High Court in its earlier judgement, the District Magistrate had the gall and cheek to reject the petitioner's application on the same ground, which had already been quashed by the High Court. Such attitude of the District Magistrate was totally unwarranted and could not be justified.

4. In **Vivek Yadav Vs. State of U.P. and others 2010 (7) ADJ**. A a Division Bench of this Court had the occasion to consider Rule 5 of the Rules, 1974 and held:

"A perusal of Rule 5 would show that an application for employment on compassionate basis is to be made within five years from the date of death of the deceased Government servant. There is a proviso conferring power upon the Government for relaxing the time-limit fixed for making such application, where the Government is of the opinion that it causes undue hardship and for dealing with the case in a just and equitable manner. Reading of this rule would demonstrate that the application must be by a competent person, who is competent to make it. A minor, therefore, could not have made application. The time-limit for an application contemplated by the rule, therefore, could only be read to mean 'by a competent person', in other words, who has attained the age of majority. In a case, where the applicant is minor, it would not be possible for the minor to make an application for various reasons including that he is minor and as such he cannot be appointed to a post in the Government. Rule 5, therefore, will have to be read in such manner that it gives effect to the policy of the Government, which is to provide employment to a member of the family of a government employee, who dies in harness, so as to mitigate the hardship. The issue whether the family of the deceased over long passage of time continues to face the hardship, would be examined on the merits of the claim. Rule 8 of the Rules, 1974 itself contemplates that a candidate seeking appointment under the Rules must not be less than 18 years of age at the time of appointment. In the instant case, as averred by the appellant, his mother was uneducated or illiterate, he was a minor though the elder son and there were elder sisters. Therefore, in such cases, considering the object of the Rules, the proviso to Rule 5 must normally be exercised, as for the purpose of dealing with the cases in a just and equitable manner. In exercising such discretion, no doubt, the authority exercising the discretion will examine the record before him."

5. The Division Bench held that the proviso to Rule-5 confers a power upon the Government to relax the time period in making the application, where in its opinion, the delay would cause undue hardship and for dealing with a case in a just and equitable manner. In the instant case, admittedly, the petitioner was a minor and was only 12 years of age. The application was moved upon attaining the age of majority. The Rule provides that the application can be filed within five years from the date of the death

of the Government employee. In the instant case, the application was filed after six years from the date of death of the father and consequently the delay, if any, is of one year only. In the opinion of the Court, the delay was not such which could be said to be belated and, such delay can be condoned in the circumstances of the given case.

6. In the light of the aforesaid, the District Magistrate committed a manifest error in rejecting the petitioner's application on the ground of delay which can not be sustained and is quashed. The writ petition is allowed with cost, which the Court imposes at Rs. 20,000/-, which shall be paid by the respondent to the petitioner within six weeks from today. The matter is again remitted to the Authority concerned to decide the matter on merits within six weeks from the date of production of a certified copy of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.10.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

CONSOLIDATION No. - 430 of 2012

Waliullah Beg & Anr. ...Applicant
Versus
District Deputy Director Of Consolidation Lucknow & Ors. ...Respondents

Counsel for the Petitioner:
Sri M.A. Siddiqui

Counsel for the Respondents:
C.S.C

U.P. Consolidation of Holding Rules 1954-Rule 65 (1-A)-Transfer of pending revision from one D.D.C. to another-without Notice to other party-without following the procedure prescribed under Section 24 C.P.C.-transfer order held-unsustainable-quashed.

Held: Para-11

Thus as the opposite party no.1 has passed the impugned order without providing any opportunity to the petitioners thereby transferring the matter from opposite party no.3 to opposite party no.2 is in contravention of principles of natural justice , as it is a settled law if any order has a civil consequence the same shall be passed after providing adequate opportunity of hearing to the parties concerned . However, if the same is passed ex parte behind the back of person who is aggrieved then the same will be arbitrary as well as in contravention to the principles of natural justice, cannot be sustained under law.

Case Law discussed:
(2000) 10 Supreme Court Cases 23; 2002 (93) RD 563; Zohra Begum (Smt.) and others Vs. VIIth ADJ Bareilly and another decided on 20 April, 2000 and M/s Moder hardwares and others Vs. prescribed Authority, Dehradun and others decided on July,26,1990

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

1. By means of present writ petition, petitioners have challenged the impugned order dated 20.7.2012(Annexure no.1) passed by opposite party no.1/ Collector/ District Deputy Director of Consolidation, Lucknow .

2. Sri M.A. Siddiqui, learned counsel for the petitioners while challenging the impugned order submits that aggrieved by the order passed by the Consolidation Officer , Mohanlalganj, Lucknow, petitioners filed a revision under Section 48 of the Consolation of Holdings Act before the Deputy Director of Consolidation, Lucknow for redressal of their grievances.

3. He further submits that during the pendency of present writ petition, contesting respondents moved an application for transfer of the matter from the Court of Deputy Director of Consolidation, Lucknow on 20.7.2012 as per the provisions as provided under Rule 65(1-A) of the U.P. Consolidation and Holding Rules, 1954 (hereinafter referred to as 'Rules) and on the same day without issuing any notice to the revisionists/petitioners the revision pending before Deputy Director of Consolidation, Lucknow has been transferred by means of impugned order passed by District Deputy Director Consolidation, District Lucknow/opposite party no.1 to the Court of Additional District Magistrate (Finance & revenue), Lucknow/ opposite party no.2.

4. In view of the above said facts, learned counsel for the petitioners submits that impugned order in question is in contravention to principles of natural justice as no opportunity whatsoever has been given to the petitioners, as well as in contravention to the law as laid down by this Court in the case of ***Smt. Vandana Sinha Vs. Yogendra Sinha, 1982 A.L.J. 253*** and Hon'ble the Supreme Court in the case of ***Vivekananda Nidhi and others Vs. Asheema Goswami (Smt),(2000) 10 Supreme Court Cases, 23.*** Accordingly, he prays that the impugned order in question may be set aside and the matter may be transferred to the Court of Deputy Director of Consolidation/ opposite party no.3 to decide the same within the time frame as fixed by this Court and till then parties may be directed to maintain status quo as exits today.

5. Sri Rajendra Kumar Yadav, learned State Counsel has no objection to the above said prayer.

6. I have heard learned counsel for the parties present today.

7. On 1.8.2012, this Court has passed the following orders :-

"Issue notice to opposite parties no. 4 to 12 returnable at an early date.

Learned State Counsel prays for and is granted two weeks' time to file counter affidavit, rejoinder affidavit, if any, be filed within a week thereafter.

List thereafter .

Learned counsel for the petitioners for the purpose of interim relief submits that an application for transfer of the matter from the Court of Deputy Director of Consolidation, Lucknow has been made by the contesting respondents invoking the provisions as provided under Rule 65(A-1) of the U.P. Consolidation and holding Rules 1954 on 20.7.2012. On the said date , without issuing any notice and without providing any opportunity of hearing to the petitioners , opposite party no.1/ District Deputy Director of Consolidation, Lucknow passed the impugned order thereby transferring the matter to the Court of Additional District Magistrate (Finance and Revenue) Lucknow. Accordingly , it is submitted by learned counsel for the petitioner that the impugned order passed by opposite party no.1 is contrary ito law and violative of principles of natural justice as well as the law as laid down by this Court in the case of ***Umesh Chandra Bharadwaj, Kanpur Vs. Mahesh Chandra Sharma Biswan and others , AIR 1983 Allahabad 290.***

It is further submitted on behalf of the petitioners that while considering the matter

for transfer, it is mandatory on the part of respondent no.1 to call for a report from opposite party no.3 where the matter in question is pending for consideration so the same cannot be allowed and the same is liable to be stayed.

Prima facie, the submission made by learned counsel for the petitioners appears to be correct as such until further orders of this Court the operation and implementation of the order order dated 20.7.2012 (Annexure no.1) passed by opposite party no.1/ District Deputy Director of Consolidation, Lucknow as well as the proceedings in pursuance of the same before opposite party no.2/ Additional District Magistrate (Finance and Revenue) Lucknow are stayed. Further, the contesting respondents are directed not to interfere in peaceful possession of the petitioners on the land in question."

8. In pursuance of above said facts and from the perusal of record it transpires that the petitioners have taken steps for service on respondents no. 4 to 11. Thereafter, office has submitted a report dated 17.9.2012 inter alia stating therein that service on contesting respondents except opposite party no.12 is sufficient. Subsequently, office has also submitted a report dated 19.9.2012 regarding service on respondent no.12(Sri Ram Kishore Gupta, Consolidation Officer).

9. In view of the above factual background with the consent of learned counsel for the parties present today as the point involved in the present case is trivial in nature , the present writ petition is being heard finally.

10. From the perusal of impugned order dated 20.7.2012 passed by opposite party no.1, it transpires that the contesting respondents no.3 to 11 moved an application for transfer of revision pending before opposite party no.3/ Deputy Director of Consolidation, Lucknow under Rule 65(1-A) of the Rules before opposite party no.1, who on the same day without issuing any notice to the petitioners, who are revisionist in the revision which they filed against the order dated 26.7.2012 passed by the Consolidation Officer, Mohanlalganj, Lucknow, allowed the said application thereby transferring the case/revision from opposite party no.3 to opposite party no.2.

11. Thus as the opposite party no.1 has passed the impugned order without providing any opportunity to the petitioners thereby transferring the matter from opposite party no.3 to opposite party no.2 is in contravention of principles of natural justice , as it is a settled law if any order has a civil consequence the same shall be passed after providing adequate opportunity of hearing to the parties concerned . However, if the same is passed ex parte behind the back of person who is aggrieved then the same will be arbitrary as well as in contravention to the principles of natural justice, cannot be sustained under law.

12. Needless to mention herein that the power as provided under Rule 65 (1-A) of the Rule for transferring the matter from one court to another court by the competent authority in the consolidation proceedings is to be decided and adjudicated on the same principles and guidelines as provided under Section 24 CPC.

13. Thus the competent authority while exercising the said power under Rule 65(1-A) of the Rules shall act and pass orders on the same parameters as provided for transferring the matter under Section 24

C.P.C. In the case of **Yogendra Sinha** (Supra) this Court while interpreting Section 24 CPC has held as under:-

" Section 24 C.P.C. does not prescribe any grounds for ordering the transfer of a case. It may be ordered suo motu. That may be done for administrative reasons. But when an application for transfer is made by a party, the Court must issue notice to the other party and hear the parties before ordering a transfer. That implies that the Court must act judicially in ordering a transfer on the application of a party, or in refusing an application for transfer of a case from one Court to another. The discretion is of the Court, and of a superior Court at that. The discretion must be exercised judicially. That means that in ordering or refusing to order a transfer, the Court must be guided by its sense of justice, but on objective considerations and not subjectively. A transfer may be ordered if the Court finds it just and proper. What is just and proper depends, of course, on the facts and circumstances of each case, and, if I may add, the good sense of the Judge. There cannot be any hard and fast rules, and that explains the conflict of authorities, if one were to read them, for determining whether a particular case was a fit one or not for ordering a transfer. The AIR Commentaries on the Code of Civil Procedure, IX Edn. Vol. I. Pages 567 to 570, Note 13, under Section 24, are full of them. I do not propose to read them in this case, for one cannot be too hidebound by authorities in a matter like this. The simple rule, which I think is the true rule, and must be followed by a Judge before ordering a transfer is to ask himself the question, of course, after settling the facts, whether on the facts and in the circumstances of the case a transfer of the case from one Court to another would advance justice, by making it more conveniently and easily available to the parties, or by giving the parties a greater confidence and sense of satisfaction in its impartial administration. The rule is like all such rules, neither exhaustive nor hard and fast. It is flexible."

14. Hon'ble the Supreme Court in the case **Vivekananda Nidhi and others(Supra)** while interpreting the provisions as provided under Section 24 CPC. held that before deciding the application under said section it is mandatory to issue a notice to the parties and after hearing the parties appropriate order shall be passed with regard to transfer.

15. Further , the ground which has been taken by opposite party no.1 for transferring the matter in question is contrary to the law as laid down by this Court in the Case of ***Masroor Vs. District Judge, Shahjahanpur and others, 2002 (93) RD 563, Zohra Begum (Smt.) and others Vs. VIIth ADJ Bareilly and another decided on 20 April, 2000 and M/s Moder hardwares and others Vs. prescribed Authority, Dehradun and others decided on July,26,1990.*** Hence the impugned order is unsustainable , liable to be set aside.

16. For the foregoing reasons, the writ petition is allowed. The impugned order dated 20.7.2012 (Annexue no.1) passed by opposite party no.1/District Deputy Director of Consolidation/ Collector , Lucknow is set aside and the Deputy Director of Consolidation, Lucknow/opposite party no.3 is directed to decide the matter in question in accordance with law expeditiously, preferably within a period of three months from the date a certified copy of this order is produced before him after hearing the learned counsel for the parties. Further, the parties are directed to maintain

status quo as exists on 1.8.2012 and also restrained from transferring or alienating the property in dispute for the aforesaid period of three months or till the decision is taken by opposite party no.3 whichever is earlier.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABD 08.10.2012

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE VIJAY PRAKASH PATHAK, J.

Criminal Appeal No. - 1780 Of 2003

Suleman ...Petitioner
Versus
State Of U.P. ...Respondent

Counsel for the Petitioner:
Sri Raj Kumar Khanna
Sri A.K.Pandey
Sri Braham Singh
Sri P.K. Pandey
Sri R.K.Pandey

Counsel for the Respondent:
A.G.A.

Criminal Appeal-offence under section 302/504 I.P.C.-conviction of life imprisonment with fine of Rs. 5000/- challenged on ground of reaction of eye witness-as "unusual" manner-held-could not affect the prosecution story-nor the conclusion drawn by Trail Court can be questioned

Held: Para 25

We are also unable to accept the contention of learned counsel for the appellant that since Siyaram did not make any attempt to save his cousin brother Balkishan; Such conduct is unnatural and therefore presence of Siyaram at the time of incident becomes doubtful.

Case Law Discussed:
2012 (5) SCC 738; 2012 (IV) SCC 124; 2012 (5) SCC 724

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

1. This criminal appeal filed by the appellant Suleman is directed against the judgment and order of the Additional Sessions Judge (Fast Track Court No.4), District Moradabad dated 5.4.2003 passed in S.T. No.745 of 2002 (State vs. Suleman) arising out of Case Crime No.114 of 2001, under sections 302/504 I.P.C. The appellant Suleman has been convicted for an offence punishable under section 302 I.P.C. and has been sentenced to life imprisonment with fine of Rs.5000/-, in case of default, the appellant is to undergo additional imprisonment of one year.

2. The prosecution story as disclosed from the records is as follows:

On 29.8.2001 at 7.00 P.M. a first information report was lodged by Chhote elder brother of one Balkishan. In the first information report it was stated that Siya Ram P.W.2 cousin brother of the deceased has informed that Balkishan has been done to death by the appellant Suleman by inflicting 5 to 6 wounds by hasiya at around 5 P.M. on the same day. The first information report was registered as case crime no.114 of 2001 under sections 302/504 I.P.C. at P.S. Bhojpur, district Moradabad. The first information report further disclosed that in the morning on the same day Balkishan younger brother of Chhote took his animals for grazing near the bank of Dhela Nadi. By mistake the animals entered the agricultural filed of Suleman, causing annoyance to Suleman. Suleman tried to get hold of Balkishan but could not succeed. At around 5.00 P.M. Suleman

could find Balkishan in the field of Mohd. Nabi and killed him by inflicting wounds through 'hasiya'. Such incident had been seen by his cousin brother Siyaram and one Mohd. Hussain of the same village. It was stated that cousin brother did make an attempt to save Balkishan, however, he could not succeed. Suleman left after assault. The deadbody of Balkishan was still lying on the spot.

3. The investigating officer made spot inspection and recorded the statement of the informant under section 161 Cr.P.C. The inquest was prepared on the same day. The deadbody was sent by S.I. Umesh Kumar Singh for postmortem examination.

4. Dr. Megh Singh (P.W.3) the Medical Officer performed autopsy and submitted his postmortem report. The ante-mortem injuries on the body of the deceased as recorded in the postmortem report were as as follows:

"1. Multiple stab wound, chest cavity deep over an area of 8 c.m. x 8 c.m. over front of left chest wall, 5 c.m. below left nipple and 8 c.m. above the umbilicus.

2. Multiple stab wound in an area of 20 c.m x 15 c.m. chest and abdominal deep, 8 c.m. below right axilla and 6 c.m. above the right iliac crest.

3. Stab wound 7 c.m. x 3 c.m. abdominal cavity deep over left site of back front of abdomen, 2 c.m. above the left iliac crest and 20 c.m. below the right axilla. Intestine is coming out.

4. Stab wound 4 c.m. x 2 c.m., abdominal cavity deep over the left site of abdomen 10 c.m. lateral to umbilicus and 3 c.m. medial to injury no.3.

5. Stab wound 2 c.m. x 2 c.m. muscle deep over lateral aspect of middle of left thigh.

6. Inside wound 3 x 1 c.m. muscle deep over front of right knee."

5. The weapon used for assault was recovered on the pointing out of the accused from the field. In respect thereof a seizure memo was prepared by S.I. Umesh Kumar Singh. The Investigating Officer prepared the site plan and also collected blood stained earth, which was sent for chemical examination.

6. After completion of investigation, charge sheet was submitted since the matter was cognizable by Sessions Court it was committed accordingly. Charge was framed under the order dated 7.2.2002 under section 302 I.P.C. against the accused.

7. The accused Suleman denied the charge and claimed trial.

8. The informant Chhote was examined as P.W.1. He proved written information report and pointed out that Siyaram his cousin brother had informed on 29.8.2001 that Balkishan had been done to death by accused Suleman by inflicting 5 to 6 wounds by hasiya. The deadbody of Balkishan was lying in the field of Mohd. Nabi.

9. The eye witness Siyaram was examined as P.W.2. In his testimony he stated that he had gone for grazing of his animals in the jungle. He was informed that the animals of Balkishan had entered the fields of Suleman in the morning which annoyed him. At around 5.00 P.M. in the evening Suleman caught hold of Balkishan and inflicted 5 to 6 wounds by his hasiya

which resulted in death of Balkishan. He had made an attempt to save Balkishan but could not succeed. On noticing that Balkishan had expired, he went home. He narrated the entire incident to Chhote, the brother of Balkishan. He also stated that one Mohd. Hussain had also witnessed the entire incident. At the relevant time some children were present.

10. Doctor Megh Singh, who performed the postmortem was examined as P.W.3. He proved the postmortem report and opined that the cause of death of Balkishan was due to bleeding and shock as a result of wounds inflicted upon Balkishan by a sharp edged weapon.

11. The Head Constable Bhagwan Singh, who had recorded chik F.I.R. was produced as P.W.4. He proved the same.

12. The Investigating Officer S.I. Umesh Kuamr Singh was examined as P.W.5. He proved the preparation of the site plan, the seizure memo of the recovery of the weapon i.e. hasiya used in the crime on the pointing out of the accused and the chargesheet.

13. The statement of the accused was recorded under section 313 Cr.P.C. He denied the charge and stated that he has been falsely implicated due to enmity and the statement made by the eye witnesses was incorrect. However, he did not lead any documentary or oral evidence in support of his case.

14. The trial court after considering the material evidence brought on record came to a conclusion that the prosecution had succeeded in bringing home the charge beyond reasonable doubt against the accused Suleman. Accordingly he was convicted of an offence under section 302 I.P.C. and has been punished as aforesaid.

15. Challenging the order so passed, learned counsel for the appellant contended that informant Chhote P.W.1 is not an eye witness and his testimony is based on the information given by P.W. 2 Siyaram. The presence of P.W.2 Siyaram at the site is doubtful inasmuch as in his examination-in-chief he stated that he had made an attempt to save the deceased but in cross-examination it was stated that he did not make any attempt to save the deceased. The learned counsel submits that in examination-in-chief P.W. 1 had stated that information of the incident was given to him by Siyaram P.W.2, who in his cross-examination as P.W. 2 stated that after seeing the incident he went home. It is then submitted that in his cross-examination P.W.2 had stated that he did not meet the investigating officer, therefore, the question of his statement being recorded by the investigating officer does not arise. It is lastly contended that since no attempt was made by Siyaram to save his cousin brother Balkishan his conduct was unnatural, therefore his presence at the time of incident becomes doubtful. It is also submitted that the alleged weapon 'hasiya' by which injuries are said to be caused had been sent for chemical examination alongwith earth collected from the spot but no examination report of the hasiya was brought on record. Recovery of the weapon, hasiya is alleged to have been made on the pointing out of the accused-appellant but no witness as mentioned in the recovery memo was examined. The accused was not asked any question under section 313 Cr.P.C. in respect of the 'hasiya' and, therefore, there has been violation of Section 313(1)(b) Cr.P.C. The entire prosecution story must fail.

16. Reliance has been placed upon the judgment of the Supreme Court in the case of **Latu Mahto vs. State of Bihar reported in 2008 (Scale) V.8, page 715,** for the proposition that once the investigating officer had recorded the statement of other witnesses, who were present on the spot of the incident, namely, Mohd. Hussain he should have produced the said witness in support of the prosecution failing which the case of the prosecution must fail.

17. Learned A.G.A. Sri Mahendra Singh Yadav pointed out that the F.I.R. was lodged within 2 hours of the incident. The distance of the police station from the place of the incident was 5 kilometer. The accused had been named in the F.I.R. The weapon used for inflicting injuries had been recovered on the pointing of the accused. The occular evidence was fully supported by the Medical evidence. The judgment of the trial court in the facts and circumstances of the case, needs no interference in exercise of appellate jurisdiction by this Court.

18. We have considered the arguments of learned counsel for the parties and examined the records.

19. At the very outset we may record that the incident is stated to have taken place at 5.00 P.M. The F.I.R. was lodged within 2 hours of the alleged incident. Therefore, the F.I.R. was prompt, which rules out the possibility of deliberations and wrongful implication of the accused.

20. We find that P.W. 1 in his cross-examination had stated that the deceased was his cousin brother. He proved what was recorded in the F.I.R. Siyaram was the eye witness, he was examined as P.W.2. In his testimony he had narrated the entire incident which he had seen. His testimony was corroborated by the medical evidence. It was disclosed by P.W.2 that in the morning the animals of Balkishan had entered the fields of Suleman, which annoyed him. Suleman was on the look out for Balkishan. At 5.00 P.M. near the field of Mohd. Nabi, Suleman could find Balkishan and attacked him with his hasiya. He inflicted 5 to 6 wounds. The statement of eye witness of the incident has been corroborated with postmortem report which shows that six injuries had been inflicted on the body of the deceased with a sharp edged weapon and that death was caused due to excess bleeding and shock because of the injuries. The postmortem report has been proved by Dr. Megh Singh, who had examined the injuries. We further find that recovery of hasiya from the field of Mohd. Nabi was made on the pointing out of the accused himself.

21. We find that F.I.R. was prompt the evidence of the eye witness has been corroborated by the Medical evidence. The prosecution has been able to prove its case beyond reasonable doubt. Reference be had to the judgment of the Apex Court in the case of **Atma Ram and others vs. State of M.P. 2012(5) SCC 738.**

22. The discrepancies in the statement of P.W.2 in the matter of his having made an attempt to save the victim is a minor discrepancy, which cannot be said to be fatal to the prosecution case.

23. Supreme Court in the case of **Sampath Kumar Vs. Inspector of Police, Krishnagiri 2012 (IV) SCC 124** has held that minor contradictions are bound to appear in the statement of truthful witnesses as

memory sometimes plays false, sense of observation differs from person to person.

24. So far as the discrepancy pointed out qua the P.W.2 having gone to his house from the site of incident is contrary to what was mentioned in the F.I.R. i.e. P.W.2 the cousin of deceased had informed about the incident and as was stated by P.W.1, in our opinion in fact no contradiction at all. Inasmuch as it is admitted that the informant P.W.1 and eye witness P.W.2 are cousin brothers and the accused has not pleaded that they were living separately. The trial court has rightly held that P.W.2 went to his house to inform the incident to P.W.1.

25. We are also unable to accept the contention of learned counsel for the appellant that since Siyaram did not make any attempt to save his cousin brother Balkishan; Such conduct is unnatural and therefore presence of Siyaram at the time of incident becomes doubtful.

26. The Apex Court in the case of **Kathi Bharat Vajsur and Another Vs. State of Gujrat 2012(5) SCC 724** has held that it is not for the prosecution or Court to go into question as to why an eye witnesses reacted in particular manner or "unusual manner". There is no fixed pattern of reaction of an eye witnesses to a crime. When faced with what is termed as "unusual reaction" by an eye witnesses, court must only examine whether prosecution story is in any way affected with by such reaction and if answer is in negative, then such reaction is irrelevant.

27. Plea of non examination of the witness of recovery memo of the weapon is also of not much consequence as the investigating officer had proved the seizure memo and the recovery of the hasiya on the pointing out by the accused. The testimony of the investigating officer in respect of the recovery and the seizure memo prepared could not be dislodged. The last plea raised about question being not put to the accused about hasiya under section 313 Cr.P.C. is on the face of it incorrect. The first question put to the appellant under section 313 Cr.P.C. especifically refers to the use of hasiya as the weapon to assault the deceased.

28. We find no good reason to interfere with the findings of guilty recorded by the Trial Court on the basis of material evidence on record.

29. The appeal is, therefore, dismissed. The judgment and order of the Trail Court is affirmed. The appellant is already in jail, he shall serve out the sentence also as ordered by trial court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 2727 of 2003

Central Consumer Coop. Stores Ltd., Moradabad ...Petitioner
Versus
Vipin Kumar & another ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Pandey

Counsel for the Respondents:
Sri B. Dayal
S.C.

U.P. Urban Building (Regulation of Letting rent & Eviction) Act 1972-Section-2 (8)-petitioner a consumer cooperative society-not owned and control by Government-can not be

excluded from application of povisions of Section 21 of the Act.

Held: Para-8

In para 3 of objection filed by petitioner before RCEO (Annexure-3 to the writ petition) it has only said that petitioner is a Central Cooperative Store, deals with commercial transactions with consumers and is a commercial establishment. It nowhere even mention that it is controlled or owned by Government in any manner. On the contrary, learned counsel for the petitioner, during the course of argument, states that members of Cooperative Society are individuals. In these circumstances, the order impugned in the writ petition cannot be faulted and it cannot be said that petitioner-Cooperative Society satisfies the requirement of exempted categories mentioned in Section 21(8) of Act, 1972.

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

1. This writ petition is directed against the order dated 06.07.2001 passed by Rent Control and Eviction Officer, Moradabad *(hereinafter referred to as the "RCEO")* rejecting petitioner's objection that Section 21(8) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (*hereinafter referred to as the "Act, 1972")* is not applicable to petitioner, who is a Consumers Cooperative Society registered under Cooperative Societies Act.

2. Learned counsel for the petitioner submitted that petitioner is a Society dealing with general public and, therefore, is excluded from application of Section 21 sub-section (8) of Act, 1972.

3. The submission is thoroughly misconceived and in fact no material and pleading is available on record to demonstrate in any manner that Section 21(8) would not apply to petitioner-Society.

4. Section 21(8) of act, 1972 reads as under:

"(8) Nothing in clause (a) of sub-section (1) shall apply to a building let out to the State Government or to a Local Authority or to a public sector corporation or to recognised educational' institution unless the Prescribed Authority is satisfied that the landlord is a person to whom clause (ii) or clause (iv) of the Explanation to sub-section (1) is applicable:

Provided that in the case of such a building the District Magistrate may, on the application of the landlord, enhance the monthly rent payable therefor to a sum equivalent to one-twelfth of ten per cent of the market value of the building under tenancy and the rent so enhanced shall be payable from the commencement of the month of tenancy following the date of the application:

Provided further that a similar application for further enhancement may be made after the expiration of a period of five years from the date of the last order of enhancement."

5. Learned counsel for the petitioner could not dispute that terms "State Government", "Local Authority" and "Recognized Educational Institution" would not apply to petitioner's Cooperative Society. He however submits that petitioner would be governed by the term "Public Sector Corporation". This submission is also misconceived.

6. The term "Public Sector Corporation" has been defined in Section 3(p) of Act, 1972 and reads as under:

"(p) "Public sector corporation" means any corporation owned or controlled by the Government and includes any company as defined in Section 3 of the Companies Act, 1956, in which not less than fifty percent of the paid up share capital is held by the Government."

7. Admittedly petitioner's Cooperative Society is not a Company registered under Companies Act, 1956. In order to qualify to be a Corporation owned or controlled by Government there is not even a whisper in the entire writ petition that petitioner's Cooperative Society satisfy the said requirement.

8. In para 3 of objection filed by petitioner before RCEO (Annexure-3 to the writ petition) it has only said that petitioner is a Central Cooperative Store, deals with commercial transactions with consumers and is a commercial establishment. It nowhere even mention that it is controlled or owned by Government in any manner. On the contrary, learned counsel for the petitioner, during the course of argument, states that members of Cooperative Society are individuals. In these circumstances, the order impugned in the writ petition cannot be faulted and it cannot be said that petitioner-Cooperative Society satisfies the requirement of exempted categories mentioned in Section 21(8) of Act, 1972.

9. The writ petition is lacks merit. It is accordingly dismissed with cost of Rs. 10,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2012

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 2922 of 2000

M/S Sachan Nursing Home & another
...Petitioner
Versus
Regional P.F. Commissioner and another
...Respondents

Counsel for the Petitioner:
SriD.P.Singh
Sri Siddharth Singh
Sri Ravindra Kumar Jaiswal
Sri Naveen Sinha
Sri Devesh Rathore

Counsel for the Respondents:
Sri S.Chaturvedi
Sri Amit Daga
S.C.
Sri D.K. Pandey
Sri P.K. Pandey

<u>Employees Provident Fund Act & Miscellaneous Provisions Act-1952-Section 2(f)-</u>petitioner running nursing home-liability of Provident Fund amount fixed-with strength of 20 employees-out of there 3 employees are partner of the Firm-whether status of such partner drawing salary became an employee or as master?-held-even drawing salary status partner will remain as owner and not employee-hence in view of law laid down by Apex Court in "Ramanuja" case order fixing liability of contributory fund-illegal, without jurisdiction.

Held: Para 18

In fact the facts of the case of Ramanuja Match Industries are identical to the facts of the present case, inasmuch as in that case also the magical figure of 20 to

bring the partnership firm within the ambit of the Employees State Insurance Act, could be arrived at only if the three partners of the firm were treated as employees and added to the employees' strength as observed by the Supreme Court in para 2 of the Ramanuja Judgment (supra).

Case Law discussed:

AIR 1985 SC 278; (1998) 1 SCC 86

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. By this writ petition, the petitioners are challenging the order dated 25/26.10.1999, passed by the Regional Provident Fund Commissioner, Varanasi.

2. The facts of the case, in brief, are that the petitioner is a nursing home and is functioning as a partnership firm. It was established as a clinic in 1984, and thereafter converted into a nursing home. In Para 6 of the writ petition it is stated that the required strength at any given point of time is not more than 14-15 regular employees including doctors, nurses, sweeper, chaukidar and accountant; sometimes even substitutes as casual labour are engaged. On 31.8.1996, at about 4 P.M,. 5 officials of the Employees Provident Fund Department came and inspected the attendance register and the petitioner no.2 was asked to fill up a form which was done by him. The contention is that by the impugned order dated 25/26.10.1999, a liability of an amount of Rs. 1,04,022/- has been fastened upon the petitioners' firm towards employees provident fund.

3. Hence the present writ petition.

4. I have heard Sri Naveen Sinha, learned senior counsel assisted by Sri Devansh Rathor for the petitioners and Sri D.K. Pandey for the respondents.

5. The submission of Sri Naveen Sinha is that at any given point of time the employees in the petitioners' firm has never exceeded 20, and therefore, The Employees' Provident Fund and Miscellaneous Provisions Act, 1952 was not applicable to the petitioner. He has particularly referred to para 4 of the impugned order, wherein, the findings have been recorded by the respondents that as per records on 17.8.1996, the employees' strength was 17 but since there were three partners, namely Sri R.C. Sachan, Sri V.P. Sachan and Smt. Reeta Sachan, therefore, the total employees' strength comes to 20 by including the partners as employees of the petitioners' firm.

6. He has referred to the provisions of Section 1, subsection (3) clause (b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 which read as follows:-

***"1. Short title, extent and application.**-[(1) This Act may be called the Employees' Provident Funds and Miscellaneous Provisions Act, 1952.]*

(2).....

[(3) Subject to the provisions contained in section 16, it applies-

(a).....

(b) to any other establishment employing [twenty] or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided that the Central Government may, after giving not less than two months' notice of its intention so to do, by

notification in the official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than [twenty] as may be specified in the notification]."

7. The submission of the learned counsel for the petitioners is that the partners of a firm are the owners of the partnership firm and a partnership firm unlike a Company does not have a separate legal entity, and therefore, the partners of the firm cannot be treated to be the employees of the partnership firm.

8. The term "Employee" is defined in Section 2(f) of the Act, 1952 and means:-

*"**2. Definitions.-** In this Act, unless the context otherwise requires,-*

[(a).....

(b).....

(c).....

(d).....

(e).....

(f) "employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of [an establishment], and who gets, his wages directly or indirectly from the employer, [and includes any person,-

(I) employed by or through a contractor in or in connection with the work of the establishment;

(ii) engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961 (52 of 1961), or under the standing orders of the establishment;]"

9. Reference has been made to a decision of the Supreme Court, reported in, **AIR 1985 SC 278 (Regional Director, Employees State Insurance Company Versus Ramanuja Match Industries),** wherein, it has been held that liability to pay employees provident fund contribution arises only when 20 or more employees are engaged.

10. The facts of the case are more or less identical to the facts of the present case. In the case before the Supreme Court also the employees' strength was 17 and in para 2 of the judgment the Supreme Court has held that unless the three partners are included, the basic number of 20 is not reached and no liability under the Act accrues.

11. The question as to whether the partners of a firm can be said to be employees of the firm so as to attract the provisions of the Employees State Insurance Act or not has been discussed in para 4 of the said judgment which reads as follows:

"4. It is appropriate that at this stage we refer to the position of a partner qua the firm. Section 4 of the Partnership Act, 1932 defines 'partnership' and one of the essential requisites of a partner ship is that there must be mutual agency between the partners. A Full Bench of the Patna High Court in Seth Hira Lal & Anr. v. A Sheikh Jamaluddin, 221 rightly emphasised upon the position that an important element in the definition of partnership is that it must be carried on by all or any one of the partners acting for all. Section 18 of the Partnership

Act statutorily declares every partner to be an agent of the firm for the purposes of the business of the firm and Section 19 states that an act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. A partnership firm is not a legal entity. This Court in Champaran Cane Concern v. State of Bihar, pointed out that in a partnership each partner acts an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or employee which concept involves an element of subordination but that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm, it may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee."

12. Thus on a reading of para 4, it is beyond doubt that a partnership firm is not a legal entity and even if some remuneration is being paid to the partners that would not involve any change of status and bring him within the definition of an employee.

13. Reference has also been made to a decision of the Supreme Court r**eported in (1998) 1 SCC 86 (Employees' State Insurance Corporation Versus Apex Engineering Pvt Ltd.)**

14. In that case the respondent was a Company registered under the Companies Act, 1956 and reliance was placed before the Supreme Court on the case of Ramanuja Match Industries judgment (supra) in support of the contention that the Directors/Managing Directors of the Company were not an employee of the company.

15. Repelling the contention of the respondent company in that case the Supreme Court reiterated and reaffirmed its judgment in the case of Ramanuja Match Industries (supra) and in para 9 of the said judgment held that the position of a partner qua afirm is not that of a master and servant or an employer and employee. The partnership business belongs to the partners and each one of them is an owner thereof. Para 9 of the said judgment reads as follows:

"9. The aforesaid decision of this Court clearly rules that the Managing Director while acting as such can have dual capacity both as Managing Director on the one hand and as servant or employees of the company on the other. The Division Bench in the impugned judgment with respect was in error in bypassing the ratio of the aforesaid decision of this Court by observing that it was a judgment rendered under the Income Tax Act and, therefore, it had no bearing on the scheme of the present Act. We also find that the Division Bench was equally in error when it placed reliance for its decision on the judgment of this court in the case of Regional Director ESI Corporation v. Ramanuja Match Industries. In the said decision a Bench of two learned Judges of this Court held that a partner of a firm receiving salary is not an employee within the meaning of Section 2 sub-section (9) of the Act. Ranganath Misra, J. (as he then was), speaking for this court held that the partners cannot be held employees of the partnership firm. A partnership firm is not a legal entity and in a partnership firm each partner acts as an agent of the other. The position of a partner qua the firm is thus not that of a master and a servant or

employer and employee which concept involved an element of subordination and not that of equality. The partnership business belongs to the partners and each one of them is an owner thereof. In common parlance the status of a partner qua the firm is thus different from employees working under the firm. It may be that a partner is being paid some remuneration for any special attention which he devotes but that would not involve any change of status and bring him within the definition of employee."

16. Sri D.K. Pandey, learned counsel for the respondents on the other hand submitted that from the records, it will be seen that the three partners of the petitioners' firm had drawn salary, and therefore, they would fall within the definition of the term 'employee', as defined in Section 2(f) of the Act, 1952 and therefore, there was no illegality or infirmity in the impugned order dated 25/26.10.1999.

17. Having considered the submissions of the learned counsel for the parties with reference to the provisions of the Act, 952 quoted above and the two judgments of the Supreme Court referred to by the learned counsel for the petitioners, there is absolutely no doubt that even if a partner or partners of the firm draw some remuneration from the partnership firm that would not convert their status from that of owner to an employee of the partnership firm. A partner/partners of a partnership firm is the owner of the firm and there is no relationship of master and servant or employer and employee between him and the partnership firm has held in the Ramanuja Match Industries (supra).

18. In fact the facts of the case of Ramanuja Match Industries are identical to the facts of the present case, inasmuch as in that case also the magical figure of 20 to bring the partnership firm within the ambit of the Employees State Insurance Act, could be arrived at only if the three partners of the firm were treated as employees and added to the employees' strength as observed by the Supreme Court in para 2 of the Ramanuja Judgment (supra).

19. In view of the above discussion and the facts of the present case, and the law settled by the Supreme Court the impugned order dated 25.10.1999 is absolutely illegal and without jurisdiction and is accordingly quashed.

20. The writ petition is allowed. There shall be no order as to cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.10.2012

BEFORE
THE HON'BLE ASHOK SRIVASTAVA, J.

Criminal Appeal No. - 3871 Of 2012

S.K. Agarwal ...Appellant
Versus
Centarl Bureau of Investigation Delhi ...Opposite Party

Counsel for the Petitioner:
Sri Rajiv Gupta
Sri Dileep Kumar
Sri Rajrshi Gupta
Sri Shristi Gupta

Counsel for the Respondents:
A.G.A.
Sri Pranay Krishna

Prevention of Corruption Act-Section 13 (1) (d), 13 (2)-Suspension of sentence-during pendency of appeal against

conviction-on ground applicant not committed any offense regarding pecuniary benefits abusing his post-working as branch manager if conviction not suspended-shall be ousted from job-court explained the contingencies and guiding factors for exercising power under Section 389 (1) Cr.P.C.-court refused to exercise its discretion to suspend conviction.

Held: Para-13

Keeping in view the above guidelines this Court has to see whether in the instant case it should exercise its discretion in favour of the appellant or not. In the case in hand the appellant S.K.Agarwal has been found guilty and convicted under section 13(2) read with section 13(1) (d) of the Prevention of Corruption Act, 1988. I have examined the judgment of the learned lower Court with caution. Keeping in view the facts and circumstances of the case I do not find that this Court should exercise its discretion in favour of the appellant.

Case Law discussed:

(2008) SCC 549; 2008 (60) ACC 471; 94 AWC (1) 606; (2007) 9 SCC 330; AIR (2007) SC 1003; 1995 STPL (LE) 20354

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

1. The prayer of the appellant S.K.Agrawal is that pending appeal the execution of the sentence awarded to him be suspended. I have heard learned counsel for the parties on such prayer.

2. It has been submitted from the side of the appellant that he has been released on bail in this case by this Court. It has further been submitted that he has been falsely implicated in this case and the judgment of the learned trial Court is studded with so many discrepancies. It has further been contended that there is absolutely no evidence to show that the appellant, in any manner, has by corrupt or illegal means obtained for himself or for any other person any valuable thing or pecuniary advantage or by abusing his position as a public servant obtained for himself or for any other person any valuable thing or any kind of other advantage, and thus his conviction under section 13(1)(d) of Prevention of Corruption Act read with section 13(2) of the same Act is illegal. Learned counsel for the appellant has further argued with vehemence that by no stretch of imagination it can be said that the appellant has committed any criminal misconduct as is held by the learned trial Court because there is absolutely no material on record on this point. It has also been submitted that there is no evidence which may indicate that the appellant has cheated the bank. It has also been submitted that the appellant is confident that his appeal shall be allowed as and when it is finally heard and decided. He is apprehending that his services may be terminated which may cause untold hardship and miseries to him and his family. It has also been submitted that he is the branch manager of a nationalized bank and due to the judgment and order impugned herein he may be thrown out of service.

3. The prayer is vehemently opposed by the learned counsel for C.B.I. He pointed out that the appellant has been found guilty under sections 420/120-B IPC and section 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988 and sentenced to various terms of imprisonment with fine. It has also been submitted that the act of the appellant involves moral turpitude and therefore, relief of suspension of sentence can not be granted to him.

4. In **(2008) SCC 549 Central Bureau of Investigation, New Delhi Vs. M.N.Sharma** and the connected appeal the Apex Court has laid down certain guidelines which should be followed while disposing of the prayer for suspension of sentence pending appeal by an appellant. Quoting the cases of the State of Maharashtra Vs. Gajanan (2003) 12 SCC 432 , K.C.Sareen Vs. C.B.I. (2001) 6 SCC 584, Union of India Vs. Atar Singh (2003) 12 SCC 434 and State of Haryana Vs. Hasmat (2004) 6 SCC 175 the Apex Court has said that the legal position is that though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389(1) of the Code yet its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the the conviction the Court should not suspend the operation of the order of conviction. The Apex Court has further said that it is the duty of the Court to look at all aspects including the ramifications of keeping such conviction in abeyance. Keeping in view this legal position the Court should examine the question as to what should be the position when a public servant is convicted of an offence under the Prevention of Corruption Act, 1988.

5. In 2**008 (60) ACC 471 Alld.(Daya Shankar Rai & another Vs. State of U.P.)** a single Judge of this Court has opined that it is well within the powers of the appellate Court to invoke its jurisdiction under section 389 (1) Cr.P.C. provided its attention is invited to the consequences that would ensue if conviction is not stayed. The Hon'ble Judge is also of the view that conviction can only be stayed in exceptional circumstances.

6. Similar opinion has been expressed by another Bench of this Court in **94 AWC(1) 606 (Yogendra Kumar & others Vs. State of U.P.).**

7. A copy of the order passed in Criminal Appeal No.3712 of 2010, Prabhu Yadav and others Vs. State of U.P. has been filed. In this case another Bench of this Court on 11.2.2011 had stayed the sentence. But this case was not under the Prevention of Corruption Act as the appellants were found guilty and convicted under section 3(1)(10) of SC/ST Act and they were acquitted of the offences punishable under sections 323/324/504/506 IPC.

8. In **(2007) 9 SCC 330, Lalsai Kunte Vs. Nirmal Sinha & Others** the Apex Court has said that the appellate Court has power not only to suspend execution of sentence but also to stay order of conviction appealed against. It has further been said that the stay of order of conviction results in rendering the order temporarily non-operative. But this result does not ensue in case of suspension of the order under appeal.

9. Infact the law laid down in this case distinguishes between order of suspension of the sentence and stay of conviction.

10. In **AIR (2007) SC 1003(Navjot Singh Sidhu Vs. State of Punjab & another)** the Apex Court has said that sub section (1) of Section 389 says that pending any appeal by a convicted person the appellate Court may, for reasons to be recorded by it in writing order that the

execution of the sentence or order appealed against be suspended, and also, if he is in confinement be released on bail, meaning thereby Sub-section confers power upon the Court not only to suspend the execution of sentence and grant bail but also to suspend the operation of the order appealed.

11. From perusal of Navjot Singh Sidhu's case(supra) it appears that the Court has power to suspend the sentence but such power should not be exercised in a routine manner. The Court has to see its ramification and after considering the facts and circumstances of the case an appropriate order should be passed.

12. In **Rama Narang Vs. Ramesh Narang 1995 STPL(LE) 20354 SC** the Apex Court has said that in certain situations the order of conviction can be executable, in the sense, it may incur a disqualification . In appropriate cases the power under Section 389(1) of the Code can be invoked. In nutshell in this case law also the Apex Court has said that an order to suspend the sentence should not be passed in a routine manner and before disposing of such prayer the Court should look into the entire facts and circumstances of the case and the ramification which may ensue if an order is passed in favour of the appellant.

13. Keeping in view the above guidelines this Court has to see whether in the instant case it should exercise its discretion in favour of the appellant or not. In the case in hand the appellant S.K.Agarwal has been found guilty and convicted under section 13(2) read with section 13(1) (d) of the Prevention of Corruption Act, 1988. I have examined the judgment of the learned lower Court with caution. Keeping in view the facts and circumstances of the case I do not find that this Court should exercise its discretion in favour of the appellant.

14. On the basis of the above discussions, I am of the view that the relief of suspending the sentence prayed for by the appellant can not be granted and therefore, the same is refused.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.09.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE SHABIHUL HASNAIN, J.
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Misc. Bench No. 10159 of 2010

Connected with Misc. Bench No. 2037 of 2011; Misc. Bench No. 7265 of 2010; Misc.Bench No. 7265 of 2010; Misc. Bench No. 7711 of 2010 and Misc.Bench No. 811 of 2012

Brij Kishore Verma ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Birendra Narain Shukla
Sri Beni Prasad Gupta
Sri Syed Ali Rehan
Sri Sushil Kumar Singh
Sri Arvins Kumar Singh
Sri Amitabh Kumar Rai
Sri Neerav Chitravanshi
Sri Sheo Prakash Singh
Sri Akhilesh Kalra

Counsel for the Respondents:
Smt. Bulbul Godiyal
Additional Advocate General assisted by Sri Pushkar Bhagel
Ms. Alka Saxena for Union of India

C.S.C.
A.S.G.
Sri Ashok Pandey
Sri Raj Kumar

Amicus Curiae:
Sri S.K. Kalia, Senior Advocate assisted by Sri Anupam Mehrotra,

U.P. Land revenue Act-Section 11-readwith Census Rules 1990, Rule 8(iv)-Notification creating new district-disturbing boundaries of Tehsil, Block and constituency during census work in progress-whether valid? Held- 'no'-it cannot override over central enactment,-power exercise by State Government-administrative in nature-during continuance of census operation of state government cannot exercise its power conferred under Section 11 of U.P.L.R. Act.

Held: Para-135, 136 and 148

In view of the above, whenever, a census is in operation and appropriate order is issued under the Census Rules, then, in view of Clause (iv) of Rule 8 of Census Rule (supra), the boundaries of districts, tehsils and towns etc., cannot be changed till the completion of census being based on Central enactment. The Census Act and Rules framed thereunder will have overriding effect over the order passed under the Land Revenue Act and the Rules framed thereunder and to the extent of repugnancy, the decision or order passed under the Census Act and Rules framed thereunder, shall prevail.

Since the impugned notification seems to be in conflict with Census Rules, it shall be bad in law and even after the end of census operation, the notification shall remain unlawful. Only option to the Government will be to proceed afresh in accordance with law.

To sum up:-

(1) Every order passed by the State Government in pursuance of power conferred by Articles 154, 162 read with Article 166 of the Constitution, may not be administrative. It shall depend upon the facts and circumstances of each case. Similarly, every order passed by the State Government in pursuance of power conferred by statute, may either be legislative or administrative and shall depend upon the facts and circumstances of each case.

(2) The order passed under statutory provisions or in pursuance of powers conferred under Articles 154, 162 read with Article 166 of the Constitution, may be administrative or legislative or quasi-legislative and quasi-administrative, will depend upon the facts and circumstances of each case. The decision taken by the State Government while deciding representation in pursuance of the order passed by the Court or on its own, keeping in view the 1992, regulatory Government order (supra) ordinarily, shall be administrative in nature.

(3) The impugned notification has been issued while deciding representation in compliance of the judgment and order passed by the Division Bench of this Court based on factual matrix of past and present hence administrative in nature, but it has legislative trapping. However, in case, the State Government took a decision in compliance of different constitutional provisions dealt with (supra) followed by notification under Section 11 of the Act and the Rules of Business, then in such a situation, decision may be of legislative character.

(4) Though, there is no conflict between the Census Act and Census Rules, 1990 with Section 11 of U.P. Land Revenue Act since both deal with the different sphere but once a notification is issued under Census Rule by the Government of India as well as the State Government, then direction under Census Rule, shall prevail over and above the State action under Section 11 of the U.P. Land Revenue Act. Since both are irreconcilable during the operation of a notification issued under

Rule 8 (4) of Census Rules, 1990, no notification could have been issued under the U.P. Land Revenue Act.

(5) The jurisdiction exercised by the Government during census operation and continuance of notification issued under Section 8 (4) of Census Rules, the power exercised by the Government under Section 11 of the U.P. Land Revenue Act, shall be illegal and void hence all consequential action therein shall also not survive. Of course, it shall be open for the Government to issue a notification to meet out exigency of services within the constitutional frame and four corners of the law after census operation.

(6). In the event of order passed under Rule 1990 during the continuance of census operation, the State Government may not exercise power conferred by Section 11 of the U.P. Land Revenue Act in a manner which may amount to change of boundaries of district or local bodies. Power under the Census Act and the Rules framed thereunder, as well as power conferred under Section 11 of the U.P. Land Revenue Act cannot be exercised simultaneously, because there is irreconcilable conflict between the two legislative action of the State Government and the Central Government.

(7) Moreover, the SLP filed against the judgment in the case of Ram Milan Shukla (supra) was consciously dismissed by Hon'ble Supreme Court hence it is binding in view of Article 141 of the Constitution of India. No contrary finding may be recorded by the High Court in view of binding precedent. Otherwise also, judgment in Ram Milan Shukla's case (supra) lays down correct law.

(8) Section 11 of the Act does not lay down the grounds or criteria for creation of districts. Government has rightly issued the Government order 1992 (supra) to fill up the gap, providing grounds for the creation of District. Government order 1992 (supra) supplements the statutory provision (Section 11) conferring power on Chairman, Board of Revenue (supra), for compliance, hence binding. In view of the above, whenever, a census is in operation and appropriate order is issued under the Census Rules, then, in view of Clause (iv) of Rule 8 of Census Rule (supra), the boundaries of districts, tehsils and towns etc., cannot be changed till the completion of census being based on Central enactment. The Census Act and Rules framed thereunder will have overriding effect over the order passed under the Land Revenue Act and the Rules framed thereunder and to the extent of repugnancy, the decision or order passed under the Census Act and Rules framed thereunder, shall prevail.

Case Law Discussed-

JT 2007 (10) SC 509; 2008 (1) UPLBEC 625; 2004 (3) AWC 2234; 1999 (17) LCD 323; AIR 1984 SC 1130; AIR 1955 SC 549; AIR 2000 SC 1060; AIR 1979 SC; [2004 (22) LCD 1002]; (2010) 5 SCC 246; (1979) 3 SCC 431; AIR 2005 SC 2014; (1976) 1 SCC 466; AIR 1970 SC 228; 2006 (10) ADJ 86; (1998) 5 SCC 637; (1998) 2 SCC 516; (2000) 6 SCC 224; (2002) 3 SCC 219; 1984 (Supp) SCC 28; (1990) 2 SCC 562; 1991 (Supp) 1 SCC 430; (2009) 5 SCC 342; AIR 1957 SC 676; (2011) 2 SCC 591; AIR 1976 Delhi 166; 2002 5 AWC 4321; AIR 1980 SC 882; (1981) 2 SCC 722; AIR 1987 SC 1802; (1989) 3 SCC 396; AIR 2002 SC 533; 2004 (3) AWC 2234; 1997 (88) RD 535; 2008 (2) Supreme Today 533; W.P. No.7749 (M/B) of 2010 [Hari Bhajan Singh and another. Vs. State of U.P. and others; (1979) 3 SCC 431; (2005) 3 SCC 212; AIR 2010 SC 1476; AIR 1978 SC 1296; 1990 (3) SCC 223;; AIR 1952 SC 252; AIR 1956 SC 503; 1975 Supp. SCC 1; AIR 1979 SC 1415; AIR 1974 SC 1539; 1990 Supplementary SCC 440; (2007) 8 SCC 212; AIR 1967 SC 1910; 1977 SC 757; AIR 1991 SC 2288; 1998 SC 431; AIR 1998 SC 2496; AIR 1955 SC 549; (1996) 2 SCC 305; State of M.P. Vs. Yashvant Trimbak (Dr.); AIR 1961 SC 221; AIE 1974 SC 2192; AIR 1982 SC 32; AIR 1981 SC 2030; AIR 1961 SC 751; AIR 1967 SC 1145; AIR 1968 SC 870; AIR 1979 SC 1676; 2006 (2) SCC 670; (2004) 11 SCC 625; AIR 1953 SC 148; 2001 (8) SCC 61; AIR 1971 SC 2560; AIR 1971 SC; AIR 2006 SC 2138; AIR 2008 SC 3; AIR 1996 SC 430; AIR 1984 SC 703; AIR 1984 SC 684; AIR 1963 SC 1323; (2004) 6 SCC 254; AIR 2004 SC

4057; 1999 (36) ALR 180 (SC); 2008 AIR SCW 2296; AIR, 1967 SC 1; AIR 1981 SC 1099; AiR 1983 SC 1272; (1996)3 SCC 114; AIR 1988 SC 1531; 1991 Supp (1) SCC 138; AIR 1993 SC 1407); 2000 (18) LCD 886; 2000(1) AWC 750; 1997 (88) RD 535; 2002 (4) SCC 297; 2003 SCC (1) 410; 2006 (5) SCC 745; 2007 (10) SCC 528; AIR 1988 SC 1681; AIR 2010 SC 1476; AIR 1988 SC 157; 1994 (5) SCC 267; 1994 (6) SCC 651; AIR 1967 SC 1458; JT 2012 (4) SC 459; [JT 1989 (3) SC 57]; 2004 (3) AWC 2234; AIR 1987 SC 1802; AIR 1959 SC 107; AIR 2002 SC 2158; AIR 1964 SC 648; AIR 1980 SC 882; (1981) 2 SCC 722; (1989) 3 SCC 396; AIR 2002 SC 533; (1955) 2 S.C.R. 225; AIR 1967 SC 1170; AIR 1964 SC 648; (1998) 3 SCC 381; (2004) 8 SCC 599; (2006) 1 SCC 530; 1986 AC 374; AIR 1978 SC 597; (1981) 3 SCC 181; AIR 1982 SC 1543; AIR 1964 SC 72; AIR 1964 SC 72; AIR 1998 SC 477; 1993 (3) SCC 634; AIR 1991 SC 1902; AIR 2004 SC 827; 2011 (8) SCC 737

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

1. With the change of Government, the creation of new districts has become a routine feature in the State of Uttar Pradesh that too, without adverting to financial viability and necessity. Ordinarily, decisions are political to perpetuate legacy of political parties.

2. Similar is the case in hand referred by the Division Bench of this Court relating to constitution of Chhatrapati Shahu Ji Maharaj Nagar (in short CSM Nagar).

3. On account of conflicting judgment with regard to right of State Government to create districts, a Division Bench of this Court (Hon'ble Pradeep Kant, J. and Hon'ble Ritu Raj Awasthi, J.), has framed three (3) questions and referred the same to the Larger Bench. In terms thereof, Hon'ble the Chief Justice has constituted the present Bench. The questions referred by the Division Bench vide order dated 25.3.2011 passed in Writ Petition No.10159 (M/B) of 2010 and three other connected writ petitions, are as under:

(I) Whether the issuance of notification under section 11 of the U.P. **Land Revenue Act read with** section 21 of the U.P. General Clauses Act by the Governor is legislative act or administrative act.

(ii) Alternatively, if the exercise of statutory power under section 11 is held to be legislative act, then whether the impugned notification can be held to be violative of the directives issued by the Central Government under rule 8(iv) of the Census Rules, 1990, in view of Article 246(1) of the Constitution and, therefore, invalid.

(iii) Whether in view of the fact that there is no apparent inconsistency in the two Acts, namely, Census Act, 1948 (Central enactment) and the U.P. Land Revenue Act (State enactment), the inconsistency which has arisen because of the exercise of executive power by the State under the State Act would be an inconsistency within the meaning of Article 246 read with Article 254 of the Constitution.

I- BRIEF FACTS

4. CSM Nagar was created by the Notification dated 21.5.2003, issued under Section 11 of the U.P. Land Revenue Act, 1901 (in short the Act) read with Section 21 of the U.P. General Clauses Act, 1904 (in short General Clauses Act), by His Excellency, the Governor of the State of U.P. The Notification was challenged in this

Court by preferring Writ Petition No.5027 (M/B) of 2003 [Nagarjun Prasad Gupta. Vs. State of U.P. and others]. A Division Bench of this Court by an interim order dated 9.10.2003, stayed the operation of notification keeping in view the earlier Division Bench judgment of Allahabad High Court reported in **1999 (17) LCD 323 [Ram Milan Shukla and others. Vs. State of U.P. and others]. s**

5. During the pendency of the Writ Petition No.5027 (M/B) of 2003 filed by Nagarjun Prasad Gupta (supra), the State of U.P. decided to abolish new district hence, a Notification dated 13.11.20003 was issued under Section 11 of the Act read with Section 21 of General Clauses Act. The Notification dated 13.11.2003 is being reproduced as under:-

उत्तर प्रदेश सरकार
राजस्व अनुभाग-5

संख्या 3122/1-5-2003-181-2002-रा-5
लखनऊ, 13 नवम्बर, 2003

अधिसूचना

प० आ०-606

उत्तर प्रदेश साधारण खण्ड अधिनियम, 1904 (उत्तर प्रदेश अधिनियम संख्या 1 सन 1904) की धारा 21 के साथ पठित यू० पी०लैण्ड रेवेन्यू ऐक्ट, 1901 (यू०पी० ऐक्ट संख्या 3 सन 1901) की धारा 11 के अधीन शक्ति का प्रयोग करके और छत्रपति शाहूजी महाराज नगर के नाम से नये जिले के सृजन के सम्बन्ध में इस निमित्त जारी सरकारी अधिसूचना संख्या सी०एल०-17/1-5-2003-181-2002-रा०-5, दिनांक 21 मई, २००३ का अधिक्रमण करके राज्यपाल उक्त जिला छत्रपति शाहूजी महाराज नगर को समाप्त करते हैं और इस अधिसूचना के गजट में प्रकाशित होने के दिनांक से अनुसूची-एक और दो में क्रमशः उल्लिखित क्षेत्रों को समाविष्ट करते हुए विद्यमान जिला रायबरेली और सुलतानपुर की सीमाओं को परिवर्तित करते हैं।

अनुसूची-एक	अनुसूची-दो
1- तिलोई	1- अमेठी
2- सालोन	2- गौरीगंज
	3- जगदीशपुर

(तिलोई व सालोन) के विधान सभा निर्वाचन क्षेत्रों में समाविष्ट किये गये जिला रायबरेली के राजस्व ग्राम।

(अमेठी, गौरीगंज व जगदीशपुर) के विधान सभा निर्वाचन क्षेत्रों में समाविष्ट किये गये जिला सुलतानपुर के राजस्व ग्राम।

आज्ञा से
टी० पी० पाठक
विशेष सचिव।

6. On account of census operation undertaken by the Government of India, by Notification dated 22.9.2009, the State Government was required not to change the boundaries of Nagar Paikas, Revenue villages, Tahsils, police

stations, Vikas Khands, Taluqas, Parganas, districts etc., from 1.1.2010 to 31.3.2011. In consequence thereof, the State Government by Notification dated 22.12.2009, issued under Rule 8 (4) of Census Rules, 1991, directed not to change the administrative boundaries of districts, Tahsils in the State of U.P.

7. During the operation of Notification dated 22.12.2009, by the impugned Notification dated 1.7.2010 issued by His Excellency, the Governor under Section 11 of the Act, read with Section 21 of General Clauses Act, the earlier Notification dated 13.11.2003 was rescinded restoring the CSM Nagar. The Notification dated 1.7.2010 is reproduced as under:-

"उत्तर प्रदेश शासन

राजस्व अनुभाग-5

संख्या 1858/1-5-2010-181-2002टी०सी०-रा०-5

लखनऊ, 1 जुलाई, 2010

अधिसूचना

प०आ०-395

उत्तर प्रदेश साधारण खण्ड अधिनियम, 1904 (उत्तर प्रदेश अधिनियम संख्या 1 सन 1904) की धारा 21 के साथ पठित यू० पी०लैण्ड रेवेन्यू ऐक्ट, 1901 (यू०पी० ऐक्ट संख्या 3 सन 1901) की धारा 11 द्वारा प्रदत्त शक्ति का प्रयोग करके राज्यपाल इस अधिसूचना के गजट में प्रकाशित होने के दिनांक से जिला छत्रपति शाहू जी महाराज नगर को समाप्त करने के सम्बन्ध में सरकारी अधिसूचना संख्या 3122/1-5-2003-181-2002-रा-5 दिनांक 13 नवम्बर, 2003 को विखण्डित करते हैं और यह निर्देश देते है कि उक्त जिला छत्रपति शाहू जी महाराज नगर को पुनर्स्थापित किया जायेगा, जिसका मुख्यालय गौरागंज में होगा, जिसमें सरकारी अधिसूचना संख्या सी०एम०-17/1-5-2003-181-2002-स०-5 दिनांक 21 मई, 2003 की अनुसूची-2 मे सम्मिलित राजस्व ग्रामों के क्षेत्र समाविष्ट होंगे।

2- राज्यपाल अग्रतर निदेश देते हैं कि इस अधिसूचना की किसी बात का प्रभाव, किसी विधि न्यायालय में जिसने अब तक उक्त क्षेत्रों के सम्बन्ध में अधिकारिता का प्रयोग कियाहै, पहले से प्रारम्भ की गयी या विचाराधीन किसी विधिक कार्यवाही पर नहीं पड़ेगा।

आज्ञा से,

के० के० सिन्हा

प्रमुख सचिव।"

8. The notification dated 22.12.2009 was issued in pursuance of the Circular dated 22.9.2009 issued under rule 8 (4) of the Census Rule by the Government of India. For convenience, Circular dated 22.9.2009, issued by the Government of India, and the consequential notification dated 22.12.2009, issued by the Government of Uttar Pradesh, are reproduced as under:-

"**Government of India**
Ministry of Home Affairs
2A, Mansingh Road, New Delhi - 110 011

No.9/66/09-CD (CEN) Dated : 22.9.09

CENSUS OF INDIA 2011-CIRCULAR NO. 6

Subject : Census of India 2011- Fixing of boundaries of Administrative Units during the period of the census operations.

The preparations for the next decennial Census of India, 2011 are in full swing. The pre-test of Census of India, 2011 has already been conducted and now we are towards 1st phase of the main Census i.e., Housing and House listing Census to be conducted all over the country from April, 2010 followed by the Population Enumeration in February/March, 2011.

2. During the census operations, it is important to ensure the complete coverage, hence, the entire country is divided into small Enumeration Blocks within the framework of respective Administrative Units in the States and Union Territories. The work of demarcation of these Enumeration Blocks is taken up well in advance of the House listing Operations, as the census maps are to be prepared accordingly to obviate any overlapping or omission of areas.

3. For conducting the census operation efficiently, it is necessary to ensure that the boundaries of administrative units are not disturbed after the demarcation of the Enumeration Blocks till the completion of the census operation. Thus, any changes proposed in the jurisdiction of the existing administrative units may be effected well before 1st January, 2010.

4. In the circumstances, proposals for making any changes in the boundaries of existing municipalities, revenue villages, tahsils, police stations, development blocks, talukas, sub-divisions, district etc., or for forming new units which may be pending or which may be taken up on near future, may kindly be finalized and given effect by 31st December, 2009. All such changes may please be intimated to the concerned Census Directorates in State/U.P. and the office of the Registrar General, India by 31st December, 2009. The State Government may further ensure that no changes, whatsoever, are effected in the boundaries of these administrative units during the period from 1st January, 2010 to 31st March, 2011.

Sd/-
(D.K. Sikri)
Registrar General and
Census Commissioner, India

To

1. All Chief Secretaries
2. All Directorates of Census Operations
3. PS to Secretary (RGI)
4. PS to JS (OSD)
5. PS to Addl. (RGI)
6. PS to DDG (MNIC)
7. All Heads of Divisions of ORGI
8. Language Division, Kolkata
9. AD (OL) for Hindi translation
10. Census Division (15) copies)
11. Guard file"

True copy

|| TYPED COPY ||
" उत्तर प्रदेश शासन
सामान्य प्रशासन अनुभागसंख्या--जी०
आई०166 / तीन--09--16 (1) / 2009
लखनऊः दिनांक 22दिसम्बर, 2009

अधिसूचना

चूंकि गृह मंत्रालय, भारत सरकार ने अपने परिपत्र संख्या--4/68/09 सी० डी० (सी०ई०एन०), दिनांक 22सितम्बर, 2000 द्वारा यह अनुरोध किया है कि राज्य सरकार विद्यमान नगर पालिकाओं, राजस्व ग्राम, तहसील, थाना, विकास खण्ड,तालुकाओं, परगना और जिला आदि की सीमाओं में किसी प्रकार का परिवर्तन करने या नई इकाईयों को गठित करने के प्रस्ताव जो लम्बित हों या निकट भविष्य में जिसका निस्तारण होना हो, को अन्तम रूप देकर 31 दिसम्बर, 2009 तक प्रभावी करें, परिवर्तनों, यदि कोई हो, के सम्बन्ध में सूचना राज्य के जनगणना निदेशालय तथा भारत सरकार के महारजिस्ट्रार कार्यालय को 31 दिसम्बर, 2009 तक दें।

और चूंकि भारत सरकार ने राज्य सरकार से यह सुनिश्चित करने के लिए भी अनुरोध किया है कि उपर्युक्त प्रशासनिक इकाईयों की सीमा में 01 जनवरी, 2010 से 31 मार्च, 2011 की अवधि के दौरान कोई परिवर्तन, जो भी हो, प्रभावी न किया जाए।

अतएव अब जनगणना अधिनियम, 1948 (अधिनियम संख्या 37 सन् 1948) की धारा--18 की उपधारा (1) के अधीन शक्ति का प्रयोग करके केन्द्र सरकार द्वारा निर्मित जनगणना नियमावली, 1990 के नियम 8 के खण्ड (चार) के अधीन शक्ति का प्रयोग करके राज्यपाल निदेश देते हैं कि नगर पालिकाओं, राजस्व ग्रामों, तहसीलों, पुलिस थानों, विकास खण्डों, तालुकों, परगनों और जिलों आदि की प्रशासनिक सीमाओं में 01 जनवरी, 2010 से प्रारम्भ होने वाली और 31 मार्च, 2011 को समाप्त होने वाली अवधि के दौरान परिवर्तन नहीं किया जायेगा।

के० के० सिन्हा,
प्रमुख सचिव

संख्या--जी० आई०166(1) /तीन--2009
तद्दिनांक

प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषितः-

1. प्रमुख सचिव, श्री राज्यपाल, उत्तर प्रदेश शासन।
2. प्रमुख सचिव, विधान सभा, उत्तर प्रदेश।
3. प्रमुख सचिव, विधान परिषद, उत्तर प्रदेश।
4. अपर मंत्रिमण्डलीय सचिव, उत्तर प्रदेश शासन।
5. प्रमुख स्टाफ अधिकारी, मंत्रिमण्डलीय सचिव, उत्तर प्रदेश शासन।

6. प्रमुख स्टाफ अधिकारी, मुख्य सचिव, उत्तर प्रदेश शासन।

7. कृषि उत्पादन आयुक्त/अवस्थापना एवं औद्योगिक विकास आयुक्त/समाज कल्याण आयुक्त, उत्तर प्रदेश
शासन।

8. भारते के महारजिस्ट्रार एवं जनगणना आयुक्त, 2/ए, मानसिंह रोड, नई दिल्ली को उनके पत्रांक-9/66/09-CD (CSN) दिनांक 22-09-2009 के क्रम में।

9. समस्त प्रमुख सचिव/सचिव, मा० मुख्यमंत्री, उत्तर प्रदेश शासन।

10. समस्त विभागाध्यक्ष, उत्तर प्रदेश।

11. समस्त मण्डलायुक्त, उत्तर प्रदेश।

12. समस्त जिलाधिकारी/मुख्य नगर अधिकारी, उत्तर प्रदेश।

13. निदेशक, जनगण्ना कार्य ....., लखनऊ।

14 . संयुक्त निदेशक, राजकीय मुद्रणालय, उ० प्र०, ऐशबाग, लखनऊ को राज्य सरकार के गजट के आगामी अंक में प्रकाशनार्थ।

15. सचिवालय के समस्त अनुभाग/.....

16. गार्ड बुक।

आज्ञा से,

ह०/-

(पी० एन० यादव)

विशेष सचिव। "

9. A Writ Petition No.6077 (M/B) of 2003 was filed in this Court by one Uma Shanker Pandey which was decided by a Division Bench of this Court by judgment and order dated 26.3.2010 at admission stage. The judgment and order dated 26.3.2010, passed by the Division Bench in Writ Petition No.6077 (M/B) of 2003 is reproduced as under:-

"**Case** :- MISC. BENCH No. - 6077 of 2003
Petitioner :- Uma Shanker Pandey (P.I.L.)
Respondent :- State Of U.P. Thru Principal Secretary And 2 Ors
Petitioner Counsel :- S.B Pandey,R.K.Pandey
Respondent Counsel :- C.S.C

Hon'ble Amitava Lala,Acting Chief Justice
Hon'ble Shabihul Hasnain, J.

The grievance of the writ petitioner is that in spite of creation of the district, namely, Chhatrapati Shahuji Maharaj Nagar, all the effects were not given due to an interim order and thereafter the notification was withdrawn though other nine districts and Tehsils are created, therefore, the matter requires little consideration by the State Government and we wanted to get the submissions from the Advocate General.

According to us, powers to create, alter and abolish divisions, districts, tahsil and sub-divisions are lying with the State Government under Section 11 of the Uttar Pradesh Land Revenue Act, 1901.

Though such creation was made by the subsequent notification, but according to the petitioner he cannot be thrown out from his right to get an appropriate consideration by the State. Hence in disposing of the writ petition, we direct the writ petitioner to

make a representation to the authority concerned within a period of one week from obtaining a certified copy of this order and if it is made, the authority concerned will consider the same upon giving the fullest opportunity of hearing and by passing a reasoned order thereon within a period of three months from the date of making such application. For the purpose of effective adjudication, a copy of the writ petition along with its annexures, affidavits and relevant judgments can also be treated as part and parcel of the representation for due consideration.

The petition is disposed of accordingly, however, without imposing any cost.

Order Date :- 26.3.2010 "

10. Admittedly, the impugned notification dated 1.7.2010 was issued in pursuance of the decision taken on the representation submitted by Sri Uma Shanker Pandey (supra), in pursuance to the order passed by the Division Bench of this Court (supra).

11. Section 11 of the Act does not provide any guideline for creation of district. However, State Government issued a Government order in the year 1992 addressed to Chairman, Board of Revenue, laying down certain guidelines prescribing the minimum area, population, police stations, blocks, tahsils and lekhpals for the purpose of creation of new district. Two Division Benches of this court in the case reported in **2000 (18) LCD 886: Brijendra Kumar Gupta and others. Vs. State of U.P. and others, and the case reported in 1999 (17) LCD 323 [Ram Milan Shukla and others. Vs. State of U.P. and others]**, held that it shall be obligatory for the State Government to abide by the regulatory Government order issued in the year 1992 with regard to creation of districts. From the material on record, it is also evident that according to own version of
the State Government, the Government order issued in the year 1992 regulating conditions for creation of district, has been followed.

12. During the course of hearing on 12.9.2012, in pursuance of directions issued by this Court, records were produced. From the records also, it is apparent that while deciding representation submitted by Sri Uma Shanker Pandey in terms of the order passed by this Court, the 1992 Government order has been taken into account. The ordersheet dated 12.9.2012 is reproduced as under:

"Court No. - 27

Case :- MISC. BENCH No. - 10159 of 2010
Petitioner :- Brij Kishore Verma (P.I.L.Civil)
Respondent :- State Of U.P., Thru. Prin. Secy., Deptt. Of Revenue & Others
Petitioner Counsel :- Birendra Narain Shukla
Respondent Counsel :- C.S.C.

Hon'ble Devi Prasad Singh,J.
Hon'ble Shabihul Hasnain,J.
Hon'ble Devendra Kumar Arora,J.

Smt. Bulbul Godiyal, learned Addl. Advocate General in pursuance to earlier order produced the record before the court. Record contains the office note with regard to decision taken in pursuance to an interim order dated 26.3.2010, passed by a Division Bench of this Court in writ petition No.6077(M/B) of 2003 Uma Shanker Pandey versus State of U.P. and others.

According to the office note dated 30.6.2010, a decision was taken in compliance of the order passed by this Court (supra) and the office note was forwarded for the opinion of the Principal Secretary (Law) who opined that the notification will be issued for the restoration of the district in the manner it has been done. Relevant office note from the record is as under :

प्रस्तुत रिट याचिका संख्या–6077/2003 उमाशंकर पाण्डेय बनाम उत्तर प्रदेश सरकार व अन्य में मा0 उच्च न्यायालय द्वारा दिनांक 26.03.2010 को पारित आदेशों के अनुपालन में प्रस्तावित किया जा रहा है । मा0 उच्च न्यायालय द्वारा पारित उक्त आदेश के अनुसार याची श्री उमाशंकर पाण्डेय द्वारा अपना प्रत्यावेदन दिनांक 03.04.2010 को शासन के समक्ष प्रस्तुत किया । परिषद द्वारा श्री उमाशंकर पाण्डेय, ऐडवोकेट को नोटिस संख्या–157/9–125 पी/04 दिनांक 21.05.2010 निर्गत की गयी, जिसमें उन्हें दिनांक 01.06.2010 को समित के समक्ष उपस्थित होकर तथा अपना पक्ष प्रस्तुत करने का निर्देश दिया गया था ।याची श्री उमा शंकर पांडे, उच्चस्तरीय समिति के समक्ष 1–6–2010 को उपस्थित हुये तथा अपना पक्ष प्रस्तुत किया ।

उच्च स्तरीय समिति ने पत्र संख्या–सी0जी0185/जी–125पी/04 दिनांक 04.06.2010 के माध्यम से जनपद छत्रपति शाहू जी महाराजनगर को बहाल किये जाने की संस्तुति की है। मा0 उच्च न्यायालय के आदेश दिनांक 26.03.2010 के अनुपालन में न्यायालय द्वारा निर्धारित तीन माह की समय सीमा के अधीन याची के प्रत्यावेदन का निस्तारण किया जाना है ।

यहॉ यह उल्लेख करना समीचीन होगा कि भारत की जनगणना को दृष्टिगत रखते हुए शासन की अधिसूचना दिनांक 22.12.2009 द्वारा जिले, तहसील आदि के सीमा परिवर्तन पर दिंनाक 01 जनवरी, 2010 से 31 मार्च, 2011 तक रोक लगा दी गयी है । इस रोक के दृष्टिगत जनगणना के आंकड़े पूर्व जनपदों में दर्शाये जायेगे । तथा 31 मार्च,2011 के पश्चात् राज्य सरकार अपने प्रयोजनों हेतू इन्हें नवसृजित जनपदों में हस्तान्तरित कर उपयोग कर सकेगी ।

अतः मा0 मंत्रिपरिषद से अनुरोध है कि रिट याचिका संख्या–6077/2003 उमाशंकर पाण्डेय बनाम उत्तर प्रदेश सरकार व अन्य में पारित आदेश दिनांक 26.03.2010 के अनुपालन में उच्चस्तरीय समिति की संस्तुति का संज्ञान लेते हुए याची का प्रत्यावेदन स्वीकार करें तथा अधिसूचना संख्या–3122/1–5–2003–181– 2002–रा–5, दिनांक 13 नवम्बर, 2003 को निरस्त करते हुए अधिसूचना संख्या–सी0एम0–17/1–5–2003–181–2002–रा–5, दिनांक 21 मई, 2003 को बहाल कर दें ।

उपरोक्तानुसार मा0 मंत्रिपरिषद के आदेशार्थ प्रस्तुत की जाने वाली टिपपणी तैयार कर ली गयी है जो सम्मुख प्रस्तुत है । कृपया अनुमोदन प्रदान करना चाहें ।

हस्ताक्षर अपठनीय
30–6–2010
हस्ताक्षर अपठनीय
30–6–2010
संयुक्त सचिव

हस्ताक्षर अपठनीय
के0के0 सिन्हा
प्रमुख सचिव एवं राहत आयुक्त
राजस्व विभाग
उत्तर प्रदेश शासन

संयुक्त सचिव

मा0मंत्रिपरिषद के आदेशार्थ प्रस्तुत की जाने वाली टिप्पणी पर प्रमुख सचिव महोदय का अनुमोदन प्राप्त हो गया है । कृपया टिप्पणी पर न्याय विभाग का अभिमत प्राप्त करने से पूर्व प्रमुख सचिव महोदय का अनुमोदन प्राप्त करना चाहें । रिट से सम्बन्धित पत्रावली सं0 टीसी 1231/02 संलग्न है ।

ह0 अपठनीय
30–6–10

प्रमुख सचिव

हस्ताक्षर अपठनीय
के0के0 सिन्हा
प्रमुख सचिव एवं राहत आयुक्त
प्रमुख सचिव न्याय राजस्व विभाग
उत्तर प्रदेश शासन

मैंने मा0 अध्यक्ष राजस्व परिषद, उ0प्र0 की अध्यक्षता में गठित उच्च स्तरीय समिति दिनांक 1–6–2010 के कार्यवत का अध्ययन किया । समिति ने नवसृजित जनपद हेतु शासन द्वारा निर्धारित मानक के अनुरूप होने के दृष्टिगत जनपद को पुनः बहाल किया जाना औचित्य पूर्ण माना है ।

अतः समिती की संस्तुती को मानने में कोइ विधिक बाधा नहीं है

के0के0शर्मा
प्रमुख सचिव न्याय
30–6–10

गोपन अनुभाग–1

कृपया जनपद छत्रपति शाहूजी महाराजनगर की पुनर्स्थापना के सम्बन्ध में मा0 मंत्रि–परिषद के लिये टिप्पणी की 4–5 प्रतियां, 3 बुलेट प्वाइंट्स सहित प्रस्तुत है, कृपया ग्रहण करने का कष्ट करें ।

ह0अपठनीय
मयूर अली 30–6–2010
अनुभाग अधिकारी उपसचिव
राजस्व अनुभाग राजस्व
सचिवालय, लखनउ

It appears that the petitioner Uma Shanker Pandey appeared before the committee constituted by the government on 1.6.2010. The report of the committee was forwarded to the Principal Secretary, Law who in turn gave his opinion on 30.6.2010.

Again according to the record, on the same day, the entire material was considered by the Principal Secretary, Home and the Addl. Cabinet Secretary who placed the matter before the Cabinet. Office note is reproduced as under :

गोपन अनुभाग–1 में टिप्पणी

विशेष सचिव

कृपया गत पृष्ट–7 पर राजस्व अनुभाग–5 की टिपपणी का अवलोकन करने का कष्ट करें ।

2– प्रशासकीय विभाग द्वारा जनपद छत्रपति शाहू जी महाराज नगर की पुर्नस्थापना के संबंध में प्रस्ताव मा0 मंत्रिपरिषद के समक्ष प्रस्तुत किये जाने हेतु उपलब्ध कराया गया है। उल्लेखनीय है कि प्रशासकीय विभाग द्वारा अवगत कराया गया है कि अधिसूचना दिनांक 21–5–2003 द्वारा छत्रपति शाहू जी महाराज नगर के नाम से एक नया जिला सृजित किया गया था जिसका मुख्यालय गौरीगंज में रखा गया था और जिसमें जनपद रायबरेली तथा जनपद सुलतानपुर के कतिपय क्षेत्रों का समावेश किया गया था । अधिसूचना दिनाकॅ 13–11–2003 द्वारा उक्त जनपद को समाप्त कर दिया गया था, जिसके विरोध में मा0 उच्च न्यायालय, लखनउ में रिट याचिका संख्या 6077/03 योजित हुई । उक्त रिट याचिका में मा0 उच्च न्यायालय द्वारा दिनांक 26.3.2010 को पारित आदेश के अनुपालन में प्रशासकिय विभाग का प्रस्ताव है कि उच्चस्तरीय समिति की संस्तुति का संज्ञान लेते हुए याची का प्रत्यावेदन स्वीकार कर लिया जाय तथा अधिसूचना दिनांक 13 नवम्बर, 2003 को अधिक्रमित करते हुए अधिसूचना दिनांक 21 मई, 2003 को पुर्नस्थापित कर दिया जाए ।

3– प्रश्नगत प्रस्ताव पर वित्त/न्याय विभाग द्वारा व्यक्त अनापत्ति का समावेश मंत्रिपरिषद के लिए टिप्पणी के क्रमशः प्रस्तर–6/7 में किया गया है । वित्त/न्याय विभाग का अभिमत पत्रावली के क्रमशः पृष्ठ 4/7 पर अवलोकनीय है । प्रशासकीय विभाग द्वारा उपलब्ध करायी मंत्रिपरिषद के लिए टिप्पणी को मा0 विभागीय मंत्री जी द्वारा पत्रावली के पृष्ठ –2 पर अनुमोदित कर दिया गया है । अस्तु यदि सहमत हो तो, प्रश्नगत प्रस्ताव को मा0 मंत्रिपरिषद के समक्ष प्रस्तुत किये जाने हेतू पत्रावली प्रमुख सचिव, अतिरिक्त मंत्रिमण्डलीय सचिव एवं मुख्य सचिव महोदय के अवलोकनार्थ प्रस्तुत करना चाहें । मुख्य सचिव महोदय के अवलोकनोपरान्त प्रश्नगत प्रस्ताव को मा0 मंत्रिपरिषद के समक्ष प्रस्तुत किये जाने हेतू पत्रावली मंत्रिमण्डलीय सचिव महोदय के अनुमोदनार्थ प्रस्तुत किया जाना प्रस्तावित है ।

ह0अपठनीय
30–6–2010
कृष्ण गोपाल
विशेष सचिव, गोपन
उ0प्र0शासन

ह0अपठनीय
30–6–2010
कुंवर फतेह बहादुर सिंह
प्रमुख सचिव, गृह एवं गोपन
उ0प्र0शासन

30–6–2010
नेतराम अतुल कुमार गुप्ता
अति.मंत्रिमण्डलीय सचिव, मुख्य सचिव
उ0प्र0शासन उ0प्र0शासन

शशांक शेखर सिंह
मंत्रि–मण्डलीय सचिव
उ0प्र0शासन

टीपें और आज्ञायें

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क्रमांक मा0मंत्रिपरिषद के आदेश दिनांक 1–7–2010
वि0प0
उप सचिव

कृपया मा0 मंत्रि परिषद के आदेश देखें ।

जनपद छत्रपति शाहू जी महाराज नगर को पुर्नस्थापित किये जाने के आदेश प्राप्त हुए हैं । आदेशें के अनुपालन में अधिसूचना का अंग्रेजी व हिन्दी आलेख तैयार कर लिया गया है । इस पर विधायी/भाषा विभाग का विधीक्षण प्राप्त करने से पूर्व प्रमुख सचिव महोदय का अनुमोदन प्राप्त करना चाहें ।

प्रमुख सचिव — आर0एन0उपाध्याय
विशेश सचिस, राजस्व विभाग
उ0प्र0शासन

ह0अपठनीय
1–7–10
अलख नारायण
विशेष सचिव एवं अपर विधि परामर्शी
विधायी एवं संसदीय कार्य विभाग
उ0प्र0शासन

From the aforesaid material on record, there appears to be no room of doubt that the decision with regard to creation of district was taken while deciding the representation submitted by Uma Shanker Pandey, Advocate.

One other fact appearing from the record is that the committee constituted in pursuance to the judgment of the Division Bench of this Court consists of Rajiv Kumar, Commissioner, Faizabad Mandal, Faizabad, Ajai Deep Singh, Special Secretary, Niyojan Vibhag, Uttar Pradesh Shashan, Lucknow, Dr. Pinki Jowal, Special Secretary, Finance Department, U.P. Government, Lucknow, Shanker Lal Pandey, District Magistrate, Sultanpur, Dr. Charanjeet Singh Bakshi, District Magistrate, Raibareli and Shri Sanjeev Dubey, Commissioner and Secretary, Board of Revenue/ Member Secretary.

The committee while concluding its opinion after considering the representation submitted by Uma Shanker Pandey has given a word of caution that before taking a decision with regard to the controversy in question, the government should take into account the embargo imposed by the Census Commission, according to which the boundary of the district cannot be changed during the period from 1.1.2010 to 31.3.2011. Operative portion of the opinion of the committee dated 4.6.2010 is reproduced as under :

शासनादेश संख्या आर0ण्च0340/92–रा.–5 दिनांक 20–10–1992 द्वारा जिला सृजन हेतु निर्धारित मानक के सापेक्ष जनपद छत्रपति शाहूजी महराजनगर का मानक विवरण निम्न प्रकार है –

1– जनसंख्या 1721 लाख	मानक	15 लाख
2– क्षेत्रफल 3070वर्ग कि0मी0	मानक	5000 वर्ग कि0मी0
3– तहसील 05	मानक	03
4– विकास खण्ड 16	मानक	10
5– थाना 17	मानक	12
6– लेखपाल क्षे0 401	मानक	300

उपरोक्त से स्पष्ट है कि छत्रपति शाहूजी महराजनगर क्षेत्रफल को छोडकर शेष सभी मानकों को पूरा करता है । याची को सुनने के पश्चात समिति द्वारा यह मत विनिश्चित किया गया कि यद्यपि छत्रपति शाहूजी महराजनगर को बहाल करने हेतु कोइ विधिक बाध्यता नहीं है, किन्तु नवसृजित जनपद हेतु शासन द्वारा निर्धारित मानक के अनुरूप होने के दृष्टिगत उक्त जनपद को पुनः बहाल किया जाना औचित्यपूर्ण होगा । तद्नुसार शासन की अधिसूचना संख्या सी0एम0 17/1–5– 2003–181/2002–रा05, दिनांक 21–5–2003 सजित एवं शासन की अधिसूचना संख्या 3122/1–5–2003–181/2003 रा05, दिनांक 13–11–2003 के द्वारा समाप्त किये गये जनपद छत्रपति शाहूजी महराजनगर को बहाल किये जाने की संस्तुति की जाती है ।

समिति द्वारा यहां यह अवगत कराना समीचीन पाया गया कि भारत की जनगणना को दृष्टिगत रखते हुये शासन की अधिसूचना दिनांक 22–12–2009 द्वारा

जिले तहसील आदि के सीमा परिवर्तन पर दिनांक 1 जनवरी 2010 से 31 मार्च 2011 तक रोक लगा दी गयी है, को संज्ञान में लेते हुए प्रश्नगत प्रकरण में यथोचित कार्यवाही शासन स्तर से किया जाना यथेष्ट होगा?

ह0अपठनीय
आयुक्त एवं सचिव ।

From the report, it appears that Chhatrapati Shahuji Maharaj Nagar does not fulfill the required criteria for creation of district to the extent its area is concerned. This aspect of the matter may be considered by the Division Bench.

We have heard learned counsel for the petitioner, Special counsel engaged by the court Shri S.K. Kalia, Senior Advocate assisted by Shri Anupam Mehrotra, Smt. Bulbul Godiyal, Addl. Advocate General, assisted by Shri Pushkar Bhagel and Ms. Alka Saxena appearing on behalf of Union of India.

Judgement reserved.

The State Govt shall ensure the payment of remuneration to Shri S.K. Kalia, learned Senior Advocate and Shri Anupam Mehrotra, assisting counsel in terms of the order dated 13.1.2012 passed by this Court, within a period of two months from today.

For additional expenses, incurred by Shri Anupam Mehrotra, he will submit the bill and the same shall also be paid by the State Government.

Order Date :- 12.9.2012"

13. It is strange to note that while adjudicating the controversy keeping in view the order passed by the Division Bench of this Court (supra), in pursuance of the representation submitted by Sri Uma Shanker Pandey Advocate, the observation has been made that things are processed for the creation of district in pursuance of the judgment and order dated 26.3.2010, passed by the Division bench of this Court (supra), which at the face of record, seems to be incorrect. The burden has been shifted on the orders passed by the Division Bench of this court as the ground to create the district (supra) though the order was to decide the representation. The Office Note further reveals that in terms of the Government order of the year 1992, all the conditions are not fulfilled. The area of CSM Nagar is less than what is required under the Government order of the year 1992.

Sri Anupam Mehrotra vehemently argued that the impugned notification has been issued arbitrarily, merely for the political end and it neither fulfils the conditions required by the Government order of the year 1992 nor the necessity for creation of new district has been looked into by the Government including the financial viability keeping in view the judgment of this Court in the case of Ram Milan Shukla (supra). However, this aspect of the matter does not call for adjudication for this Full Bench. We leave it open for the Division bench to look into it in case it is pleaded and raised.

14. It is trite in law that courts while exercising power under Article 226 of the Constitution, may not issue writ in the nature of mandamus directing the Legislators to legislate the law or exercise their jurisdiction to a matter which purely fall within the domain of Legislators or the executives, based o n policy decision of the State Government vide, **JT 2007 (10) SC 509: Bal Ram Bali & another. Vs. Union of India; 2008 (1) UPLBEC 625, Food Corporation of India and others Vs. Parashotam Das Bansal and others.**

Accordingly, directly or indirectly, it was not open for the State Government to take a decision for issuance of the impugned notification treating the judgment of this Court (supra as an order to consider or to restore the district CSM Nagar.

15. The Writ Petition No.7265 (M/B) of 2010 [Manoj Kumar Rastogi And Ors. Vs. State of U.P. and others] and Writ Petition No.7711 (M/B) of 2010 [Ved Prakash Singh. Vs. State of U.P. and others] were filed in this Court challenging the Notification dated 1.7.2010. A Division Bench of this Court by an interim order dated 18.8.2010, stayed the operation and implementation of the Notification dated 1.7.2010 till 31.3.2011, after taking into account the Notification dated 22.12.2009 with regard to census operation. The operative portion of the interim order dated 18.8.2010 for convenience, is reproduced as under:-

"We, therefore, being prima facie, satisfied that in view of the specific embargo placed in the notification dated 22.12.2009, no district could be created, including Chhatrapati Shahuji Maharaj Nagar and even if any such notification is issued, such notification cannot be given effect to, on or before 31.3.2011, stay the operation, implementation and execution of the notification dated 1.7.2010 till further orders of the Court or till the aforesaid date i.e. 31.3.2011, whichever is earlier.

Consideration of further interim relief on the plea of non-providing of infrastructure etc. as required, before the creation of the district may be made after the counter affidavit is filed.

In the meantime, it will be open to the State Government to provide the necessary infrastructure, keeping in mind the dictum of the Court in the case of **Ram Milan Shukla (supra)** and the observations made hereinabove."

16. During the operation of the interim order dated 18.8.2010 (supra), one other writ petition namely, **W.P. No.7749 (M/B) of 2010 [Hari Bhajan Singh and another. Vs. State of U.P. and others]**, was filed on 9.8.2010. The writ petition was heard by the Division Bench ceased with miscellaneous bench matters. On 11.8.2010, the Division Bench (Hon'ble Uma Nath Singh, J. Hon'ble Dr. Satish Chandra, J.) was pleased to dismiss the writ petition summarily in limine relying upon the other Division Bench judgment of this Court, reported in **2004 (3) AWC 2234 [Rakesh Kumar Sharma and others. Vs. State of U.P. and others.**

17. The unfortunate part is, neither the Additional Advocate General, nor other counsel representing the State of U.P., had drawn attention of the Division Bench which decided the W.P. No.7749 (M/B) of 2010 [Hari Bhajan Singh and another. Vs. State of U.P. and others] (supra), with regard to pendency of aforesaid two writ petitions in which the interim order dated 18.8.2010 was passed (supra). Hence it may not be ruled out that some authorities of the State Government managed and helped to expedite the case of Hari Bhajan Singh (supra) without inviting attention to the interim order passed in two already pending writ petitions by the different Division Bench seized with public interest litigation.

18. It appears that a Special Leave Petition was filed in the Hon'ble Supreme Court against the interim order dated 18.8.2010 and the main plank of argument before the Hon'ble Supreme Court against

the interim order passed in the case of Nagarjun Prasad (supra), was the conflicting judgment delivered by the Division Bench in the case of Hari Bhajan Singh (supra). Hon'ble Supreme Court set aside the interim order (supra) and remitted the matter back to decide the controversy afresh after taking into account the judgment of Hari Bhajan Singh (supra). The Division Bench ceased with the PIL in the case of Nagarjun Prasad (supra), recorded the statement of factual situation and framed the questions (supra) while referring the matter for constitution of larger Bench.

19. Learned counsel for the petitioner Sri Akhilesh Kalra, Sri S.K. Singh and other counsel had assailed the impugned notification citing various judgments broadly referred by the Division Bench in the order of reference. Learned Senior Counsel Sri S.K. Kalia, Sri Anupam Mehrotra, Sri Akhilesh Kalra and Sri S.K. Singh have referred the cases reported in **1999 (17) LCD 323 [Ram Milan Shukla and others. Vs. State of U.P. and others; AIR 1984 SC 1130 Ajay Kumar Banerjee and others. Vs. Union of India and others; AIR 1955 SC 549: Rai Sahib Ram Jawaya Kapur and others. V. The State of Punjab; AIR 2000 SC 1060: Kunj Behari Lal Butail and others. Vs. State of H.P. and others; AIR 1979 SC 1415 Union of India. Vs. Valluri Basavaiah Chouwdhary and others; [2004 (22) LCD 1002: Rakesh Kumar Sharma and others. Vs. State of U.P. and another; (2010) 5 SCC 246: Zameer Ahmed Latifur Rehman. Vs. State of Maharashtra and others; (1979) 3 SCC 431: M. Karunanidhi. Vs. Union of India and another; AIR 2005 SC 2014: Government of A.P. and another. Vs. J.P. Educational Society and another; (1976) 1 SCC 466: Kerala State Electricity Board. Vs. The Indian Aluminium Co. Ltd.; AIR 1970 SC 228: Indu Bhusan Bose. Vs. Rama Sundari Debi and another; 2006 (10) ADJ 86: Sumac Intl. Ltd. Vs. PNB Capital Services and the Official Liquidator, High Court of Allahabad & Uttaranchal; (1998) 5 SCC 637: State of Tripura. Vs. Tripura Bar Assn. & Ors.; (1998) 2 SCC 516: State of A.P. Vs. V.C. Subbarayudu & ors.; (2000) 6 SCC 224: Lily Thomas Vs. Union of India; (2002) 3 SCC 219: Jawahar Lal Sazawal & ors. Vs. State of J.& K.; 1984 (Supp) SCC 28: M/s. Ram Chandra Mawa Lal & others. Vs. State of U.P. & others; (1990) 2 SCC 562: Vijay Kumar Sharma & others. Vs. State of Karnataka & others; 1991 (Supp) 1 SCC 430: Orissa Cement Ltd. Vs. State of Orissa & others; (2009) 5 SCC 342: Grand Kakatiya Sheraton Hotel Vs. Sri Nivas Resorts Ltd.; AIR 1957 SC 676: Kamla prasad Khetan Vs. Union of India; (2011) 2 SCC 591: State of Jharkhand. Vs. Pakur Jagran Manch; AIR 1976 Delhi 166: Jai Narain. Vs. The Land Acquisition Collector and 2002 5 AWC 4321: Rakesh Chandra Srivastava. Vs. Sri Santosh Kumar Mishra & ors.**

The cases referred by the learned counsels also deal with the extent of judicial review, interference with the policy decisions of the Government, arbitrary exercise of power by the State Government. Such cases are not considered since they are not necessary to be taken into account to record a finding on the question referred to this Bench.

20. On behalf of State of U.P., Smt. Bulbul Godiyal, learned Additional Advocate General had relied upon the cases considered by the Division Bench in the Case of Rakesh Kumar Sharma (supra) and

defended the impugned notification relying upon the cases of Rakesh Kumar Sharma (supra). She further submits that the notification under Section 11 of the U.P. Land Revenue Act is legislative and power exercised by the State of U.P. is not in conflict of the Circular issued by the Election Commission of India during the course of census operation. She would submit that even during the course of census operation, State has got statutory right to create districts and change the boundaries. The notification issued under Rule 8 (4) of Census Rules, 1990, does not have got overriding effect over the power exercised under Section 11 of the U.P. Land Revenue Act. She referred the cases reported in **AIR 1980 SC 882 The Tulsipur Sugar Co. Ltd., Vs. The Notified Area Committee Tulsipur; (1981) 2 SCC 722: Ramesh Chandra Kachardas Porwal and others. Vs. State of Maharastra and others; AIR 1987 SC 1802: Union of India and another. Vs. Cynamidle India Ltd and another; (1989) 3 SCC 396: Sundarjas Kanyalal Bhatija and others. Vs. Collector, Thane, Maharastra and others; AIR 2002 SC 533 State of Punjab. Vs. Tehal Singh and others; 2004 (3) AWC 2234 [Rakesh Kumar Sharma and others. Vs. State of U.P. and others; 1997 (88) RD 535: Samvidhan Bahali Andolan Vs. Union of India and others; 2008 (2) Supreme Today 533: State of U.P. and others. Vs. Chaudhari Ram Beer Singh & another; W.P. No.7749 (M/B) of 2010 [Hari Bhajan Singh and another. Vs. State of U.P. and others; (1979) 3 SCC 431: M. Karananidhi. Vs. Union of India and another; (2005) 3 SCC 212 Govt. of A. P. and another. Vs. J.B. Educational Society and another and AIR 2010 SC 1476: State of West Bengal and others. Vs. Committee for Protection of Democratic Rights West Bengal and others; AIR 1978 SC 1296: Prag Ice & Oil Mills & Anr. Etc vs Union Of India: 1990 (3) SCC 223: Shri Sitaram Sugar Company. Vs. Union Of India & Ors.**

21. On the other hand, Sri S.K. Kalia, learned Senior Counsel assisted by Sri Anupam Mehrotra, appointed by the Court to assist, submitted that the impugned notification has been issued while deciding a representation in compliance of the order passed by the Division Bench of this Court in **Writ Petition No.6077 (M/B) of 2003 (PIL): Uma Shanker Pandey. Vs. State of U.P. and others,** decided by judgment and order dated 26.3.2010. Since the impugned notification has been issued while deciding the representation on administrative side by the State Government, it shall be deemed to be administrative in nature. Learned Senior Counsel further submits that once in pursuance of Circular dated 22.9.2009, issued under Rule 8 (4) of Census Rules, 1990, followed by notification dated 22.12.2009 issued by the State Government itself, the boundaries of revenue districts, tahsils, local bodies is not to be changed, then it was not open for the State Government to exercise the power conferred by Section 11 of the U.P. Land Revenue Act. Notification being repugnant to the notification issued under Rule 8 (4) of Census Rules, is not sustainable and suffers not only from vice of arbitrariness but also is inoperative, illegal and void.

22. Learned Senior Counsel further submits that after lapse of almost 10 years, it was not open to the State Government to revive the districts under the garb of Section 11 of the U.P. Land Revenue Act read with Section 21 of General Clauses Act that too, while deciding a representation.

DICTIONARY MEANING & INTERPRETATION

23. Whether the Notification issued under Section 11 of the Act read with Section 21 is a legislative or administrative act, is a question which may be considered keeping in view the meaning assigned to the words, in different reference books.

24. The Legislative, Executive or Administration and the Judiciary, are the three arms of the Government collectively discharge sovereign function. The function of the Government are classified. *"The Halsbury's Laws of England"* Fourth Edn. Vol. 1, at page 7, discussed the organs and functions of the Government as under:

"4. Organs and functions of government. There are three principal organs of government: the legislature (the Queen in Parliament), the executive or administration, and the judiciary. The functions of government are classified as legislative; executive or administrative; judicial; and ministerial. Broadly, legislative acts entail the formulation, making and promulgation of new rules of law which are general in application; executive and administrative acts entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of individual discretionary decisions; judicial acts involve the determination of questions of law and fact, or the exercise of limited discretionary power, in relation to claims and controversies susceptible of resolution by reference to pro-existing legal rules or standards, or the adoption of a procedure analogous to that of a court of law in the course of resolving a disputed issue; ministerial acts consist of the performance of a public duty in the discharge of which little or no discretion is legally permissible. Potentially important legal consequences flow from the designation of a function as legislative, executive or administrative, judicial (or quasi-judicial), or ministerial. Precise definition of these categories are however, unattainable; one class of function tends to shade off into another, and in practice classification varies according to the context and the purpose for which classification is attempted."

25. While discussing the legislative work of Parliament, *"The Halsbury's Laws of England"* Fourth Edn. Vol. 34, at page 488, rules that main task of legislation is to pass bills and make law to reproduce:-

"1222. Public and private bills. Bills submitted to Parliament are divided into two classes and are described either as public or private bills. A public bill may be introduced by a member of either House, but a private bill may only be laid before Parliament upon a petition presented by the parties interested. With certain exceptions each House has the right to originate and pass any public bill."

26. The dictionary meaning of the word, 'legislation' in the *Stroud's Judicial Dictionary of Words and Phrases* 7th Edn. Vol.2, pg.1503 and 1504, are as under:-

"LEGISLATION. A national regulation on social security matters whose effects extended to persons carrying out or who had carried out activities partially or wholly outside the

Community was to be regarded as "legislation" within the meaning of Art.2 of EEC Regulation No.1408/71 (*Van Roosmalen v Bestuar van de Bedriffsvereniging voor de Gezondheid,* The Times, October 29, 1986).

Stat. Def., "means any enactment, Community legislation or subordinate legislation" (s.135 of the Finance Act 2002 (c.23)).

"Private legislation in Parliament", Stat. Def., Environment Act, 1995 (c.25), s.28 (3); see also Enactment."

27. The words, 'legislation' and legislative in Concise Oxford English Dictionary Indian Edn., are defined as under:

legislation n. laws collectively, the action of legislating

--Origin C17. from late L. legis lativ(n.), lit. 'proposing of a law'.

legislative /'ledyslativ/ adj. having the power to make laws, 2. relating to law or a legislative.

--DERIVATIVES. **legislatively** adv."

28. In Jowitt's Dictionary of English Law Vol.2, Second Edn. 1977, at page 1081, the word, 'legislation', is defined as under:

Legislation, the making of law; any set of statutes.

29. In 'Words and Phrases' Permanent Edn. Vol. 24B, the words, "Legislation" and "Legislative", are defined as under:

...

Ala. 1908. The word "legislation," as used in Const. $$ 76, 246, providing, respectively, that as a special session of the Legislature there shall be no legislation upon subjects other than those designated in the call for the session except by vote of two-thirds of each House, and that no railroad shall have the benefit of any future legislation by general or special laws, refers to the enactment of statutes and is not descriptive of the processes by or through which laws are perfected by constituted authority, and hence such sections do not forbid the introduction of bills not within the subjects specially designated in the proclamation, unless the named proportion of the respective Houses sanction it.--State v. Skeggs, 46 So. 268, 154 Ala.249.

C.A.D.C. 1992, "Legislative" or "substantive rule" is one that does more than simply clarify or explain statutory term or confirm regulatory requirement or maintain consistent agency policy, for purpose of determining whether notice and comment rule making is required under the Administrative Procedure Act (APA), 5 U.S.C.A. $ 553--National Family Planning and Reproductive Health Ass'n. Inc. v. Sullivan, 979 F.2d 227, 298 U.S. App. D.C. 288.--Admn. Law 382.1.

C.A. 9 (Hawai'i) 2003. A court determines whether an action is "legislative," for purposes of legislative immunity under $1983, by considering each of four non-mutually exclusive factors; (a) whether the act involves ad hoc decision making, or the formulation of policy, (2) whether the act applies to a few individuals,

or to the public at large, (3) whether the act is formally legislative in character, and (4) whether it bears all the hallmarks of traditional legislation. 42 U.S.C.A. $1983.---Kaahumanu v. County of Maui. 315. F. 3d 1215.---Civil R 1376 (1).

M.D. Ala. 1973, Whether rules are "legislative" or "interpretative" for purposes of determining "scope of judicial review" depends initially on whether they have been issued pursuant to a grant of law-making power, but as a practical matter, the particular classification given a rule depends in large measure on whether the focus of the reviewing court is on the propriety of the procedure followed by the agency in issuing the rule or on the substantive reasonableness or correctness of the rule.---Opelika Nursing Home, Inc. v. Richardson, 356 F. Supp.1338.---Admin Law 797.

D.N.H. 1996, In determining whether proceeding are "legislative" in character, and thus protected by absolute immunity, or "administrative," and not so protected, court considers whether underlying facts on which decision is based are "legislative fact," such as generalizations concerning policy or state of affairs, in which case decision is legislative, or if facts used in decision making are more specific, relating to particular individuals or situation, in which case decision is administrative; court also considers whether action involves establishment of a general policy, and so is legislative, or whether action singles out specifiable individuals and affects them differently from others, and so is administrative.---Miles-Un-Ltd., Inc. v. Town of New Shorehum, R.I., 917 F.Supp. 91.--Offic 114.

Colo, 1987. In most cases, tests of whether proposed initiative or referendum permissibly relates to legislative matter or impermissibly relates to administrative matter, are that action that relate to subjects of a permanent or general character are "legislative," while those that are temporary in operation and effect are not, and that acts necessary to carry out existing legislative policies and purposes which are properly characterized as executive are deemed "administrative," while acts constituting declaration of public policy are deemed to be legislative, and in appropriate cases a third test exists which provides that amendment to original legislative acts is likewise legislative.---City of Idaho Springs v. Blackwell, 731, P.2d 1250--Statut. 303, 343.

Nev. 2002. Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of "legislative" power, whereas, acts which are to be deemed as acts of "administration," and classed among those governmental powers properly assigned to the executive department, are those which must be done to carry out legislative policies and purposes already declared by the legislative body, or which are inherent in its existence.---Citizens for Public Train Trench Vote v. City of Reno, 53 P.3d 387, 118 Nev. 574, rehearing denied.---Mun Corp 108.2.

Ind. 1912. The words "legislative power", as used in Const. Art. 4 $ 1, conferring legislative power on the General assembly, mean the power or authority, under the Constitution or form of government, to make, alter, and repeal laws and to pass any law within the orginary function of legislation not delegated to the federal government or prohibited by the state Constitution, not transferring,

however, from the people fundamental legislative power.--Ellingham v. Dye, 99 N.E. 1, 178 Ind 336, Am.Ann. Cas. 1915C,200, appeal dismissed Marshal v. Dye, 34 Sct. 92, 231 U.S. 250, 58 L.Ed. 206.

W.D.Wash. 1914. Judicial Code, Act March 3, 1911, c. 231, 36 Stat. 1162, 28 U.S.C.A. $$ 1253, 2101, 2281, 2284; U.S.Ct.Cl. Rule 10, 28 U.S.C.A. Provides that no interlocutory injunction restraining the enforcement of any state statute shall be issued by any justice of the Supreme Court or any District Court of the United States, or by any judge thereof, or circuit judge acting as a District Court, for unconstitutionality, unless the application shall be presented to a justice of the Supreme Court of the United States or to a court or district judge, and shall be determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two either circuit or district judges, and unless a majority of the three shall concur in granting the application. Held, that the word "statute" meant the express written will of the Legislature, rendered authentic by certain described forms and solemnities, the word "Legislature" being synonymous with General Assembly of the state, and did not include city ordinances, which are laws passed by the governing body of a municipal corporation; and a federal District Court, presided over by a single judge, had jurisdiction to restrain the enforcement of city ordinances attempting to repeal the franchises of a railroad company, under a bill alleging that such repealing ordinances were violative of the railroad company's contract rights under the federal Constitution.--Calhoun. v. City of Seattle, 215 F. 226.

30. In **AIR 1952 SC 252: The State of Bihar. Vs. Sir Kameshwar Singh,** Hon'ble Supreme Court while dealing with Article 31 (4) of the Constitution, held that the term, "legislature" is not always used in the Constitution as including the Governor, though article 168 makes him a component part of the State Legislature. The word, "legislature" means the house or houses of Legislature and does not include the Governor within its ambit. At some place, the Governor may include along with the house of legislature while at other place, it only means the house or houses of Legislature.

31. While reiterating the aforesaid proposition of law in the case reported in **(S) AIR 1956 SC 503: Bhairabendra Narayan Bhup vs State of Assam,** Hon'ble Supreme Court held that the word, "Legislature" has been used in article 389 in the larger sense, namely, comprising all the units that were concerned in the entire legislative process and included His Majesty represented by the Governor-General or the Governor, as the case might be.

32. In a case reported in **1975 Supp. SCC 1: Indira Nehru Gandhi Versus. Shri Raj Narain and another,** Hon'ble Supreme Court ruled that it is for the Legislature to make a law or amend a law and Court may not substitute its own opinion for that of legislature. The essence of distinction between the legislative and judicial power has been considered by the Hon'ble Supreme Court and held that legislature makes new law which becomes binding on all persons or on whom the legislature exercises legislative power.

33. In **AIR 1979 SC 1415: Union of India and others. Vs. Valluri Basavaiah**

Chouwdhary and others, Hon'ble Supreme Court held that the Governor is the component part of Legislature but cannot participate in the procedure of State Legislature.

34. Broadly, legislative function means bill or resolution passed or a decision taken by legislature of a State or in context of Central Government, by the Parliament, independent of any regulatory Government order or guideline.

35. Administrative or executive functions are different than the legislative functions. According to Halsbury's Laws of England 4th Edn. Vol.8, no comprehensive definition can be given to administrative or executive functions but they may be said to entail the formulation or application of general policy in relation to particular situations or cases, to quote from Halsbury's Laws of England, as under:

"814. The executive. Although the legislative, executive and judicial functions are formally distinct, it is not the case the executive functions are exclusively performed by the executive, or that the executive does not engage in functions which would normally be described as legislative or judicial in character.

Executive functions are incapable of comprehensive definition, for they are merely the residue of functions of government after legislative and judicial functions have been taken away. They may, however, be said to entail the formulation or application of general policy in relation to particular situations or cases, or the making or execution of individual discretionary decisions. More specifically, they include the execution of law and policy, the maintenance of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provisions or supervision of such services as education, public health, transport and national insurance.

In the performance of these functions, public authorities may be empowered by statute to exercise functions which are strictly legislative or strictly judicial in character; in addition certain discretionary actions of the executive are not far removed form legislation and certain decisions affecting personal and proprietary rights, whilst not strictly judicial, have been held to give rise to a duty to act judicially."

36. In *"Words and Phrases"* Permanent Edn. Vol. 2A, the words, 'administrative function' of the Government has been defined as under:

ADMINISTRATIVE FUNCTION

Cal. App. 1 Dist. 1942. In the exercise of an "administrative function" there is lacking the power to determine according to the law, and the most that such a function can embrace is the power to ascertain a fact or state of facts which will justify a course of action, but where it is concluded how the law operates upon a set of facts, the law must of necessity be declared. Const. Art. 3, $ 1.--Board of Ed. of San Francisco Unified School Dist. v. Mulcahy, 123 P. 2d 114, 50 Cal. App. 2D 418.--Courts 1.

Kan. 1940. The State Corporation Commission's stay order, in the nature of a temporary injunction prohibiting the commission from enforcing a basic gas proration order, designed by the commission to form the basis standard, or

guide, pursuant to which it proposed to fix the allowable production for various gas wells in certain gas field, was prematurely and improvidently issued, since it was solely the "administrative function" of the commission to hold the hearing to receive and consider evidence to determine the schedule of allowable and not that of the district court or of the Supreme Court. Gen. St. 1935, 55--701 et seq.--Hayward v. State Corporation Commission, 101 P 2d 1041, 151 Kan. 1008.-- Mines 92.63.

Mont. 1977. In view of fact that acceptance of bids and use of funds for pawing roads are "administrative functions," where resolution proposed for voter referendum was in express terms of whether funds should be expended and bids accepted for a paving project and where resolution, if enacted, would provide that no funds of any nature might be used for paving or oiling a certain segment of country road and that no bid from any person might be accepted, resolution sought to govern "administrative functions" of the board of county commissioners which were not subject to referendum and therefore, proposed referendum was invalid. Cons. 1972. art. 3 $$4, 5; art. 5, $ 1; art. 11, $ 8; R.C.M. 1947, $$ 11-1104 et seq., 37--301 et. Seq., 37--301 (1, 2).--Chouteau County v. Grossman, 563 P. 2d 1125, 172 Mont. 373.--High 97.5.

N.Y. Sup. 1950. The state rent administrator in fixing and enforcing maximum rents exercised purely "legislative" and "administrative functions" as distinguished from "judicial or quasi judicial functions" and hence prohibition would not lie to restrain administrator from enforcing maximum rent established by him pursuant to Emergency Housing Rent Control Law, particularly where regulation as to maximum rent had already been adopted and promulgated. McK. Unconsol. Laws, $$ 8581 et seq., 8584; Civil Practice Act, $$ 1283 et seq., 1284, subd. 4.-- Baldwin Gardens v. Mc.Goldrick, 100 N.Y.S. 2D 548, 198 Misc. 743.-- Prohib 6 (2).

37. Thus, keeping in view the discretionary meaning as well as interpretation given by Hon'ble Supreme Court, ordinarily, the 'Legislation' means, making of law, any set of statutes, rules and regulations, and exercise of power under such Legislative enactment or constitutional provision (Article 154, 162, 166), shall be administrative in nature. The statutory provisions or the Act is a legislative declaration of public purpose making provisions for ways and means of accomplishment whereas, the power exercised by the Government through the executive department to carry out the executive policies and purpose, may be administrative in nature.

STATUTORY AND EXECUTIVE FUNCTION

38. U.P. Land Revenue Act, 1901 (In short Act) is pre-constitutional statute. Under Article 372 of the Constitution, all the laws in force in the territory of India, immediately before the commencement of the Constitution shall continue in force, until altered or repealed or amended by a competent Legislature or other competent authority.

Under Clause (2) of Article 372 of the Constitution, the power is conferred on the President of India to make such adaptations and modifications of any law within three years from the commencement of the Constitution, by the Presidential order.

39. The U.P. Land Revenue Act, 1901, was enacted during the Colonial Rule when the British took over the revenue administration of India.

The Land Revenue Act deals with the maintenance of revenue records, maps, agricultural and abadi land, creating different posts to administer and to exercise power with regard to revenue matters, collection of records, reading of maps and records and provide procedure for revenue courts and revenue officers containing provisions with regard to the appeal and revision also with regard to the decision taken by the competent authority in relation to the agricultural land.

40. When the British took over the revenue administration of India, the Government issued a series of Regulations relating to the revenue law. The revenue law was thus contained in several Bengal Regulations issued between 1795 and 1833 and enactment passed from 1834 to 1863. The directions issued from time to time to revenue officials were also collected under the heading "Directions to Settlement Officers and Collectors" by Mr. Thompson. The N.W.P. Land Revenue Act No.19 of 1873, was the first consolidating and amending Act relating to North-Western Provinces which later on came to be known as the Province of Agra. The first Oudh Revenue Act, being Act No.17 of 1876, was also passed to consolidate and amend the law relating to land revenue in Oudh. Both these Acts (which had replaced Mr. Thompson's manual referred to above) and certain minor Acts were replaced by the present U.P. Land Revenue Act, 1901, which unified the law relating to land revenue in Agra and Oudh in one code, an object which was achieved by the U.P. Tenancy Act, 1939, nearly 38 years later, in relation to agricultural tenancies.

Both the systems of land tenure came to exist in U.P. as a result of merger of some Indian States or parts or enclaves of others into the then United Provinces of Agra and Oudh (now Uttar Pradesh). U.P. Zamindari Abolition and Land Reforms Act (U.P. Act 1 of 1951) abolished the zamindari system. It amended U.P. Land Revenue Act, 1901 in stages in the various areas, as and where the zamindari was abolished under U.P. Act 1 of 1951.

Later under the U.P. Urban Area Zamindari Abolition and Land Reforms Act (U.P. Act 9 of 1957), the zamindari was abolished in agricultural areas demarcated under it within the Town Areas, the Notified Areas, Municipalities, Cantonments and Corporations (hereinafter referred to as the urban areas). These Acts made a sea change in this Act.

41. In view of Article 372 of the Constitution, the Act continues to deal with the matter regulating the land laws in the State of U.P. However, certain provisions were omitted and substituted by the A.O. 1950 and in Section 11 of the Act, the word, 'State Government' was added. The power has been conferred by the amended Section 11 of the Act on the State Government to alter the limits or any division, district or tahsil and may create new or abolish existing tahsil. Section 11 of the Act is reproduced as under:-

"11. Power to create, alter and abolish divisions, districts, tahsil and sub-divisions.--(1) The State Government may create new or abolish existing divisions or districts.

(2) The 'State Government' may alter the limits or any division, district or tahsil and may create new or abolish existing tahsil, and may divide any district into sub - divisions, and may alter the limits of sub-divisions.

(3) Subject to the orders of the 'State Government' under sub-section (2), all tahsils shall be deemed to be sub-divisions of districts."

42. Section 12 of the Act empowers the State Government to appoint Divisional Commissioner in each division who shall exercise power and discharge duty conferred upon him under the Act or any other law for the time being in force. Under Section 14 of the Act, State Government has been conferred power to appoint collector in each district who shall exercise power and discharge duty conferred under the Act or any other law for the time being in force.

Section 221 of the U.P. Land Revenue Act provides that while conferring power under the Act, State Government may empower persons by name or classes of officials generally by their official titles, to quote Section 221 of the U.P. Land Revenue Act as under:-

"221. Conferring of powers-- In conferring powers under this Act, the State Government may empower persons by name, or classes of officials, generally, by their official titles, and may vary or cancel any such order."

The power conferred by Section 221 of the Act is analogous to power conferred by Section 14 of the U.P. General Clauses Act 1904.

43. Entry 5, 18, 45, 46, and 47 of List-II of Schedule-VII of the Constitution of India, empowers the State Government to legislate the law with regard to local Government and local authorities, village administration, land and land revenue including assessment and collection of revenue, taxes on agricultural income etc. For convenience, they are reproduced as under:-

"5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

46. Taxes on agricultural income.

47.Duties in respect of succession to agricultural land."

44. Section 4 (42B) of the U. P. General Clauses Act, 1904, defines the statutory instrument which is reproduced as under:-

"4 (42B) 'statutory instrument' shall mean any notification, order, scheme, rule,

or bye-law issued under any enactment and having the force of law ;"

Thus, even an order may be statutory instrument in case issued by the Government under the power conferred by an Act.

Admittedly, the guidelines of 1992 Government order has been relied upon by the Government from time to time while issuing impugned notification.

45. A plain reading of the statutory provisions reveals that though the State Government has conferred power to alter the limits of revenue districts or create new or abolish existing revenue districts but it does not envisage the ground or criteria to deal with the subject matter. In view of the above, admittedly, the Government has issued an order addressing the Chairman, Board of Revenue laying down certain criteria to be taken into account during the creation of districts.

46. It is vehemently argued that the Government order 1992 is not binding. There appears to be no dispute over the proposition of law that policy decision and order in the form of guidelines may be deviated and are directory in nature, vide **AIR 1974 SC 1539 Andhra Industrial Works vs. Chief Controller of Imports and others; 1990 Supplementary SCC 440: Gonendra Kumar Maheshwari. Vs. Union of India; Chief Commercial Manager, South Central Railway, Secunderabad and Ors. v. G. Ratnam and Ors., (2007) 8 SCC 212.**

47. However, the facts, circumstances and controversy in question should be looked into with different angle. Section 11 is silent with regard to grounds or criteria necessary to be looked into while creating districts for discharge of statutory power. Under Section 11, read with Section 221 of the Act the Government has got no right to issue order or circular to fill up the gap, and confer power for appropriate purpose. The statutory provisions or rules may be supplemented and vacuum may be filled up by executive instructions, vide **AIR 1967 SC 1910: Sant Ram Sharma. Vs. State of Rajasthan and others; 1977 SC 757: Union of India and another. Vs. Majji Jangammayya and others; AIR 1991 SC 2288:Comptroller & Auditor General of India and others. Vs. Mohan Lal Mehrotra and others; 1998 SC 431: Naga People's Movement of Human Rights. Vs. Union of India; AIR 1998 SC 2496: C. Rangaswamaiah & others. Vs. Karnataka Lokayukta and others.**

48. The 1992 Government order provides criteria with regard to grounds for creation of new districts which include the area, population, infrastructure, financial aspects etc. It supplements the provision contained in Section 11 of the Act directing to Chairman, Board of Revenue to ensure its compliance. Hence it shall be binding on the Government. Moreover, the State Government itself relied upon the 1992 Government order as is evident from the material on record (supra) hence there appears to be no reason to defy it.

49. In pursuance of Entry 18 and 45 of the List-II of Schedule-VII, the State Legislature has been conferred exclusive power to legislate the law with regard to land and land revenue. Accordingly, different provision of the Act has been amended from time to time by the State Legislature to keep pace with time. Being not relevant, need not to refer those provisions and may be noticed by bare

reading of the statutory provisions contained in the Act. However, it may be noted that the amendment in the Act has been done by the State Legislature like U.P. Act No.37 of 1958, U.P. Act No.1 of 1951, U.P. Act No.10 of 1961 etc.

50. Article 12 of the Constitution, defines 'State' which includes the local bodies, corporation and other statutory authorities.

Article 154 deals with the executive power of the State which is vested in Governor and Article 162 deals with the extent of executive power of the State and Article 166 deals with the conduct of business of the State. For convenience, Article 154, 162 and 166 are reproduced as under:-

"154. Executive power of State.-

(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

(2) Nothing in this article shall-

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

162. Extent of executive power of State.-

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

166. Conduct of business of the Government of a State.-

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion."

51. The provisions contained in Article 154, 162 and 166 of the Constitution of India, deal with executive power of the State and conduct of business of the State Government. The word, "executive power',

has got very wide expression. It connotes the residue of governmental functions and includes acts necessary for carrying on or supervision of general administration of the State Government which include a decision as to action and the carrying out of the decision so taken. Some of the executive power may partake of legislative or judicial character, vide **AIR 1955 SC 549: Rai Sahib Ram Jawaya Kapur and others. V. The State of Punjab; (1996) 2 SCC 305; State of M.P. Vs. Yashvant Trimbak (Dr.); AIR 1961 SC 221: State of Bihar Vs. Sonabati Kumari and AIE 1974 SC 2192: Samsher Singh Vs. State of Punjab.**

The executive power of the State is co-extensive with the legislative power, but State power is limited to secure public interest within the frame work of the Constitution and statutory provisions. The Executive cannot go against the provisions of the Constitution or any law (supra). In any case, the legislation shall be necessary if the executive action affects the right of citizen (supra).

However, in absence of any provisions, the State Government may exercise their executive power by issuing administrative rules, orders, circulars or instructions so long as the Legislature does not make any law on that subject vide, **AIR 1982 SC 32: Bishamber Dayal Chandra Mohan. Vs. State of U.P.; AIR 1981 SC 2030: Sarkari Sasta Anaj Vikreta Sangh. Vs. State of M.P.**

In a case where executive power is conferred or regulated by statute like in the present case, the exercise of State power must be limited by the terms of that statute so that in appropriate case, during judicial review of the action taken, court may inquire into the validity of any act done in exercise of that power on the ground of ultra vires, mala fide or abuse of power, vide **AIR 1961 SC 751: State of U.P. Vs. Babu Ram Upadhya; AIR 1967 SC 1145: B.L. Cotton Mills. Vs. State of W.B.; AIR 1968 SC 870: Ishwarlal Girdharilal Joshi. Vs. State of Gujarat:; AIR 1979 SC 1676: Nagarjun B.N. Vs. State of Karnataka.**

52. The Section 11 of the U.P. Land Revenue Act, confers power on the State Government to take decision with regard to creation of district. Accordingly, power conferred under Section 11 of the U.P. Land Revenue Act is statutory in nature and the decision taken, shall have statutory force. Since the power has been conferred on the State Government and Article 166 deals with the manner in which the State Government shall conduct its business, the decision taken by the State Government, shall be in the name of Governor of the State in view of Clause (1) of Article 166 of the Constitution. A decision taken by the State Government further shall be authenticated by the Governor of the State in the manner prescribed by the Rules of Business. The Rules shall be framed to conduct business of the Government, commonly known as "Rules of Business of the Government"

53. In pursuance of power conferred by Article 166 of the Constitution, the Government of Uttar Pradesh had framed Rules namely, the Uttar Pradesh Rules of Business, 1975 (In short the Rules of Business). For convenience, the entire Rules of Business is reproduced as under:

"THE UTTAR PRADESH RULES OF BUSINESS, 1975

In exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India, the Governor of Uttar

Pradesh is pleased to make the following Rules, namely:

1.*Short title*--These Rules may be called the Uttar Pradesh Rules of Business, 1975.

2.*Definition*--In these Rules "Department" means any of the Departments specified in the Business of Uttrar Pradesh (Allocation) rules, 1975.

3.*Disposal of Business*-- Subject to the provisions of these Rules in regard to conclusion with other departments and submission of cases to the Chief Minister, the Cabinet and the Governor, all business allotted, to a department under the Business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special direction of the Minister-in-charge.

4.*Inter-departmental Consultations*-- (1) When the subject of a case concerns more than one department, no order shall be issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

Explanation--Every case in which a decision, if taken in one department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department.

(2) Unless the case is fully covered by powers to sanction expenditure or to appropriate or reappropriate funds conferred by any general or special orders made by the Finance Department, no department shall, without the previous concurrence of the Finance Department, issue any orders which may--

(a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the Appropriation Act;

(b) involve any grant of land or assignment of revenue or concession, grant, lease or licence or mineral or forest rights or a right to water power of any easement or privilege in respect of such concession;

(c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of government servants or to any other conditions of their service having financial implications; or

(d) otherwise have a financial bearing whether involving expenditure or not:

Provided that no orders of the nature specified in clause (C) shall be issued in respect of the Finance Department without the previous concurrence of the Department of Personnel.

(3)The Law Department shall be consulted on:--

(a) proposals for legislation;

(b) the making of rules and orders of a general character in the exercise of a statutory power conferred on the Government; and

(c) the preparation of contracts and assurances to be entered into by the Government.

(4)Unless the case is fully covered by a decision or advice previously given by the Department of Personnel that Department shall be consulted on all matters involving--

(a) the determination of the methods of recruitment and conditions of service of general application to government servants in civil employment, and

(b) the interpretation of the existing orders of general application relating to such recruitment or conditions of service.

(5)Notwithstanding anything contained in sub-rules (1), (2) and (4), the Department in-charge of a case may, while consulting any Department other than the Law Department and Finance Department, as required under these rules, set a time-limit, which shall ordinarily not be less than two weeks, and if the comments of the Department consulted are not received within the time-limit, the Department in-charge of the case may presume that the Department consulted has no comments to offer or no views to express. It may thereupon recall its file from the Department consulted and take its own decision accordingly, except where these rules require the concurrence of the Department consulted.

(6) For the removal of doubts, it is hereby declared that the mere fact that the advice of any other Department is sought should not mean that its consent is necessary, and the Department seeking advice may take its own decision according to these rules while differing from the Department consulted.

5.*Request for Papers*-- (1) The Chief Minister may call for papers from any department.

(2) The Finance Minister may call for papers from any department in which financial consideration is involved.

(3) Any Minister may ask to see papers in any other department if they are related to or required for the consideration of any case before him.

(4) *(a)* The Chief Secretary may, on the orders of the Chief Minister or of any Minister or of his own motion, ask to see papers relating to any case in any Department and any such request by him shall be complied with by the Secretary of the Department concerned.

(b) The Chief Secretary may after examination of the case, submit it for the orders of the Minister-in-charge or of the Chief Minister through the Minister-in-charge.

(6) *Committees of Cabinet*-- (1) Ad hoc Committees of of Ministers may be appointed by the Cabinet or by the Chief Minister for investigating and reporting to the Cabinet on such matters as may be specified, and, it so authorised by the Cabinet, for taking decisions on such matters.

(2) Any decision taken by an Ad hoc Committee may be reviewed by the Cabinet.

(3) No case which concerns more than one department shall be brought before an Ad hoc Committee of the Cabinet until all the departments concerned have been consulted.

(7) S*ubmission of cases to the Cabinet*-- All cases specified in the First Schedule to these Rules shall be brought before the Cabinet :

Provided that no case which concerns more than one department shall, save in cases of urgency, be brought before the Cabinet until all the departments concerned have been consulted.

(8) *Submission of cases to the Chief Minister and the Governor*-- All cases of the nature specified in the Second Schedule to these Rules shall, before the issue of orders thereon, be submitted to the Chief Minister or to the Governor or to the Chief Minister and the Governor as indicated therein.

(9) *Submission of periodical returns to the Cabinet*-- Each department shall submit to the Cabinet a periodical summary of its principal activities and such other periodical returns, as the Cabinet or the Chief Minister may from time to time require.

(10) *Responsibility of Departmental Secretaries*-- In each department, the Secretary (which term includes a Special Secretary or Joint Secretary, if any, in independent charge) shall be the administrative head thereof, and shall be responsible for the proper transaction of business and the careful observance of these rules in that department and if he considers that there has been any material departure from them he shall personally bring the matter to the notice of the Minister-in-charge and the Chief Secretary.

(11) *Departure from Rules*-- The Chief Minister may, in any case or classes of cases, permit or condone a departure from these rules to the extent he deems necessary.

(12) *Supplementary Instructions*-- These Rules may to such extent as may be necessary be supplemented by Instructions to be issued by the Governor on the advice of the Chief Minister.

13. (1) The Uttar Pradesh Rules of Business, 1955 are hereby rescinded except as respects things done or omitted to be done thereunder.

(2) Notwithstanding such recession, the U.P. Secretariat Instructions, 1955 shall, until rescinded or amended by instructions issued under rule 12 of these rules continue in force as if they were issued under the said rule 12."

A plain reading of sub-rule (2) of Rule 4 reveals that without previous concurrence of Finance Department, no order shall be issued which involve abandonment of revenue or involve any expenditure for which, no provision has been made in Appropriation Act. The statutory power shall be exercised with due consultation of Law Department. The Rules of Business read with constitutional provisions (Articles 266 and 267) makes it obligatory for the State to generate money for the purpose of creation of district and for the purpose a decision is to be taken by the Cabinet within the constitutional frame.

54. Rule 7 of the Rules of Business deals with the matter which is to be placed before the Cabinet. The items have been provided under the First Schedule of the Rules of Business. Item No.6 and 7 provide that annual financial statement shall be laid before the State Legislature along with demand of supplementary, additional or excess grant in terms of Cabinet decision. The proposal with regard to lumpsum allotment of fund shall also be placed before the State Legislature subject to approval by the Cabinet. Item No.6 and 7 (supra), is reproduced as under:

"6. The annual financial statements to be laid before the Legislature and demands for supplementary, additional of excess grants."

7. Proposals for making lump sum allotments regarding any scheme, unless the proposal has been considered by the Cabinet in connection with the Budget or supplementary or additional demands. Also proposals for making assignments out of such lump sum allotment."

55. Apart from the above, the First Schedule contains 32 items which are to be brought before the Cabinet for decision which includes annual audit review of finances of State, proposal with regard to change of policy or contracts, change in the administrative system of State, change in the condition of service of members of any State service or in the method of recruitment to service or post to which appointment is made by the Government, proposal for legislation, issuance of ordinance, amendment of rules, framing of rules, cases involving financial implication, decision by Finance Minister, major policy, winding up amalgamation or creation of new corporation, companies owned by the Government or by public sector, summing or prorogue House of Legislature, appointment or renewal of Advocate General, etc.

Needless to say that combined reading of Rules of Business with Appendix-I, reveals that decision with regard to creation of district is to be taken by the State Cabinet authenticated by the Governor with subsequent notification. While taking a decision to create revenue district, it shall be obligatory to generate fund within the constitutional frame.

56. Since the power has been conferred by the Statutory provisions, i.e., Section 11 of the U.P. Land Revenue Act, it shall not be necessary for the State government to take shelter of Article 154 and 162 of the Constitution, but the decision should be taken in accordance with the Rules of the Business in terms of Rules framed under Article 166 of the Constitution unless, some provision has been made in the Act itself in consonance with the constitutional provisions.

In the present case, the State Government took a decision for creation of district by rescinding earlier one while exercising power under Section 11 of the U.P. Land Revenue Act read with Section 21 of General Clauses Act while deciding the representation of Sri Uma Shanker Pandey in pursuance of the judgment and order dated 26.3.2010 passed in Writ Petition No.6077 (M/B) of 2003. The decision taken by the State Government while deciding the representation, is in pursuance of statutory power conferred by the enactment like Section 11 of the U.P. Land Revenue Act read with Section 21 of General Clauses Act, seems to be a decision taken on administrative side by the authority of the State Government. Hence it appears to be administrative in nature.

57. In the case of Rai Sahib Ram Jawaya Kapur (supra), Hon'ble Supreme Court held that it may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away, to quote relevant portion of para 12 as under:-

"12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of executive are limited merely to the carrying out of these laws."

The case of Rai Sahib Ram Jawaya Kapur (supra), has been followed by another Constitution Bench of Hon'ble Supreme Court reported in State of M.P. Vs. Bharat Singh and Jayantilal Amrit Lal Shodhan (supra) and other subsequent judgments.

58. A combined reading of Articles 154, 162, 166 of the Constitution and Section 11 of the U.P. Land Revenue Act, does not make a decision with regard to creation of district, legislative in nature. Conferment of executive power on the State Government under Section 11 of the Act by the State Legislature, is itself indicative of the fact that the power exercised by the State Government for creation of district shall be administrative in nature, may have legislative trapping. It is residual power exercised by the State Government, in terms of Government order of 1992.

59. It is well settled principles of law that ordinarily, statutes should be construed literally and no causus omicus should be supplied unless there is vacuum or ambiguity in the statutory provisions vide, **2006 (2) SCC 670, Vemareddy Kumaraswamy Reddy and another VS. State of A.P.; (2004) 11 SCC 625, Delhi Financial Corporation and others Vs. Rajeev Anand and others; AIR 1953 SC 148, Nalinakhya Bysacik Vs. Shyam Sunder Haldar and 2001 (8) SCC 61, Dental Council of India Vs. Hari Prakash.**

60. Under Section 11 of the Act, power with regard to alteration of limits oF any division, district or tahsil has been conferred on the State Government and not on the State Legislature. Chapter-III of the Constitution deals with the State Legislatures. The State Legislatures are constituted through electoral body and discharges its constitutional obligations in the manner prescribed by the Constitution.

61. Section 11 of the Act does not require a decision by the State Legislature but it confers power on the State Government. It is well settled law that executive power of the State is co-extensive with that of the State Legislature. The State may make rules regulating any matter within the legislative competence of the State Legislature without prior legislative

authority except where a law is required. It is further trite law that where statutory rules govern the field, the executive instructions shall cease to apply and they cannot be in derogation of statutory rules, vide **AIR 1971 SC 2560: State Of Andhra Pradesh & Ors vs Lavu Narendranath & Ors.; AIR 1971 SC 2045 : State of Madhya Pradesh Vs. Jain.; AIR 2006 SC 2138, K.P. Sudhakaran. Vs. State of Kerala; AIR 2008 SC 3: Union of India Vs. Central Electoral Mechanical Engineering Group A (Direct Recruit) Association).**

62. It is further held by Hon'ble Supreme Court that proper function of the State administration should not be jeopardised to ego clashes between high officers. Powers should be exercised for public good and not for personal benefit or extraneous reasons, vide, **AIR 1996 SC 430 State of Assam Vs. P.C. Mishra.**

63. Hon'ble Supreme Court has defined the word, 'State Government' and held that it means the authority or person authorised at the relevant date to exercise executive power of the Government in the State and after commencement of Constitution it means the Governor of the State, vide **AIR 1964 SC 703: State of U.P. Vs. Mohammad Naim.**

64. In the case reported in **AIR 1984 SC 684 :R.S. Nayak. Vs. A.R. Antule:,** Hon'ble Supreme Court held that expression "Government" requires to be interpreted in the context used in a particular statute.

While interpreting Section 21 of Indian Penal Code, Hon'ble Supreme Court held that expression "State" denotes the the executive and not the Legislature. In earlier judgment also reported in **AIR 1963 SC 1323: State Of Rajasthan And Anr Vs Sripal Jain,** same view has been expressed.

65. In **(2006) 2 SCC 682: Shrikant Vs. Vasantrao,** while defining the word, State Government, it is held that it is different from local or other authorities under the control of the State Government. Section 11 of the Act (supra) refers to State Government which means the Government of the State exercising power under Section 11 read with 166 of the Constitution. In any case, it does not refer to State Legislature provided under Chapter-VII of the Constitution.

66. In view of the above, the power exercised by the State Government under Section 11 of the Act shall be statutory but administrative in nature having legislative trapping. The power conferred in pursuance of the provisions conferred under Section 11 of the Act is to be exercised in accordance with Rules of Business notified under Article 166 of the Constitution. In view of Section 14 of the General Clauses Act and the Government order of 1992 (supra) decision under Section 11 of the Act may not be purely legislative.

LEGISLATIVE PROVISIONS

67. It shall be appropriate that the constitutional provisions with regard to legislative action should also be looked into while considering the question framed by the Division Bench of this Court (supra). The provisions contained in Constitution of India, can neither be sidelined nor ignored while dealing with the legislative and executive functions. The manner in which the State Legislature exercise function, has been dealt with keeping in view the provisions contained in Articles 154, 162 and 166 of the Constitution. Now, it is

necessary to deal with the legislative functions and related provisions as enshrined in Indian Constitution.

68. Article 243 (a) of the Constitution of India, defines the 'district', which means a district in a State. Article 243 (f) defines 'population', which ascertains at last preceding census. Gram Sabha, Panchayat, village have also been defined under Article 243 of the Constitution. For convenience, Article 243 of the Constitution of India is reproduced as under:

"243. Definitions.-

In this Part, unless the context otherwise requires,-

(a) "district" means a district in a State;

(b) "Gram Sabha" means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level;

(c) "intermediate level" means a level between the village and district levels specified by the Governor of a State by public notification to be the intermediate level for the purposes of this Part;

(d) "Panchayat" means an institution (by whatever name called) of self-government constituted under article 243B, for the rural areas;

(e) "Panchayat area" means the territorial area of a Panchayat;

(f) "population" means the population as ascertained at the last preceding census of which the relevant figures have been published;

(g) "village" means a village specified by the Governor by public notification to be a village for the purposes of this Part and includes a group of villages so specified."

69. Part IX and IXA gives constitutional status to Panchayat & Local Bodies of a district and provides specified period to the elected representatives of the Panchayat.

70. The legislative procedure for the State Legislature has been given from Article 196 to Article 212 of the Constitution. The introduction of bill has been dealt with under Article 196 of the Constitution. Special procedure has been provided with regard to money bill under Article 198 and 199 of the Constitution of India.

71. Article 202 of the Constitution provides that in every financial year, an estimate of estimated receipts and expenditure shall be placed before the House or Houses of the Legislature of the State. Article 204 of the Constitution provides for the appropriation out of consolidated fund of the State of all moneys required to meet the grants and expenditures which are on the consolidated fund of the State. Article 205 provides for supplementary grant. For convenience, Article 202, 204, 205 and 206 are reproduced as under:-

"202. Annual financial statement.-

(1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that

year, in this Part referred to as the "annual financial statement".

(2) The estimates of expenditure embodied in the annual financial statement shall show separately-

(a) the sums required to meet expenditure described by this Constitution as expenditure charged upon the Consolidated Fund of the State; and

(b) the sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State;

and shall distinguish expenditure on revenue account from other expenditure.

(3) The following expenditure shall be expenditure charged on the Consolidated Fund of each State-

(a) the emoluments and allowances of the Governor and other expenditure relating to his office;

(b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and, in the case of a State having a Legislative Council, also of the Chairman and the Deputy Chairman of the Legislative Council;

(c) debt charges for which the State is liable including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of loans and the service and redemption of debt;

(d) expenditure in respect of the salaries and allowances of Judges of any High Court;

(e) any sums required to satisfy any judgment, decree or award of any court or arbitral tribunal;

(f) any other expenditure declared by this Constitution, or by the Legislature of the State by law, to be so charged.

204. Appropriation Bills.-

(1) As soon as may be after the grants under article 203 have been made by the Assembly, there shall be introduced a Bill to provide for the appropriation out of the Consolidated Fund of the State of all moneys required to meet-

(a) the grants so made by the Assembly; and

(b) the expenditure charged on the Consolidated Fund of the State but not exceeding in any case the amount shown in the statement previously laid before the House or Houses.

(2) No amendment shall be proposed to any such Bill in the House or either House of the Legislature of the State which will have the effect of varying the amount or altering the destination of any grant so made or of varying the amount of any expenditure charged on the Consolidated Fund of the State, and the decision of the person presiding as to whether an amendment is inadmissible under this clause shall be final.

(3) subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

205. Supplementary additional or excess grants.-

1) The Governor shall-

(a) if the amount authorised by any law made in accordance with the provisions of article 204 to be expended for a particular service for the current financial year is found to be insufficient for the purposes of that year or when a need has arisen during the current financial year for supplementary or additional expenditure upon some new service not contemplated in the annual financial statement for that year, or

(b) if any money has been spent on any service during a financial year in excess of the amount granted for that service and for that year,

cause to be laid before the House or the Houses of the Legislature of the State another statement showing the estimated amount of that expenditure or cause to be presented to the Legislative assembly of the State a demand for such excess, as the case may be.

(2) The provisions of articles 202, 203 and 204 shall have effect in relation to any such statement and expenditure or demand and also to any law to be made authorising the appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or the grant in respect of such demand as they have effect in relation to the annual financial statement and the expenditure mentioned therein or to a demand for a grant and the law to be made for the authorisation of appropriation of moneys out of the Consolidated Fund of the State to meet such expenditure or grant.

206. Votes on account, votes of credit and exceptional grants.-

(1) Notwithstanding anything in the foregoing provisions of this Chapter, the Legislative Assembly of a State shall have power-

(a) to make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure prescribed in article 203 for the voting of such grant and the passing of the law in accordance with the provisions of article 204 in relation to that expenditure;

(b) to make a grant for meeting an unexpected demand upon the resources of the State when on account of the magnitude or the indefinite character of the service the demand cannot be stated with the details ordinarily given in an annual financial statement;

(c) to make an exceptional grant which forms no part of the current service of any financial year;

and the Legislature of the State shall have power to authorise by law the withdrawal of moneys from the Consolidated Fund of the State for the purposes for which the said grants are made.

(2) The provisions of articles 203 and 204 shall have effect in relation to the making of any grant under clause (1) and to any law to be made under that clause as they have effect in relation to the making of a grant with regard to any expenditure mentioned in the annual financial statement and the law to be made for the authorisation of appropriation of moneys out of the

Consolidated Fund of the State to meet such expenditure."

72. A plain reading of clause (3) of Article 204 reveals that it puts an embargo on the State Government to the effect that subject to the provisions of articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this article.

Thus, a combined reading of the aforesaid constitutional provisions reveals that no money under the Constitution, can be drawn or spent by the State Government except in the manner provided under the Constitution.

73. The creation of districts requires huge expenditure which includes not only infrastructure including building for the officers and employees and executive as well as judiciary but also hospital and court rooms and other related paraphernalia with sufficient fund to pay salary to employees coupled with other recurring expenditures.

74. Article 266 and 267 of the Constitution deal with consolidated fund and public accounts of India as well as State. It provides that all revenue received by the Government of a State, shall form consolidated fund. Clause (2) and (3) of Article 266 further provides that all public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State and no money out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. For convenience, Article 266 of the Constitution of India, is reproduced as under:-

"266. Consolidated Funds and public accounts of India and of the States.-

(1) Subject to the provisions of article 267 and to the provisions of this Chapter with respect to the assignment of the whole or part of the net proceeds of certain taxes and duties to States, all revenues received by the Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State".

(2) All other public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the public account of the State, as the case may be.

(3) No moneys out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution."

75. The restriction imposed by Article 266 of the Constitution, makes it obligatory

on the part of the State Government to follow the constitutional procedure to generate money for the purpose of creation of new districts and to meet out the requirements in terms of the constitutional mandates, vide Rai Sahib Ram Jawaya Kapur v. The State of Punjab, 1955-2 SCR 225.

76. Different countries are governed by two different sets of Constitution i.e., Unwritten Constitution and Written Constitution. An unwritten constitution is one, in which most of the principles of the Government have never been enacted in the form of law. It consists of customs, functions, traditions and some written laws framed on different dates unsystematic, indefinite and unemphasized. Such constitutions are not outcome of conscious and deliberate efforts of the people. Ordinarily, it is based on historical development and not by a representative of constituent assembly at the definite stage of history.

On the other hand, written constitution is one promulgated on a specified date in history. For example, Constitution of India was promulgated on 26.1.1950. Written Constitution of India like Indian Constitution, contains elaborate procedure with regard to governance of the country which includes legislative, regulatory, financial, judicial, constitutional and electoral etc. The Constitution of India elaborately deals with the State and Central Legislature including their legislative and executive functions.

77. According to Wharton, the exercise of sovereign law making power, the act of making or giving enacting laws, is called legislation. According to Supreme Court of India, in fact a legislation is not confined to statute enacted by parliament or legislature of a State which would include the delegated legislation and subordinate legislation and executive order made by Union of India, State or any order statutory authority, vide **(2004) 6 SCC 254 - Kusum Ingots & Alloys Ltd. Union of India and another.**

78. However, in a case reported in **AIR 2004 SC 4057: Godawat Pan Masala Products I.P. Ltd. and another. Vs. Union Of India & Ors.,** Hon'ble Supreme Court held that notification issued to ban on manufacture, sale, storage and distribution of pan masala and gukka, shall not be a legislative act of the Government.

79. In the case reported in Kusum Ingots (supra), it has been held by Hon'ble Supreme Court that legislation is not confined to statute but it includes delegated legislation, subordinate legislation or an executive order. Their lordship held that in fact, a legislation, it is trite, is not confined to a statute enacted by the Parliament or Legislature of a State, which would include delegated legislation and subordinate legislation or an executive order made by the Union of India, State or any other statutory authority. In the present case, the statutory authority is the State Government and in terms of Section 11 of the Act, the subject matter with regard to which the State Government has been conferred the power to exercise jurisdiction i.e., creation of district, is also self-contained under Section 11 of the Act. Thus, the exercise of discretion by the statutory authority in terms of statutory provisions, may not be termed as "legislative action' but shall always be the executive action having legislative trapping. Things would have been different in case the statutory authority would have been conferred power to issue certain order

dealing with the procedure with regard to creation of district or other related matter. In the present case, the power itself has been exercised in terms of the Section 11.

80. The procedure with regard to creation of district and alteration of boundaries, has been conferred by Section 11 of the Act to the State Government and not to the State Legislature and also not by any constitutional provisions. The Legislature has amended the act from time to time conferring power on the executive to exercise it within the constitutional framework (Art. 162 read with 166). The constitutional provisions referred to hereinabove with regard to money bills and expenditure ordinarily, does not come in the way to exercise power under Section 11 of the Act. The Act itself is the outcome of an act of State Legislature. The Legislators to their wisdom have enacted the Act shifting the burden to exercise power conferred by it in public interest on the executives who are supposed to exercise power conferred by it to secure public interest.

81. Accordingly, exercise of power under Section 11 of the Act sans constitutional provisions shall be administrative in nature. There may be situation where the State Legislature take a decision to appropriate money for creation of districts and allocate fund following the constitutional provisions and in consequence thereof, Government issue a notification under Section 11 of the Act, then only, in such a situation, State action may be held to be legislative in nature.

Ordinarily, legislative power may not be regulated or guided by Government order like 1992 Government order (supra).

82. Power exercised under Section 11 of the Act shall be administrative in nature, is also borne out from the head note of Section 20 and 21 of the U.P. General Clauses Act, 1904. For convenience, Section 20 and 21 along with its head note, are reproduced as under:

"PROVISIONS AS TO [STATUTORY INSTRUMENTS] MADE UNDER ENACTMENTS

20. Construction of notifications, issued under enactments. -- (1) Where, by any [Uttar Pradesh] Act, a power to issue any statutory instruments is conferred, then expressions used in the [statutory instruments] shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power. \

[(2) The provisions of Section 4, 4-A, 6, 6-A, 6-B, 7, 8, 9, 10, 10-A, 10-C, 11, 12, 13, 14, 15, 16, 17, 18, 19, 19-A and 28 shall mutatis mutandis apply in relation to any statutory instruments issued under any Uttar Pradesh Act as they apply in relation to any Uttar Pradesh Act].

21. Power to make to include power to add, to amend, vary or rescind statutory instruments. -- Where, by any [Uttar Pradesh] Act, a power to issue statutory instruments is conferred, then that power includes a power exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any [statutory instruments] so issued."

83. A plain reading of the aforesaid provision reveals that Section 20 deals with construction of statutory instruments issued under an enactment whereas, Section 21

deals with power to make, to include, power to add, to amend, vary or rescind statutory instruments.

Needless to say that U.P. Land Revenue Act is U.P. Act, is the outcome of legislative act of the State Legislature. The impugned notification has been issued in pursuance of Section 11 of the Act read with Section 20 of the U.P. General Clauses Act, 1904. The statute as well as statutory notification issued thereon may be amended, varied or rescinded by the Government or the Legislature in public interest for the expediency of service.

84. In the case of Ram Milan Shukla (supra), the Division Bench of this Court upheld the power of the State Government to create a district by virtue of Section 11 of the Act. However, the power conferred by Section 11 of the Act was held to be administrative in nature. It was held that the Government cannot exercise power conferred by Section 11 of the Act on irrelevant consideration or in an arbitrary manner. While holding the power conferred by "Section 11 of the Act as administrative, the Division bench further opined that the appropriation of bill under Article 204 or 205 of the Constitution with regard to additional expenses, must be introduced in the State Legislature to meet out the expenses. The Division Bench was of the view that Section 11 of the Act cannot be read in isolation but it must be read along with the constitutional provisions. For convenience, relevant portion of the judgment of Ram Milan Shukla (supra), is reproduced as under:-

"14. In our opinion, before any notification under Section 11 of the U. P. Land Revenue Act is issued, an appropriation bill under Article 204 of the Constitution or a bill for supplementary or additional expenditure under Article 205 or a vote on account under Article 206 must be introduced in the Legislature and passed. This is necessary because Section 11 cannot be read in isolation, but it must be read along with the constitutional provisions. After all, creation of a new district involves heavy expenditure, and for this, the constitutional provisions must be followed. These constitutional provisions relating to financial matters have been made to ensure strict fiscal discipline and accountability. In our opinion, a district, cannot be created by a simple executive fiat at the whims and fancies of a particular individual or individuals. As already observed above, creation of a new district has serious administrative and financial implications, and it is an exercise which has an impact on the future also.

Article 204(3) of the Constitution states : "Subject to the provisions of the Articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this Article."

15. This is a principle of high constitutional importance in a democracy. It implies that every rupee spent by the Government or any public authority must be strictly accounted for to the people's representatives. In our opinion, this principle in Article 204(3) and in Article 266(3) is one of the basic features of the Constitution. This principle implies strict fiscal discipline. It is the minimum requirement of the Constitution that public money must be spent for public purposes, and. when this minimum vanishes, the entire system exists only in name or as a shell. When those entrusted with the power

of running the Constitution fail to observe fiscal discipline, the Constitution becomes unworkable.

16. The Constitution has provided in Article 148 for a Comptroller and Auditor General of India with the same high independent status as Judges of the Superior Courts and his duty is to keep a check on the accounts of the Union and the States, and report to the Legislatures vide Article 151. This also indicates that fiscal discipline was given the highest importance by the Founding Fathers, and it is a basic feature of the Constitution."

85. Thus, the case of Ram Milan Shukla (supra) provides that while proceeding under Section 11 of the Act with regard to creation of district, State Legislature has to discharge its obligation to generate fund to meet out the requirement of new district in pursuance of the Constitutional mandate (supra) seems to be correct interpretation of constitutional mandate and statutory provisions.

86. Special Leave Petitions were filed against the judgment of Ram Milan Shukla's case which was dismissed by the Hon'ble Supreme Court. In the case reported in **1999 (36) ALR 180 (SC) : District Sant Kabir Nagar Resident Welfare Association and others. Vs. Ram Milan and others,** the Hon'ble Supreme Court was pleased to pass the following order:-

"Judgment

S.V. Manohar and R.C. Lahoti.JJ-- Permission to file S.L.P. is granted in Special Leave Petition.....(CC1364/99).

Looking to the facts and circumstances as set out by the High Court in the impugned judgment no intervention is called for under Article 136. Hence the Special Leave Petitions are dismissed."

87. A plain reading of the aforesaid order passed by the Hon'ble Supreme Court shows that with due application of mind to the contents of judgment of Ram Milan Shukla's case (supra), their lordships of Hon'ble Supreme Court found it not to be a fit case for non-interference under Article 136 of the Constitution.

88. The Division bench of this Court in the case of Ram Milan Shukla (supra) seems to lay down the correct proposition of law while holding that before issuing notification under Section 11 of the Act for creation of district, it shall be incumbent upon the State Government to find out the financial viability, abide by the Government order of the year 1992 and generate funds in terms of the constitutional provisions to create the infrastructure of the proposed district. It is rightly held in Ram Milan Shukla (supra) that a lot of fund is required for establishment of a district and unless the fund is made available, the power under Section 11 of the Act may not be exercised.

89. The finding in Ram Milan Shukla's case (supra) is supported by the Constitution bench of Hon'ble Supreme Court in the case of Rai Sahib Ram Jawaya Kapur (supra) in which the dispute before the Hon'ble Supreme Court was with regard to decision taken by the Government to enter into the trade or business. Their lordships held that there must be specific legislation legalizing such trade activities before they could be embarked upon and for that purpose certain sum is required to carry out the business and should be entered into

the annual financial statement and should be laid before the House or the Houses of Legislature. After the grant is sanctioned, an Appropriation Bill should be introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly under Article 204. Relevant paras of Rai Sahib Ram Jawaya Kapur (supra) are reproduced as under:-

"15. Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon ? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the House or Houses of Legislature in respect of every financial year under article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (article 203). After the grant is sanctioned, an Appropriation Bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly (article 204). As soon as the Appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under article 266(3) of the Constitution.

16. It may be, as Mr. Pathak contends, that the Appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. The expression "law" here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford complete answer.

17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific legislation sanctioning such course would have to be passed."

90. Though, the finding recorded in Ram Milan Shukla's case (supra is not elaborate one but it is in tune with the constitutional mandate (supra) and the law settled by Hon'ble Supreme Court. We may take judicial notice of the fact that on account of paucity of fund in the State of U.P., several districts have been created long back but for decades the Government has been failed to provide infrastructure for judiciary and executive. It is evident that in some of the newly created districts, the OSDs or Judges are living in rented houses and the courts are also running in rented building. It is unfortunate affairs of the state, happens because of non-compliance of constitutional mandate (supra).

BINDING PRECEDENT AND ARTICLE 141

91. In Hari Bhajan Singh's case (supra) reliance has been placed on Apex Court judgment in the case reported in **2008 AIR SCW 2296 (State of U.P. and others vs. Chaudhari Ram Veer Singh and another).** Hon'ble Supreme Court in Chaudhari Ram Veer Singh (supra) had declined to interfere with regard to decision taken for creation of district being policy matter. Observation made with regard to judgment of Ram Milan Shukla seems to be "obiter dicta" with observation that High Court had directed for reconsideration of matter in the light of judgment, which was acted upon by the State Government.

92. Since while dismissing the special appeal under Article 136 of the Constitution of India against the judgment of Ram Milan Shukla (supra) Hon'ble Supreme Court of India had applied mind and affirmed it with the observation that it calls no interference under Article 136 of the Constitution, it is binding precedent. The High Court cannot take a different view at later stage against the ratio of Ram Milan Shukla (supra). Under Article 141 of the Constitution of India, it is a binding precedent being affirmed by the Hon'ble Supreme Court.

93. It is well settled proposition of law that the correctness of a judicial order, which has attained finality cannot be examined in a writ jurisdiction. **(Vide Naresh Shridhar Mirajkar versus State of Maharastra, AIR, 1967 SC 1; Chief Secretary to Govt of Andhra Pradesh and another versus V.J. Cornelius etc., AIR 1981 SC 1099; Cotton Corporation of India Limited versus United Industrial Bank Limited, AiR 1983 SC 1272; Khoday Distilleries Limited and another versus Registrar General, Supre Court of India, (1996)3 SCC 114; A.R. Antulay versus R.S. Nayak and another, AIR 1988 SC 1531; State of West Bengal and others versus Debdas Kumar and others, 1991 Supp (1) SCC 138 and Krishna Swamy versus Union of India, AIR 1993 SC 1407).**

JUDGMENT AND RATIONALITY

94. In the case reported in **2000 (18) LCD 886: Brijendra Kumar Gupta and others. Vs. State of U.P. and others,** no finding has been recorded that power exercised under Section 11 of the Act is legislative. While considering the question with regard to creation of district Auraiya in the State of U.P., it was held that decision taken by the Government is violative of Government order 1992 hence it was arbitrary and mala fide. To quote relevant portion as under:-

"6.2. It is true that the provisions as contained in Andhra Pradesh Act are more exhaustive in relation to forming a new

district. Revenue Division or Mandal or increase or diminish or alternname as it is apparent from a bare perusal of the judgment vis-a-vis our Act but nevertheless the ratio laid down aforementioned that to enforce the guidelines issued by the Government, which were nothing more than administrative instructions not having any statutory force, which did not give rise to any legal right in favour of the writ-petitioner, is binding hand and foot on us and we hold that this G.O. is nothing more than administrative instructions and is not having statutory force. This legal position cannot be ignored as suggested to by Sri Agrawal on the ground that notwithstanding declaration of law by Supreme Court, this G.O. was binding on Miss Mayawati and even on the present Government."

Thus, in the case of Brijendra Kumar Gupta (supra) though, the division Bench of this court held that the judgment of Ram Milan Shukla (supra) lacks binding precedent but simultaneously, seems to rule that the Government order issued in the year 1992 containing guidelines with regard to creation of district shall be binding and the district must be created strictly in accordance with the guidelines issued by the Government order of the year 1992. The observation made by the Division Bench (supra), makes the decision taken and notification issued under Section 11 of the U.P. Land Revenue Act, administrative in nature. It may be noted that in Brijendra Kumar Gupta (supra) the writ petition was dismissed for non-joinder of necessary party as well as keeping in view the fact that the district Auraiya came into existence and courts were created and also functioning. The case of Brijendra Kumar Gupta (supra) has not been considered in the later judgment by the Division Bench of this court in Rakesh Kumar Sharma's case correctly.

95. The principle of stare decisis seems to have not been adhered to by the different Benches of this Court while giving different judgment without recording the point of dissent or reference to larger bench. In the case reported in **2000 (1) AWC 750: Brijendra Kumar Gupta and others. Vs. State of U.P. and others,** another Division bench of this Court at Allahabad, took a contrary view than that the Division Bench in the case of Ram Milan Shukla (supra) lacks binding precedent.

96. The controversy in the case of Brijendra Kumar Gupta (supra), was with regard to validity of notification issued under Section 11 of the Act on the ground that it was violative of earlier policy and norms laid down in the Government order dated 22.10.1992 containing certain guidelines with regard to creation of new districts. The policy and norms laid down by the Government order dated 22.10.1991, was to ensure the financial viability to provide infrastructure for creation of new district. It is held while deciding the Ram Milan Shukla's case (supra), that the earlier judgment in the case reported in **1997 (88) RD 535: Samvidhan Bahali Andolan Vs. Union of India and others,**[Civil Misc. Writ Petition No.17736 of 1997], was not considered. The Division Bench held that the case of Samvidhan Bahali Andolan (supra), laid down the correct law. Relevant portion from Brijendra Kumar Gupta's case (supra) are reproduced as under:-

"**8.4.** According to Mr. Mishra, the first judgment to Samvidhan Bahali Andolan. v. Union of India and others, was binding on the subsequent Division Bench as well as on us in view of the doctrine of

precedent enunciated by the Apex Court and the submission of Mr. Agrawal that in view of the conflict between first and second Division Bench, the second Division Bench judgment is binding on us and that if we intend to take a view different from the second Division Bench, the only option for us is to refer this case to a larger Bench, is of no substance."

97. However, the observations made in the case of Brijendra Kumar Gupta (supra) seems to be not correct. In Samvidhan Bahali Andolan (supra), the vires of Section 11 was challenged which has been upheld by the Division Bench. No finding has been recorded as to whether power exercised under Section 11 of the Act is legislative or administrative.

98. In the case of Brijendra Kumar Gupta (supra), the Division Bench has not considered the case of Ram Milan Shukla (supra) in its totality, the relevant portion of which has been reproduced in the preceding paras.

99. It is well settled proposition of law that judgment should be considered in its totality as well as in reference to the context vide, **2002 (4) SCC 297 Grasim Industries Limited v. Collector of Customs; 2003 SCC (1) 410 Easland Combines v. CCE; 2006 (5) SCC 745 A. N. Roy v. Suresh Sham Singh and 2007 (10) SCC 528 Deewan Singh v. Rajendra Prasad Ardevi.**

As held in Samvidhan Bahali Andolan (supra), Section 11 of the Act is intra vires to the Constitution. The different constitutional provisions considered in Ram Milan Shukla's case (supra) coupled with other provisions referred in preceding paras, have not been considered in their real perspective. Only a casual reference has been made.

100. The Division Bench had relied upon a case reported in **AIR 1988 SC 1681: J.R. Raghupathy v. State of A.P.,** in which the issue before the Hon'ble Supreme Court was with regard to location of Mandal Headquarters inter alia on the ground that administrative instructions were breached by the State Government. While setting aside the judgment of High Court, Hon'ble Supreme Court held that it is the discretion of the State Government to take a decision with regard to Mandal Headquarters. Relying upon the administrative law by H.W.R. Wade, Hon'ble Supreme Court held that where Parliament confers powers upon some Minister or other authority to use 'its' discretion, it is obvious that the discretion ought to be that of the designated authority and not that of the Court and ordinarily, the discretion exercised by the authority, should not be interfered. There shall be assumption that designated authority would act properly and responsibly with a view to deny what is best in the public interest and most consistent with the policy of the statute. With this presumption, the Courts take their warrant to impose legal bounds on even the most extensive discretion. However, neither in the case of Brijendra Kumar Gupta nor in the case of J.R. Raghupathy (supra), a finding has been recorded or observation has been made with regard to limits of interference by the Court in the matter of abuse of power by the authorities.

101. A long journey has been travelled by the Hon'ble Supreme Court with regard to interference by the Courts under extraordinary jurisdiction under Article 226, 227 by the High Courts or Articles 32 and 136 by the Hon'ble Supreme

Court against the executive and legislative actions.

102. In the case relied upon by the learned Additional Advocate General herself, reported in **AIR 2010 SC 1476: State of West Bengal Vs. Committee for Protection of Democratic Rights**, Hon'ble Supreme Court while reiterating the earlier principles of law, held that constitution is a living and organic document and it cannot remain static and must grow with nation. The constitutional provision have to be construed broadly and liberally having regard to changed circumstances and need of time and polity, to quote relevant portion para 29, 30 and 31:-

"29. The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The Constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity. In Kehar Singh & Anr. Vs. Union of India & Anr., speaking for the Constitution Bench, R.S. Pathak, C.J. held that in keeping with modern Constitutional practice, the Constitution of India is a constitutive document, fundamental to the governance of the country, whereby the people of India have provided a Constitutional polity consisting of certain primary organs, institutions and functionaries with the intention of working out, maintaining and operating a Constitutional order. On the aspect of interpretation of a Constitution, the following observations of Justice Dickson of the Supreme Court of Canada in Lawson A.W. Hunter & Ors. Vs. Southam Inc. are quite apposite:

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind".

30 In M. Nagaraj & Ors. Vs. Union of India & Ors., speaking for the Constitution Bench, S.H. Kapadia, J. observed as under:

"The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges." [Emphasis supplied]

31. Recently, in I.R. Coelho (*AIR 2007 SC 861: 2007 AIR SCW 611)* (supra), noticing the principles relevant for the

interpretation of Constitutional provisions, Y.K. Sabharwal, C.J., speaking for the Bench of nine Judges of this Court, observed as follows:

"The principle of constitutionalism is now a legal principle which requires control over the exercise of Governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision making. The principle of constitutionalism underpins the principle of legality which requires the Courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The Legislature can restrict fundamental rights but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes.;"

In State of West Bengal (supra), Hon'ble Supreme Court with regard to power of judicial review under Article 226 of the Constitution has further held as under:

"35. As regards the power of judicial review conferred on the High Court, undoubtedly they are, in a way, wider in scope. The High Courts are authorised under Article 226 of the Constitution, to issue directions, orders or writs to any person or authority, including any government to enforce fundamental rights and, "for any other purpose". It is manifest from the difference in the phraseology of Articles 32 and 226 of the Constitution that there is a marked difference in the nature and purpose of the right conferred by these two Articles. Whereas the right guaranteed by Article 32 can be exercised only for the enforcement of fundamental rights conferred by Part III of the Constitution, the right conferred by Article 226 can be exercised not only for the enforcement of fundamental rights, but "for any other purpose" as well, i.e. for enforcement of any legal right conferred by a Statute etc.

36. In Tirupati Balaji Developers (P) Ltd. & Ors. Vs. State of Bihar & Ors., this Court had observed thus:

"8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts both are courts of record. The High Court is not a court "subordinate" to the Supreme Court. In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose while the original jurisdiction of Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts."

37. In Dwarkanath's case (AIR 1966 SC 81) (supra), this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extra-ordinary circumstances of the case.

Therefore, what we have said above in regard to the exercise of jurisdiction by this Court under Article 32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226 of the Constitution."

103. Thus, High Court while exercising power of judicial review under Article 226, may interfere in appropriate case to a decision taken and notification issued for creation of Districts, no matter whether the order is administrative or legislative.

104. Now, it is well settled proposition of law that while exercising administrative power, authorities have to discharge obligation in a just and fair manner only to secure public interest and not for political or vested interest that too, on unfounded grounds and irrationally vide, **Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, AIR 1988 SC 157; Dr. Rash Lal Yadav Vs. State of Bihar and others, 1994 (5) SCC 267 and Tata Cellular Vs. Union of India, 1994 (6) SCC 651, State of Andhra Pradesh & Anr. Vs. Nalla Raja Reddy & ors., AIR 1967 SC 1458.**

105. However, one of the important factors, which may be noted in the case of J.R. Raghupathy (supra), is that, keeping in view the statutory provisions, their lordships, while recording a finding with regard to executive powers of Union and the States under Article 73 and 162 of the Constitution, treated the action with regard to creation of Mandal Headquarters as the administrative decisions. Power conferred under under Article 226 of the Constitution is much wider than the hihgher Courts in England. It would have been better that on account of conflict, the controversy of Brijendra Kumar Gupta's case (supra) should have been referred to larger Bench. It appears that the Division Bench was impressed from the fact that judgment in Ram Milan Shukla (supra) was delivered in the absence of any counter affidavit merely on the statement made by the petitioner as is evident from the observations from the pleading set up by the petitioner noted in para 4.2 in the judgment.

106. In identical situation, in a recent case reported in **JT 2012 (4) SC 459: U.P. Power Corporation Lt. V. Rajesh Kumar and others,** their lordship of Hon'ble Supreme Court held that even if such a situation arises, a coordinate Division Bench cannot sit in appeal to earlier Division Bench and the matter should have been referred to larger Bench. It shall be appropriate to reproduce the relevant portion from the judgment of U.P. Power Corporation (supra) as under:-

"11. Various grounds were urged to substantiate the aforesaid stand. The Division Bench, after analysing the reasoning of the Allahabad Bench in great detail and after referring to certain decisions and the principles pertaining to binding precedent, opined as follows:-

"The Division Bench at Allahabad, did not enter into the question of exercise of power by the State Government under the enabling provisions of the Constitution and upheld the validity of Rule 8-A only for the reason, that there did exist such a power to enact the Rule, whereas the Apex Court, very clearly has pronounced, that if the given exercise has not been undertaken by the State Government while making a rule for reservation with or without accelerated seniority, such a rule may not stand the test of judicial review.

In fact, M. Nagraj obliges the High Court that when a challenge is made to the reservation in promotion, it shall scrutinize the same on the given parameters and it also casts a corresponding duty upon the State Government to satisfy the Court about the exercise undertaken in making such a provision for reservation. The Division Bench did not advert upon this issue, nor the State Government fulfilled its duty as enumerated in M. Nagraj.

The effect of the judgment delivered at Allahabad is also to be seen in the light of the fact that though the Division Bench at Allahabad did not adjudicate on the dispute with regard to the seniority for which the petitioner Mukund Kumar Srivastava has been relegated to the remedy of State Public Services Tribunal, but upheld the validity of Rule 8-A, which could not be said to be the main relief, claimed by the petitioner.

For the aforesaid reasons and also for the reason, that the present writ petitions do challenge the very rule of reservation in promotion, which challenge we have upheld for the reasons hereinafter stated, because of which the rule of accelerated seniority itself falls to the ground, we, with deep respect, are unable to subscribe to the view taken by the Division Bench at Allahabad and hold that the said judgment cannot be considered as binding precedent having been rendered per incuriam."

12. We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken recourse to. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in M. Nagraj (supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated albeit incorrectly, the same could not have been a ground to treat the decision as per incuriam or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case.

13. In this context, we may profitably quote a passage from Lala Shri Bhagwan and another v. Ram Chand and another[3]:-

"18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters

and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

14. **In Sundarjas Kanyalal Bhatija and others v. The Collector, Thane, Maharashtra and others** [JT 1989 (3) SC 57: AIR 199 SC 1893] while dealing with judicial discipline, the two- Judge Bench has expressed thus:-

"One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure."

14.1. The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges."

107. In view of the above, their appears to be no occasion to hold that the judgment in Ram Milan Shukla's case (supra) is not a binding precedent that too, when the finding recorded, is conclusive and specific to the effect that the State should not exercise power under Section 11 of the Act in an arbitrary manner merely for political consideration without looking into the financial viability and the public interest.

108. The principle with regard to judicial propriety dealt with in the case of U.P. Power Corporation (supra) by Hon'ble Supreme Court, is equally applicable to the case of Hari Bhajan Singh and another (supra). On account of conflict between the case of Ram Milan Shukla (supra) and Rakesh Kumar Sharma (supra), the Division Bench should have referred the matter to Larger Bench in stead of deciding on merit at admission stage.

109. In **2004 (3) AWC 2234: Rakesh Kumar Sharma and others. Vs. State of U.P. and another**, the Division Bench of this Court at Allahabad, had considered the provisions contained under Section 11 of the Act.

After considering the Apex Court judgments, the Division Bench in the case of Rakesh Kumar Sharma (supra), arrived at the conclusion that the power conferred under Section 11 is legislative in nature. The order passed under Section 11 of the Act, has the force of law, to quote relevant portion of the said judgment as under:-

"68. As noted hereinearlier and applying the test as laid down by the Apex Court in State of Punjab's case (supra), it is clear that the notification issued by the State Government under Section 11 of the Act is a legislative instrument of general rule of conduct and the power exercised does not concern with the interest of an individual and it relates to public in general. In this connection, Section 4 (42B) of the U. P. General Clauses Act, 1904, which defines statutory instrument must be looked into. Section 4 (42B) of the U. P. General Clauses Act, 1904, runs as under :

"4 (42B) 'statutory instrument' shall mean any notification, order, scheme, rule, or bye-law issued under any enactment and having the force of law ;"

69. It cannot be disputed that the power exercised by the State Government is admittedly the power exercised under the Act, 1901 and the order passed under Section 11 of the Act has the force of law. It can also not be disputed that the notification issued by the State Government under Section 11 of the Act falls within the definition of statutory instrument as defined in Section 4 (42B) of U. P. General Clauses Act, 1904. The learned Additional Advocate General submitted that the State Government while creating, altering or abolishing districts had issued notifications, which were published in the official Gazette.

75. For the reasons aforesaid, we are of the firm opinion that the power of the State Government in issuing the notifications under Section 11 of the Act is legislative, in character, must be accepted. Therefore, we hold that the State Government while issuing a notification under Section 11 of the Act exercises power which is legislative in nature and it is not purely an executive or administrative power of the State Government.

80. In view of our discussions made hereinabove, we are, therefore, of the firm opinion that exercise of power under Section 11 of the Act by the State Government was legislative, in nature and, therefore, in view of the aforesaid discussions and applying the principles laid down by the Supreme Court in its aforesaid decisions, as noted hereinearlier, we are of the view that the State Government was not duty bound to follow the principle of natural justice by giving opportunity to the residents of the respective districts and the members of the Bar Associations and others before issuing the impugned notifications. Accordingly, the submission raised on behalf of the writ petitioners on this question is not acceptable and, therefore, rejected. We may also keep on record that some of the learned counsel appearing for the writ petitioners before us also accepted that the exercise of power under Section 11 of the Act by the State Government was legislative, in nature and it was not executive, in character.

90. Keeping our findings, as made hereinearlier, in mind to the extent that exercise of power under Section 11 of the Act by the State Government was legislative in character, the scope of judicial review is to be considered qua the legislative power delegated to Government."

110. In the case of Rakesh Kumar Sharma (supra), the Division Bench noted that in pursuance of the judgment in Ram Milan Shukla (supra), the State Government constituted a committee and considered the utility, viability, expenditure along with the

facilities of public in general with regard to creation of district and placed it before the Cabinet and later on, regular financial statement/budget, preparation of bill was passed on 15.1.1999. Virtually, in Rakesh Kumar Sharma's case (supra), the case of Ram Milan Shukla (supra), has not been distinguished but reaffirmed. Though, the proceeding under Section 11 of the Act has been held to be legislative in nature but in Rakesh Kumar Sharma's case (supra), the division Bench of this court had quashed the notification based on policy decision of the State Government on the ground of arbitrariness and being violative of Article 14 of the Constitution. The policy decision to abolish 9 districts and retaining 4 districts was held to be selective and discriminatory. After considering various pronouncements of Hon'ble Supreme Court, their lordships in the case of Rakesh Kumar Sharma (supra), held that decision taken by the State Government with regard to abolition and creation of districts, suffers from vice of arbitrariness hence set aside.

111. In **Rakesh Kumar Sharma** (supra), the Division Bench has not considered and interpreted the word, 'State Government' incorporated through amendment in Section 11 of the Act in the year 1950. There appears to be no doubt over the proposition that the legislative functions are not only formed by the Legislatures but also by the executive. When a power is exercised by an authority or the State Government in pursuance of statutory provisions, then the limit of executive function conferred by Article 154, 162 and 166 may not be overlooked. While considering the case reported in **AIR 1987 SC 1802: Union of India and another. Vs. Cynamide India Limited and another,** the Division Bench relied upon para-7 of the judgment. In para-7 it has been observed by Hon'ble Supreme Court that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction of the application of a general rule to a particular case in accordance with the requirements of policy. Relevant portion from Cynamide India Limited (supra) is reproduced as under:

"7. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.' It has also been said "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended

effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application the prospectivity of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price-fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire aquasijudicial character. Otherwise, price fixation is generally a legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price-fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price-fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price-fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer, if not more."

A plain reading of aforementioned judgment of Hon'ble Supreme Court reveals that those actions shall be executive and administrative in nature where, a specific direction is issued or general rule is applied to a particular case in accordance with requirement of the policy. On this issue the argument advanced by Mr. Anupam Mehrotra, seems to be correct.

112. In Rakesh Kumar Sharma (supra), the Division Bench relied upon the "Judicial Review of Administrative Action" by De-Smith. Learned author (supra) while distinguishing the legislative and administrative action held as under:

"A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined but it includes the adoption of a policy, the making and issue of a specific direction, and the application of a general rule to a particular case in accordance with the requirements of policy of expediency or administrative practice."

In the present case, the creation or division of a district into two or formation of one district by amalgamating part of two or more districts, is based on a decision

taken by the State Government keeping in view the particular facts and circumstances of the case. It is not a decision based on some general principle evolved by the Government for whole of the State. Hence it seems to be administrative in nature.

113. A Constitution Bench of Hon'ble Supreme Court in the case reported in **AIR 1959 SC 107 Radheyshyam Khare and another. Vs. The State of Madhya Pradesh and others,** while distinguishing the quasi-judicial and administrative order, has held as under:-

"(11) ... It is assumed that whenever there has to be a determination of a fact which affects the rights of the parties, the decision must be a quasi-judicial decision, so as to be liable to be corrected by a writ of certiorari. In Advani's case (AIR 1950 SC 22) Kania C. J. with whom Patanjali Sastri J. agreed, said at page 632 of SCR): (at p. 225 of AIR).

"The respondent's argument that whenever there is a determination of a fact which affects the rights of parties, the decision is quasi-judicial, does not appear to be sound."

Further down the learned Chief Justice said:

"".... it is broadly stated that when the fact has to be determined by an objective test and when that decision affects rights of some one, the decision or act is quasi- judicial. This last statement overlooks the aspect that every decision of the executive generally is a decision of fact and in most cases affects the rights of some one or the other. Because an executive authority has to determine certain objective facts as a preliminary step in the discharge of an executive function, it does not follow that it must determine those facts judicially. When the executive authority has to form an opinion about an objective matter as a preliminary step to the exercise of a certain power conferred on it, the determination of the objective fact and the exercise of the power based thereon are alike matters of an administrative character and are not amenable to the writ of certiorari."

To the like effect is the following observation of Fazl Ali J. in the same case at page 642 (of SCR) : (at p. 229 of AIR):

"The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference, and the real test is: Is there any duty to decide judicially ? As I have already said, there is nothing in the Ordinance to show that the Provincial Government has to decide the existence of a public purpose judicially or quasi-judicially." Dealing with the essential characteristics of a quasi- judicial act as opposed to an administrative act, I said at page 719 (of SCR) : (at p.257 of AIR):--

"..., the two kinds of acts have many common features. Thus a person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power. He has to consider facts and circumstances and to weigh pros and cons in his mind before he makes up his mind to exercise his power just as a person exercising a judicial or quasi-judicial function has to do. Both have to act in good faith. A good and valid administrative or executive act binds the subject and affects his rights or imposes liability on his just as effectively as a quasi-judicial act does. The exercise of an administrative or executive

act may well be and is frequently made dependent by the Legislature upon a condition or contingency which may involve a question of fact, but the question of fulfilment of which may, nevertheless, be left to the subjective opinion or satisfaction of the executive authority, as was done in the several Ordinances, regulations and enactments considered and construed in the several cases referred to above. The first two items of the definition given by Atkin L. J., may be equally applicable to an administrative act. The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L. J.'s definition, namely, the duty to act judicially.

I found support for my opinion on the following passage occurring in the judgment of Lord Hewart C. J. in R. v. Legislative Committee of the Church Assembly, (1928) 1 KB 411 of p. 415:

"In order that a body may satisfy the required test it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be super-added to that characteristic the further characteristic that the body has the duty to act judicially."

The above passage was quoted with approval by Lord Radeliffe in delivering the judgment of the Privy Council in Nakkuda Ali v. M.F. De S. Jayaratne, 1951 AC 66."

114. The aforesaid principle has been reiterated by the Hon'ble Supreme Court in the case reported in **AIR 2002 SC 2158: Indian National Congress (I) Vs. Institute of Social Welfare and others.** Their lordships ruled that the order passed on the ground of expediency, and policy, shall be administrative in nature to quote, relevant para 35 of the judgment:-

35. ... The decision of this Court in Province of Bombay vs. Kusaldas Advani (supra) has been dealt with by us in the foregoing paragraph and is of no help to the case of the respondent. In the case of Radhey Shyam Khare vs. State of M.P.(supra), the State government issued an order on the ground of expediency and policy and, therefore, it was held that the impugned order is an administrative in nature. In T.N. Seshan vs. Union of India (supra), it was held that the Election Commission besides administrative function is required to perform quasi-judicial duties and undertakes subordinate legislation making functions as well. This decision also is of no help to the case of the respondent. In the case of State of H.P. vs. Raja Mahendra Pal (supra), this Court found that Price Committee appointed by the government was not constituted under any statutory or plenary administrative power and, therefore, did not discharge any quasi-judicial function. This decision again is of no assistance to the case of the respondent."

The decision taken by the State Government to create district on the ground of expediency and policy while exercising statutory power, seems to be administrative in nature though it has trapping of Legislation.

115. The case reported in **AIR 1964 SC 648: Jayantilal Amrit Lal Shodhan vs F.N. Rana And Others,** deals with different facts and circumstances. Hon'ble Supreme court ruled that executive has also been empowered by the statutes to exercise functions which are legislative in nature and appear to partake at the same moment of

legislative, executive and judicial characteristics. The case of Jayantilal Amrit Lal Shodhan (supra) applied to a decision of the State Government with regard to creation of district and make it legislative in nature, is neither borne out nor the Division Bench has dealt with.

116. A close reading of the judgment in the case of Jayantilal Amrit Lal Shodhan (supra), reveals something else. Though, their lordship held that it cannot be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial function by the judiciary alone but simultaneously, it has been held that the legislative functions shall be of generalised in nature. All residue powers should be regarded as executive. For convenience, relevant portion from Jayantilal Amrit Lal Shodhan (supra), is reproduced as under:

"(10) The High Court held that the entrustment of functions under Art. 258(1) did not fall within the executive power of the Union. In the view of the High Court functions which were not judicial or legislative would not necessarily be regarded as executive, and that certain functions which did not fall within the three recognised categories--legislative, judicial and executive, may be placed in the category of miscellaneous functions. But it is now well settled that functions which do not fall strictly within the field legislative or judicial, fall in the residuary class and must be regarded as executive.

(11) In Halsbury's Laws of England, 3rd Edn. Vol. 7, Art. 409 p. 192 it is observed:

"Executive Functions are incapable of Comprehensive definition, for they are merely the residue of the functions of government after legislative and judicial functions have been taken away. They include, in addition to the execution of the laws, the maintenance "of public order, the management of Crown property and nationalised industries and services, the direction of foreign policy, the conduct of military operations, and the provision or supervision of such services as education, public health, transport, and state assistance and insurance."

Similarly in Wade and Phillips, Constitutional Law, 6th Edn, at p. 16 it is observed:

"It is customary to divide functions of government into three classes, legislative, executive (or administrative) and judicial."

In Rai Sahib Ram Jawaya Kapur v. The State of Punjab, 1955-2 SCR 225: (S) AIR 1955 SC 549) in dealing with the question whether publishing, printing and selling of text books for the use of students may be regarded as an executive function of the State Government, Mukherjea, C. J., speaking for the Court observed:

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away."

It cannot however be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three

agencies of the State. To the executive, exercise of functions legislative or judicial are often entrusted. For instance power to frame rules, regulations and notifications which are essentially legislative in character is frequently entrusted to the executive. Similarly judicial authority is also entrusted by legislation to the executive authority: Harinagar Sugar Mills Ltd. v. Shyamsundar (1962) 2 SCR 339: (AIR 1961 SC 1969). In the performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial, and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In the complexity of problems which modern governments have to face and the plethora of parliamentary business to which it inevitably leads, it becomes necessary that the executive should often exercise powers of subordinate legislation: Halsbury's Laws of England, Vol. 7, Art. 409. It is indeed possible to characterise with precision that an agency of the State is executive, legislative or judicial, but it cannot be predicated that a particular function exercised by any individual agency is necessarily of the character which. the agency bears."

117. In view of the above, keeping in view the fact that the residue function comes later to legislative and judicial and functions of the Government is based on legislative decision or legislative enactment, the notification issued in pursuance of Section 11 of the Act seems to be of executive in nature even in case it is considered in the light of the judgment of Jayantilal Amrit Lal Shodhan (supra), relied upon by the Division Bench in the case of Rakesh Kumar Sharma (supra). Entire finding over the point has not been taken into account by the Division Bench in Rakesh Kumar Sharma (supra). Moreover, it may be noted that in the case of Jayantilal Amrit Lal Shodhan (supra), the question before the Hon'ble Supreme Court was to interpret the word, "function' as contained in Article 258 (1) of the Constitution of India and it does not relate to interpretation of statutory enactment made by the Legislature.

118. In the case reported in **AIR 1980 SC 882: Tulsipur Sugar Co. Ltd.Vs. Notified Area Committee**, the controversy before the Hon'ble Supreme Court was as to whether the principle of natural justice shall be applicable where a particular area has been declared town area in pursuance of decision taken by the State Government after deciding the representation. Their lordships held that power of declaration made under Section 3 of the U.P. Town Area Act (2 of 1914), is legislative in character because the application of the rest of the provisions of the Act namely, U.P. Town Area Act, has been made applicable to a particular geographical area, to quote relevant para 12, 15 and 18:-

"12. Repelling the contention urged against the validity of the aforesaid section 9, Lord Selborne observed at page 193 thus:

"Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area

to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement".

15. The essential distinction between conditional legislation and delegated legislation was considered for the first time by this Court in In re The Delhi laws Act, 1912, 1951 SCR 747. After considering the decision in The Queen v. Burah (supra), Mukherjea, J. observed at page 980:

"The same principle was applied by the Judicial Committee in King v. Benoari Lal Sharma , ((1945) 72 Ind App 57). In that case, the validity of an emergency ordinance by the Governor-General of India was Challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that "this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity.

Thus, conditional legislation has all along been treated in judicial pronouncements not to be a species of delegated legislation at all. It comes under a separate category, and, if in a particular case all the elements of a conditional legislation exist, the question does not arise as to whether in leaving the task of determining the condition to an outside authority, the legislature acted beyond the scope of its powers."

18. We are, therefore, of the view that a notification issued under section 3 of the Act which has the effect of making the Act applicable to a geographical area is in the nature of a conditional legislation and that it cannot be characterised as a piece of subordinate legislation. In view of the foregoing, we hold that the contention of the plaintiff that the declaration made by the State Government under section 3 of the Act declaring the area in which the sugar factory of the plaintiff is situated as a part of the Tulsipur town area is invalid is not tenable."

119. The facts, circumstances and controversy involved in the present case, seems to be entirely different than the dispute involved in the Tulsipur Sugar Company (supra). In the present case, the impugned notification has been issued while deciding a representation in pursuance of the order of this Court and the repealed provision has been revived to establish the district. It is not a case where notification was issued to enforce U.P. Land Revenue Act in a particular area.

120. The case reported in **(1981) 2 SCC 722: Ramesh Chandra Kachardas Porwal. Vs. State of Maharastra,** deals with the matter where, under the Maharashtra Agricultural Produce Marketing (Regulation) Act, 1963, a particular area was declared as principal market yard for marketing area to enforce statutory provisions. The aims and object of the Act has been dealt with by Hon'ble Supreme Court in the case as under:

"4. For a proper appreciation of the submissions made, it is necessary to refer to some of the relevant provisions of the Maharashtra Agricultural Produce Marketing (Regulation) Act 1963 and the Maharashtra Agricultural Produce Marketing (Regulation) Rules 1967. The long title of the Act is "An Act to regulate the marketing of agricultural and certain other produce in market areas and markets to be established therefor in the State; to confer powers upon Market Committees to be constituted in connection with or acting for purposes connected with such markets; to establish Market Fund for purposes of the Market Committees and to provide for purposes connected with the matters aforesaid..."

Their lordships further held that Human ingenuity is such that vents and escapes will always be found in any system of controls and that localising marketing is helpful and necessary for regulation and control and for providing facilities. If all transactions are carried on in the market under the watchful and at the same time, helpful vigil of the Market Committee and its officers, there is surely a greater chance of the success of the objectives of the statute. The decision seems to be based on a different facts and circumstances of the case.

Hon'ble Supreme Court further held that there is no right to be heard before making of legislation whether primary or delegated unless it is provided by the Statute.

Their lordships further held that where, under a declaration certain statutory provisions spring into action and certain consequences prescribed by statute are followed, may be legislative in nature.

121. In the case reported in **(1989) 3 SCC 396: Sundarjas Kanyalal Bhatija and others. Vs. Collector, Thane, Maharastra and others,** the controversy before the Hon'ble Supreme Court was with regard to formation of Municipal Corporation by merging Municipal area of Kalyan, Ambarnath, Domoivali and Ulhasnagar of Maharashtra State.

122. In Prag Ice & Oil Mills (supra), statutory order fixing the price of mustard oil for whole of the country held to be legislative being an incident of general rule of conduct. Their lordships held that legislation is indicative of future course of action.

However, constitution Bench of Hon'ble Supreme Court in the case of Shri Sitaram Sugar Company (supra) held that there may be circumstance, when price fixation may assume administrative or quasi-judicial character dealing with individual issue.

123. In the case reported in **AIR 2002 SC 533: State of Punjab. Vs. Tehal Singh,** the dispute before Hon'ble Supreme Court was with regard to establishment of Gram Sabha area where, a notification was issued by the State Government for establishment of Gram Sabha under the power conferred by statute. While considering the difference between the administrative and legislative power, their lordships held as under:

"5. Before we consider the main question, it is necessary to trace out the nature of power, that the State Government exercises under provisions of Section 3 and 4 of the Act. The said power could either be legislative, administrative or quasi-judicial.

6. In Rameshchandra Kachardas Porwal and Ors. etc. v. State of Maharashtra and Ors. etc. etc.(1981 (2) SCC 722), it was held that making of a declaration by notification that certain place shall be principal market yard for a market area under the relevant agricultural produce Market Act was an act legislative in character. In Union of India and Anr. v. Cynamide India Ltd. and another (1987 (2) SCC 720), this Court while making distinction between legislative, administrative and quasi-judicial held thus:

"A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy. Legislation in the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases'. It has also been said: "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares right and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of future. The object of the rule, the reach of its application, the rights and obligations arising out of it. Its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non-legislative acts".

7. The principles of law that emerge from the aforesaid decisions are-(1) where provisions of a statue provide for the legislative activity, i.e. making of a legislative instrument or promulgation of general rule of conduct or a declaration by a notification by the Government that certain place or area shall be part of a Gram Sabha and on issue of such a declaration certain other statutory provisions come into an action forthwith which provide for certain consequences; (2) where the power to be exercised by the Government under provisions of a statute does not concern with the interest of an individual and it relates to public in general or concerns with a general direction of a general character and not direct against an individual or to a particular situation and (3) lay down future course of actions, the same is generally held to be legislative in character."

124. Learned Additional Advocate General has vehemently relied upon the judgment of aforesaid case of Tehal Singh (supra), which seems to be based on different facts and circumstances of the case. Apparently, their lordships held that adjudication is determinative of past and present while legislation is indicative of future. In the present case, the impugned notification has been issued while deciding representation restoring back the position as existing in the year 2003. Thus, the notification is based on adjudication of factual controversy based on past and

present hence, seems to be administrative in nature.

125. While considering the finding to the effect that the impugned notification is administrative in nature having trapping of legislation, it shall be appropriate to consider a passage from the *"Constitutional Law of India"* by *H.M. Seervai.* The Constitutional Law of H.M. Seervai is a treatise, well recognised by the courts in India. The learned author after considering the judgment of Hon'ble Supreme court in the case of **Ram Jawaya Kapur. Vs. State of Punjab: (1955) 2 S.C.R. 225, State of M.P. Vs. Bharat Singh reported in AIR 1967 SC 1170 and AIR 1964 SC 648: Jayantilal Amrit Lal Shodhan vs F.N. Rana And Others,** noted that the modern State not only discharge their obligations through legislative or administrative function but also they carry with them by the quasi-legislative and the quasi-judicial functions. Relying upon the aforesaid judgments, learned author held that executive function in modern Government carry with them the quasi-legislative and quasi-judicial functions, to quote a passage from the *"Constitutional Law of India [Fourth Edition Vol. 2 (1993)] "* by *H.K. Seervai* as under:-

"... But Shah J. said that it was not necessary to decide whether under Art. 258 only executive functions could be delegated, and not legislative or judicial functions, because, in the case before the court, only executive functions had been delegated. It is submitted that if executive functions in a modern State carry with them quasi-legislative and quasi-judicial functions, it must follow that those functions could also be delegated as part of the executive functions of the Union, for otherwise, contrary to well-settled principles of constructions, words would have to be read into Art. 258 (1) which are not there, namely, "excluding quasi-judicial and quasi-legislative executive functions of the Union.," Following Amritlal's Case, it was held that the Union's functions under the Land Acquisition Act could be validly entrusted to the State Govt.

18.19 In considering Art. 258 (1), Shah J. said that it was necessary to remove a misconception. Article 258 (1) authorised the President, in whom the executive power of the Union was vested, to delegate the executive functions of the Union; but not the powers and functions with which, by express provisions of the Constitution, the President was invested.

"The power to promulgate Ordinances under Art. 123; to suspend the provisions of Arts. 268 to 279 during an emergency; to declare failure of the Constitutional machinery in States under Art. 356; to declare a financial emergency under Art. 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Art. 309-- to enumerate a few out of the various powers-- are not powers of the Union Govt.; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Art. 258 (1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Art. 258 91) to the State or officer of the State, and, therefore, that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under Art. 258 (1) because they are not the powers of the Union, and not because of their special character. There is a vast array of

other powers exercisable by the President--to mention only a few--appointment of Judges: Art. 124 and 217, appointment of Committees of Official Languages Act: Art. 344, appointment of Commissions to investigate conditions of backward classes: Art. 340, appointment of Special Officer for Scheduled Castes and Tribes: Art. 338 exercise of his pleasure to terminate employment: Art. 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Art. 311 (2)--these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Art. 258."....

...On a review of the undernoted provisions of the Constitution, Shah J. held that subject to the proviso to Art. 73 (1), it was open to the President, with the consent of the State Govt. to entrust the executive power of the Union relating to the acquisition of land, either to the State or to any officers of the State."

126. In view of the aforesaid interpretation of the administrative and legislative function by learned author, based on the larger Bench judgment of Hon'ble Supreme court, if the present controversy is considered, then also, the decision taken under Section 11 of the U.P. Land Revenue Act, shall be deemed to be executive in nature having trapping of legislation. Under Article 154 of the Constitution (supra), the executive power vests in the Governor of the State. The U.P. Land Revenue Act is enacted by the State Legislature conferring power under Section 11 of the Act on the State Government. The Governor being the Executive Head of the State, in view of the aforesaid analogy (supra), may issue notification in pursuance of power conferred under Article 154 of the Constitution with regard to creation of district and shall be administrative in nature. Keeping in view the nature of decision taken, at the most it may be held to be administrative power having trapping of legislation. Hence principle of natural justice shall not be attracted. The executive function being quasi-legislative, means an administrative function with trapping of legislation and in case a judgment is rendered in pursuance of executive power, then it shall be quasi-judicial function. To say that notification by the State Government, may be issued under Section 11 of the Act is purely legislative in nature, seems to be not correct.

127. In the present case, the impugned notification has been issued while adjudicating the controversy after taking into account a repealed notification issued in the year 2003. The adjudication is based on past and present material hence even on applying the judgment relied upon by the learned Additional Advocate General, it seems to be administrative in nature.

Apart from the above, Section 11 of the Act confers power in the State to create district. The creation of district is residual statutory power exercised by the State Government, keeping in view the guidelines issued by the State Government in the year 1992 Hence, the exercise of power under Section 11 of the Act seems to be administrative in nature, may be, having legislative trapping.

128. Admittedly, impugned notification has been issued conferring power on the Chairman (under Section 221 of the U.P. Land Revenue Act), directing to be abide by certain conditions while

processing a matter for creation of new districts. Thus, the 1992 Government order has got binding effect.

Ordinarily, legislative action is based on policy or decision taken in public interest at the helms of affair.

REPUGNANCY

129. The Census Act, 1948 (in short the Act), enacted by the Parliament, deals with the matter in connection with census. Under Section 3 of the Census Act, the Government of India has been conferred power to declare its intention of taking census in the whole or in part of territories to which the Act extends by the notification published in the official gazette. Under Section 4 of the Census Act, all authorities engaged in census operation, shall be deemed to be public servant. Under Section 11 of the Census Act, power has been conferred to call upon any person/public servant to give assistance. Under Section 15 of the Census Act, the record of census are not open to inspection nor admissible in evidence. Section 16 provides that during census operation, there may be temporary suspension of all other laws. For convenience, Section 16 of the Census Act is reproduced as under:

"16. Temporary suspension of other laws as to mode of taking census in municipalities-- Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority, in consultation with the [Director of Census Operation] or with such other authority as the [State Government] may authorise in this behalf, shall at the time appointed for the taking of any census cause the census of the municipality to be taken wholly or in part by any method authorised by or under this Act."

130. Section 18 of the Census Act confers power to the Central Government to make rules for the census purpose. Rules framed, shall be laid before each House of Parliament in pursuance of power conferred under Section 17 of Census Act, the Central Government made rules namely, namely, Census Rules, 1990. The directives issued by the Central Government under the Rule, is binding on the State and its authorities. Relevant portion of the Rule 8 of Census Rule, 1990 is reproduced as under:

"Notifications, Orders and Instructions to be issued by State Government-- The State Governments and the Union territory Administrations shall,

(i) republish the intention of taking a census notified by the Central Government in their State or Union territory Gazettes;

[(ia) republish the census schedules and questionnaires notified by the Central Government in their States or Union Territory Gazettes.]

(ii) publish a notification directing the public to cooperate in furnishing accurate and unambiguous information in respect of the questions that may be put to them through census alongwith an extract of penalties prescribed under section 11 of the Act;

(iii) [publish] in the gazette the reference date for the census and the period during which houselisting operations and population census will take place under section 3 of the Act'

(iv) freeze the administrative boundaries of districts, tehsils, towns, etc. from the date to be intimated by the Census Commissioner which shall not be earlier than one year from the census reference date and till the completion of the census;

(v) nominate a senior officer of the State Government at State Head Quarters as Nodal officer to liaise between Director of Census Operations and other Officers in Census work;

(vi) impose restrictions on the Head of Department/Officer on the transfer of officers/officials once appointed as Supervisor/Enumerator, without the proper consent of Principal/District Census Officer; and

(vii) give wide publicity of the census through radio, audiovisuals, posters etc."

131. Keeping in view the statutory mandate under the Rule 8 (iv), it was not open for the State or State authorities to change the boundaries or area of different districts unless and until the census is completed in terms of existing population.

132. Admittedly, when the notification dated 21.5.2003, was issued the census operation was in continuance. The question cropped up whether such notification could have been issued by the Government which amounts to creation of new district changing the boundaries of local bodies as well as the districts? Whether the executive power exercised by the Government on account of inconsistency with the Central Act, impugned notification is bad in law keeping in view the provisions contained in Article 246 to 254 of the Constitution of India?

133. Article 254 deals with inconsistency between the law made by the Parliament and the law made by the Legislature of the State. It further provides that in the event of conflict the law framed by the Parliament shall prevail. The proviso to Clause (2) further provides that the Parliament will have right to enact at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State. Article 254 is reproduced as under :

"254. (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2)Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same

matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State".

Now, it is settled proposition of law that the Union law shall prevail over the law made by the State and any law made by the Parliament at later stage to the extent of repugnancy will override the State law and will have binding effect vide **AIR 1959 SC 648 Deep Chand versus State of U.P., AIR 1959 SC 749 Premnath Kaul versus State of J. & K, AIR 1954 SC 752 Zaverbhai Amaidas versus State of Bombay.**

It is further settled law that the repugnancy is not further confined where there is a direct conflict between the two legislatures. It may arise where both laws operate in the same field and the two cannot possibly stand together vide **AIR 1979 SC 898 Karunanidhi M. versus Union of India.**

In the case of Karunanidhi (supra), Hon'ble Supreme Court held as under :

"35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge:-

1.That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

2.That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

3.That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

4.That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field.".

134. In the present case, keeping in view the bar created by the Rules that during census operation, the area of different local bodies, shall not be changed and the area of Zila Parishad includes whole of the district, it shall not be possible to carry out the census operation, in case the division of district is taken place. There is irreconcilable conflict between two legislations. Hence Central Legislation should prevail. Since, it shall not be possible to give effect both of them simultaneously, even under the principle of harmonious construction both cannot run together, Central Legislation shall prevail.

135. In view of the above, whenever, a census is in operation and appropriate order is issued under the Census Rules, then, in view of Clause (iv) of Rule 8 of Census Rule (supra), the boundaries of districts, tehsils and towns etc., cannot be changed till the completion of census being based on Central enactment. The Census Act and Rules framed thereunder will have overriding effect over the order passed under the Land Revenue Act and the Rules

framed thereunder and to the extent of repugnancy, the decision or order passed under the Census Act and Rules framed thereunder, shall prevail.

136. Since the impugned notification seems to be in conflict with Census Rules, it shall be bad in law and even after the end of census operation, the notification shall remain unlawful. Only option to the Government will be to proceed afresh in accordance with law.

It is trite law that if an order is bad in its inception, it does not get sanctified at a later stage. Hon'ble Supreme Court held that a right in law exists only and only when it has a lawful origin vide, **(1998) 3 SCC 381: Upen Chandra Gogoi. Vs. State of Assam and others; (2004) 8 SCC 599: Satchidananda Mishra. Vs. State of Orissa and others and (2006) 1 SCC 530: Regional Manager, SBI Vs Rakesh Kumar Tewari.**

In view of the above, since the impugned notification issued during the census operation being violative of Rule 8 (4) of Census Rules, 1990, it shall be invalid.

EXERCISE OF DISCRETION

137. In democratic polity, as held by the Hon'ble supreme court, in catena of judgments, no public body, authority or institution possess unfettered discretion. The discretion should be exercised only for public good and not for any other purpose. While exercising discretion, the State authorities are not supposed to apply their mind to secure own interest but they are discharging their statutory and constitutional obligation to secure public interest.

138. In Sharp v. Wakefield, reported in 1891 AC 173, 179, Lord Halsbury rightly observed as under:-

"[D]iscretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion..... according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself...."

139. The State Government could not have issued a notification under Section 11 of the Act contrary to the direction issued by the Central Government during the census operation. It was not open for the State Government to change the boundaries of the district or the local bodies for creation of new district in view of the bar created by the Census Rules, 1990.

140. The power exercised by the State Government under Section 11 of the Act is though statutory, but it is administrative in nature (supra). Even if it is based on certain policy decision taken by the State Government, it could not be exercised arbitrarily or capriciously. The dividing line between the administrative and quasi-judicial power has been obliterated **[AIR 1970 SC 150, A.K.Karipak Vs. Uniion of India].** Wherever the State machinery is abused or power is exercised not in public interest but vested with political interest without looking into the public interest, then the exercise of power in such a manner, shall be hit by Article 14 and may be subject for judicial review.

141. The broad contour of judicial review of administrative actions was clarified by Lord Diplock in **Council of Civil Service Union v. Minister for the Civil Service: 1986 AC 374,** in the following words:

"...one can conveniently clarify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality, the second "irrationality' and the third "procedural impropriety'. That is not to say that further development on a case-by-case basis may not in course of time add further grounds."

142. Hon'ble Supreme Court ruled that every administrative order is to be tested at the touchstone of rationality, reasonableness, justness and fairness in action, vide **AIR 1978 SC 597, Smt. Maneka Gandhi Vs. Union of India and another, (1981) 3 SCC 181: C.E.D. v. Prayag Das Agarwal, AIR 1982 SC 1543: Merugu Satyanarayana v. State of A.P.;AIR 1964 SC 72, S.Pratap Singh Vs. State of Punjab; AIR 1964 SC 72: Pratap Singh v. State of Punjab;**

143. Hon'ble Supreme Court in the case reported in **AIR 1998 SC 477, Amarnath Ashram Trust Society Vs. Governor of U.P.,** held that discretion of Government cannot be absolute and unjusticiable.

In **1993(3) SCC 634, Hansraj H. Jain Vs. State of Maharastra and others,** it has been held that the Authorities have to pass the test of reasonableness and action should not lack bonafide and made a colourable exercise of power.

In **AIR 1991 SC 1902: Bangalore Medical Trust Vs. B.S. Muddappa and others**, it is held by Hon'ble Supreme Court that where statutes are silent and only power is conferred the authorities can not be permitted to act whimsically or arbitrarily. It should be guided by reasonableness and fairness.

In **AIR 2004 SC 827: Union of India Vs. Kuldeep Singh,** their lordships have reiterated the principle of reasonableness flowing from Ramana Dayaram Shetty Vs. International Airport Authority of India and others, AIR 1979 SC 1628 and ruled that Every action of the executive, government must be informed by reasons and should be free from arbitrariness. The discretion conferred is to discern between right and wrong and therefore whoever had power to act at discretion is bound by the rule of reason and law.

144. In a recent judgment reported in **2011 (8) SCC 737: State of Tamil Nadu and others. Vs. K. Shyam Sunder and others,** their lordships of Hon'ble Supreme Court held that the Government has to rise above the nexus of vested interests and nepotism and eschew window-dressing. The principles of Governance have to be tested on the touchstone of justice, equity, fair play and if a decision is not based on these principles may be legislative, cannot be allowed to operate.

145. In view of the above, while issuing the notification under Section 11 of the Act, the Government could not have exercised power mechanically in violation of order passed by the Central Government under Census Rules, 1990 as well as financial viability and public interest.

146. Apart from the above, there is one other aspect of the matter. The original notification was issued for creation of CSM Nagar on 21.5.2003. The notification was stayed by the Division bench of this Court on 9.4.2003. Later on, the State Government decided to abolish the CSM Nagar and issued subsequent notification dated 13.11.2003 in pursuance of powers conferred by Section 11 of the Act read with Section 21 of the General Clauses Act (supra). Now, by the impugned notification dated 1.7.2010, the subsequent notification dated 13.1.2003 has been annulled under the garb of Section 21 of General Clauses Act. The Government has got ample power to amend, annul, the existing order or replace it by another Government order but in the present case, on account of notification dated 13.1.2003, the original notification was annulled and CSM Nagar became non-existent.

In such a situation whether the non-existing district in view of repealed notification could have been restored after lapse of almost ten years under the garb of Section 21 of General Clauses Act and whether such decision without considering the ground realities and financial viabilities, shall not suffer from vice of arbitrariness is an important question.

Exercise of power under the garb of Section 21 of the General Clauses Act, after inordinate delay or after lapse of decades or so, may be unreasonable and arbitrary. We leave open the question to be considered by the Division Bench in case argued or raised. Since such question has not been framed and we have also not framed after opportunity of hearing to parties, no conclusive finding may be recorded at this stage.

147. In view of the above, the power conferred under Section 11 of the Act seems to be administrative in nature though it has trapping of legislation. The judgment in the case of Ram Milan Shukla (supra), seems to be based on correct appreciation of law and constitutional mandate. In Rakesh Kumar Sharma (supra), the Division Bench has not considered the statutory mandate considering Section 11 of the Act in its totality while recording a finding to the effect that it is legislative in nature.

148. To sum up:-

(1) Every order passed by the State Government in pursuance of power conferred by Articles 154, 162 read with Article 166 of the Constitution, may not be administrative. It shall depend upon the facts and circumstances of each case. Similarly, every order passed by the State Government in pursuance of power conferred by statute, may either be legislative or administrative and shall depend upon the facts and circumstances of each case.

(2) The order passed under statutory provisions or in pursuance of powers conferred under Articles 154, 162 read with Article 166 of the Constitution, may be administrative or legislative or quasi-legislative and quasi-administrative, will depend upon the facts and circumstances of each case. The decision taken by the State Government while deciding representation in pursuance of the order passed by the Court or on its own, keeping in view the 1992, regulatory Government order (supra) ordinarily, shall be administrative in nature.

(3) The impugned notification has been issued while deciding representation in compliance of the judgment and order

passed by the Division Bench of this Court based on factual matrix of past and present hence administrative in nature, but it has legislative trapping. However, in case, the State Government took a decision in compliance of different constitutional provisions dealt with (supra) followed by notification under Section 11 of the Act and the Rules of Business, then in such a situation, decision may be of legislative character.

(4) Though, there is no conflict between the Census Act and Census Rules, 1990 with Section 11 of U.P. Land Revenue Act since both deal with the different sphere but once a notification is issued under Census Rule by the Government of India as well as the State Government, then direction under Census Rule, shall prevail over and above the State action under Section 11 of the U.P. Land Revenue Act. Since both are irreconcilable during the operation of a notification issued under Rule 8 (4) of Census Rules, 1990, no notification could have been issued under the U.P. Land Revenue Act.

(5) The jurisdiction exercised by the Government during census operation and continuance of notification issued under Section 8 (4) of Census Rules, the power exercised by the Government under Section 11 of the U.P. Land Revenue Act, shall be illegal and void hence all consequential action therein shall also not survive. Of course, it shall be open for the Government to issue a notification to meet out exigency of services within the constitutional frame and four corners of the law after census operation.

(6). In the event of order passed under Rule 1990 during the continuance of census operation, the State Government may not exercise power conferred by Section 11 of the U.P. Land Revenue Act in a manner which may amount to change of boundaries of district or local bodies. Power under the Census Act and the Rules framed thereunder, as well as power conferred under Section 11 of the U.P. Land Revenue Act cannot be exercised simultaneously, because there is irreconcilable conflict between the two legislative action of the State Government and the Central Government.

(7) Moreover, the SLP filed against the judgment in the case of Ram Milan Shukla (supra) was consciously dismissed by Hon'ble Supreme Court hence it is binding in view of Article 141 of the Constitution of India. No contrary finding may be recorded by the High Court in view of binding precedent. Otherwise also, judgment in Ram Milan Shukla's case (supra) lays down correct law.

(8) Section 11 of the Act does not lay down the grounds or criteria for creation of districts. Government has rightly issued the Government order 1992 (supra) to fill up the gap, providing grounds for the creation of District. Government order 1992 (supra) supplements the statutory provision (Section 11) conferring power on Chairman, Board of Revenue (supra), for compliance, hence binding.

149. It shall be appropriate to reproduce what Justice Holems had said, to quote:-

"The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at the end, and it always retains old ones from history at the other, which have not yet been absorbed or

sloughed off. It will become entirely consistent only when it ceases to grow." *["The Common Law, Oliver Wendell Holems P.36 (1881).*

150. In view of the above, subject to observation made in the body of the present judgment, we answer the question referred to this Bench as under:-

(i)The issuance of notification under Section 11 of the U.P. Land Revenue Act read with Section 21 of the U.P. General Clauses Act by the Governor, is an administrative act but it has got trapping of legislation.

(ii)The impugned notification though administrative in nature but is violative of directives issued by the Central Government under Rule 8 (4) of the Census Rules, 1990, as such, barred by Article 246 (1) of the Constitution, hence invalid.

(iii) There is apparent inconsistency in two Acts namely, Census Act 1948 and the Rules framed thereunder, and the U.P. Land Revenue Act a State enactment in the reference to Section 11 with regard to creation of district. Both are irreconcilable and in any case, the conflict cannot be reconciled, hence during census operation notification under Section 11 of U.P. Land Revenue Act cannot be issued and if issued shall be invalid and void.

The reference is answered accordingly. The writ petition may be listed before the Division Bench forthwith for adjudication of the controversy in terms of answers to the reference given hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2012

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 10323 of 1995

Amar Kumar Pandey ...Petitioner
Versus
Ram Ganga Command, Kanpur & Others ...Respondents

Counsel for the Petitioner:
Sri B.N. Singh
Srti A. Goswami

Counsel for the Respondents:
C.S.C.

U.P. Industrial Dispute Act 1947-Section 6(6)-Back Wagers-Labour Court while reinstating petitioner-granted award of back wager-from the date of first award to the date of reinstatement-following the verdict of Apex Court in case of Devinder Singh-held-warrant no interfered-petition dismissed.

Held: Para-12 and 13

Be that as it may, the Labour Court while considering the entire case of the petitioner in the award dated 24.8.1993 and the order dated 15.7.1994 has recorded all the facts and thereafter come to the conclusion that the petitioner is only entitled to backwages for the period from the date of the first award till date of his reinstatement. Similar direction has been given by the Supreme Court in para 28 of the judgment in the case of Devinder Singh (supra).

In the circumstances, having gone through the award dated 24.8.1993 and the order dated 15.7.1994 and the direction given by the Supreme Court in the case of Devinder Singh (supra), in

my opinion, there is no illegality or infirmity in the two impugned orders.

Case Law discussed:

2011 (3) ESC 514

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. By means of this writ petition, the petitioner is challenging the award of the Labour Court dated 24.8.1993 and the order dated 15.7.1994.

2. The facts of the case in brief are that the petitioner raised an industrial dispute claiming that he was appointed on the post of Chaukidar on permanent basis w.e.f. 17.9.1979 and was posted under the Soil Conservation Officer-II, Fatehpur. It is stated that he was appointed by the Member Secretary of the Ram Ganga Command (Project). After about a year, the Soil Conservation Officer-II, Fatehpur lodged a first information report against the petitioner for committing fraud and impersonation, in the police station Kotwali, District Fatehpur and the police thereafter submitted a chargesheet in the matter and the case was registered as case crime no. 2439 of 1983 in the court of Chief Judicial Magistrate, Fatehpur.

3. The submission of the learned counsel for the petitioner is that in view of this the respondent no.1 terminated the services of the petitioner by order dated 12.7.1980 w.e.f. 7.6.1980, without giving any opportunity of hearing to the petitioner. His submission further is that subsequently, he was acquitted in the criminal case honourably. When the petitioner presented himself before the respondent no.1 to give him joining, the respondent no.1 refused to take the petitioner back in service. Thereupon the petitioner applied for conciliation but no settlement could take place. As such the State Government by order dated 4.6.1991 referred the dispute to the Labour Court for adjudication and the case was registered as Adjudication Case No. 208 of 1991. According to the petitioner, he submitted all his documents and other evidence. The Labour Court by its award dated 24.8.1993 held the termination of the petitioner w.e.f. 7.6.1980 to be illegal and directed the respondent no.1 to reinstate the petitioner in service but denied him backwages on the ground that the petitioner had not been able to state before the Labour Court, as to whether during the period he was out of service he had not been gainfully employed.

4. Thereafter on 6.4.1994, the petitioner filed a misc. Application 27-B, under Section 6(6) of the U.P. Industrial Disputes Act, 1947. The matter was contested and the Labour Court thereafter by its order dated 15.7.1994, awarded backwages from 24.8.1993 i.e. date of the award in Adjudication Case No. 208 of 1991 till the date of his reinstatement.

5. I have heard Sri B.N. Singh, learned counsel for the petitioner and the learned Additional Chief Standing Counsel for the respondent.

6. Sri B.N. Singh has submitted that the award dated 24.8.1993, passed by the Labour Court was never challenged by the respondent no.1 and therefore, the findings recorded therein and the direction given therein had become final. The submission of the learned counsel for the petitioner is that the respondent Department had alleged that the so called appointment letter was a fraudulent document and it is on this basis that a first information report was lodged against the petitioner. However, he further submitted that case crime no. 208 of 1991, was instituted in the court of C.J.M.

Fatehpur and a chargesheet was issued. In the said criminal case, the petitioner was honourably acquitted and therefore, it was no longer open for the respondent to insist that the appointment letter appointing the petitioner as Chaukidar under the respondent no.1 was obtained fraudulently and was forged document. Against the award given in Adjudication Case no. 208 of 1991, no writ petition was filed by the respondents and the award of the Labour Court, therefore was not challenged by the respondents and the same has attained finality.

7. The further submission of the learned counsel for the petitioner is that once his appointment has been held to be bad, he is entitled to be reinstated in service with full backwages as his appointment was of a permanent nature.

8. In the misc. case under Section 6(6) of the U.P. Industrial Disputes Act, 1947, the Labour Court has however, only awarded him backwages from the date of the first award i.e. from 24.8.1993 till the date of his reinstatement. The submission of the learned counsel is that since his appointment was of a permanent nature and the order of termination has been held to be bad, he was entitled to full backwages.

9. I have considered the submission of the learned counsel for the petitioner as well as Sri Mata Prashad, learned Additional Chief Standing Counsel for the respondents. Even though, the award dated 24.8.1993 had attained finality, however, in my opinion, the petitioner was not entitled to full backwages as he was not able to demonstrate before the court below that during the period after his termination from service, he had not been gainfully employed.

10. The Supreme Court in the case reported in 2011 (3) ESC 514 (SC), Devinder Singh Vs. Municipal Counsel, Sanaur, while modifying the directions given in the award of the Labour Court has directed that the appellant shall be entitled to wages for the period between the date of the award and the date of actual reinstatement. Para 28 of the judgment reads as follows:

"28. In the result, the appeal is allowed. The impugned order is set aside and the award passed by the Labour Court for reinstatement of the appellant is restored. If the respondent shall reinstate the appellant within a period of four weeks from today, the appellant shall also be entitled to wages for the period between the date of award and the date of actual reinstatement. The respondent shall pay the arrears to the appellant within a period of three months from the date of receipt/production of the copy of this order."

11. In the present case, the petitioner allegedly is stated to have been appointed by one Laxhmi Chandra, Member Secretary of the respondent no.1 but when he was required to produce the appointment letter, he stated that his house had caught fire and the appointment letter was destroyed and therefore, he could not trace out same. In this regard a report has also been lodged at the police station by his wife.

12. Be that as it may, the Labour Court while considering the entire case of the petitioner in the award dated 24.8.1993 and the order dated 15.7.1994 has recorded all the facts and thereafter come to the conclusion that the petitioner is only entitled to backwages for the period from the date of

the first award till date of his reinstatement. Similar direction has been given by the Supreme Court in para 28 of the judgment in the case of Devinder Singh (supra).

13. In the circumstances, having gone through the award dated 24.8.1993 and the order dated 15.7.1994 and the direction given by the Supreme Court in the case of Devinder Singh (supra), in my opinion, there is no illegality or infirmity in the two impugned orders.

14. The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2012

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 13636 of 2011

Sant Lal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar

Counsel for the Respondents:
C.S.C.

U.P. Regularization of Daily Wages Appointment on Group-D post Rules 2001-Rule 4-Regularization of Daily Wagers-rejection on ground-not completed 240 days continuous working-in the year 1981-out of job for the last 17 years-held-illegal-only requirement that should be engaged prior to 29.06.1991 and be found working on 21.09.2001-Non consideration of these factors-entire finding violated-quashed-direction for fresh consideration issued.

Held: Para-5

From a perusal of the aforesaid Rule, the only requirement for consideration for regularisation is that a person appointed on daily wage basis should be in Government Service on or before 29th June, 1991 and is still continuing in service on the date of the commencement of these Rules. The Rules have come into force from 21st September, 2001. The petitioner's case for regularisation has been rejected on the ground that he had not been worked for 240 days in the year 1981. Rule-4 does not prescribe that a daily wage person should work for 240 days in a calender year. The Rule only prescribes that he should have worked on daily wage basis on or before 29th June, 1991 and is continuing in service on the date of commencement of these Rules of 2001.

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

1. The petitioner's claim for regularization of his service, was rejected by an order dated 04.12.2010, against which the petitioner has filed the present writ petition.

2. In the impugned order, it has only been stated that the petitioner was an employee on daily wage basis in the year 1981 and since, he had not worked for more than 240 days in a calender year, his services could not be regularized under the U.P. Regularisation of Daily Wages Appointments on Group- D Posts Rules, 2001 (hereinafter referred to as the Rules of 2001).

3. In the counter affidavit, the respondents have come out with an additional stand, namely that the petitioner had only worked for a limited period in the year, 1981 and thereafter did not work for

the next 17 years. This fact is however, not indicated in the impugned order and therefore, this additional fact can not be taken into consideration.

4. Rule 4 of the Rules of 2001 is relevant for the purpose of deciding the present issue and have formulated the said rule, which has been extracted hereunder:

4. (1) Any person who-

(a) was directly appointed on daily wage basis on a Group-D post in the government service before June, 29,1991 and is continuing in service as such on the date of commencement of these rules; and

(b) possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy as may be available in Group-D post on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or order.

5. From a perusal of the aforesaid Rule, the only requirement for consideration for regularisation is that a person appointed on daily wage basis should be in Government Service on or before 29th June, 1991 and is still continuing in service on the date of the commencement of these Rules. The Rules have come into force from 21st September, 2001. The petitioner's case for regularisation has been rejected on the ground that he had not been worked for 240 days in the year 1981. Rule-4 does not prescribe that a daily wage person should work for 240 days in a calender year. The Rule only prescribes that he should have worked on daily wage basis on or before 29th June, 1991 and is continuing in service on the date of commencement of these Rules of 2001.

6. In the light of the aforesaid, the rejection of the petitioner's case is patently erroneous and can not be sustained.

7. The impugned order is quashed.

8. Writ petition is allowed. The matter is remitted again to the Authority to re-consider the matter and pass a fresh order in the light of observations made above within three months from the date of production of a certified copy of the order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

Criminal Misc. Writ Petition No. 13740 of 2012

Mairaj Ahmad Khan ...Petitioner
Versus
State of U.P. and anr. ...Respondents

Counsel for the Petitioner:
Sri Satyendra Pratap Singh-I

Counsel for the Respondents:
A.G.A.

Constitution of India, Article 226-Release of Vehicle-offense under Section 279, 337 and 338 I.P.C.-motorcycle involved in accident-under Section 203-B (I) of Motor Vehicle Act-in absence of finding of either causing death or grievous hurt-absence of either pending claim Petition on award-imposing condition to deposit security of Rs. 4 Lac apart from Rs. 2 Lac towards market value-held-highly onerous

, irrational and arbitrary-condition order passed by Court below quashed-direction to pass fresh order in light of observations.

Held: Para-8 and 9

A perusal of the aforesaid Rule indicates that for invocation of sub rule (3) the accident involving the vehicle must have caused death or permanent disablement. In the instant case, no finding has been recorded by the court below while imposing the onerous conditions that the accident had either caused death or permanent disablement of the victim. There is also no finding as to whether any claim has been set up before, or awarded by, any Court or Tribunal. I, therefore, do not find any basis for imposing condition to furnish security of Rs.4,00,000/- and additional security of Rs.2,00,000/- when neither the market value of the Motorcycle has been determined nor anything has been discussed about the claim or an award, as the case may be. Thus, the conditions imposed in the release order appear to be irrational and arbitrary. Accordingly, I'm of the view that the matter requires to be reconsidered by the court below.

While considering the applicability of sub rule (3) of Rule 203-B of the Rules, the Court must first assess whether the injury caused by the accident resulted in death or permanent disablement of the third party (victim). In case it comes to the conclusion that the accident involving the vehicle has resulted in permanent disablement or death of the third party, then it should proceed to examine whether any claim has been set up or not. If it is found that a claim has been set up and awarded, then the security required to be furnished under sub rule (3) of Rule 203-B of the Rules would not be less than the amount awarded. However, where a claim has neither been set up nor awarded, then, in such a situation, discretion has to be exercised by the Court. While exercising such discretion it may also notionally assess the compensation payable by taking the aid of structured formula provided under Section 163A of the Motor Vehicles Act, 1988. While finally assessing the security required to be furnished, the Court must always take into account the value of the vehicle involved in the accident. Because if the security far exceeds the value of the vehicle, no owner would ever seek for its release and ultimately, the vehicle would have to be sold on expiry of six months as per sub rule (4) of Rule 203-B. It is a matter of common knowledge that if the vehicle lies at the police station for six months then its value would drastically depreciate. Further, in a situation contemplated under sub rule (3) of Rule 203-B of the Rules while seeking for security the Court must ensure that the security furnished is worthy of enforcement, when required, and not illusory.

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

1. Heard learned counsel for the petitioner and learned A.G.A. for the State.

2. By order dated 18.9.2012 ten days time was allowed to the learned A.G.A. to seek instructions or to file counter affidavit. No counter affidavit could be filed. However, considering that there is no factual controversy involved in this petition, with the consent of the learned counsel for the parties, the petition is being finally disposed off at the admission stage itself.

3. The petitioner aggrieved by few onerous conditions put by the Chief Judicial Magistrate, Pilibhit in his vehicle release order dated 04.08.2012 passed in Case Crime No.458 of 2012, under sections 279, 337 and 338 IPC, P.S. Kotwali, district Pilibhit, has filed this writ petition. The conditions were also affirmed by the revisional court vide order dated 16.8.2012 passed by the Sessions Judge, Pilibhit in Criminal Revision No.166 of 2012.

4. By the order dated 04.08.2012 the Hero Honda Splendor Pro Motorcycle with registration No. U.P.26 L-1077 was ordered to be released in favour of the petitioner, who is the registered owner thereof, on certain conditions, apart from others, that he would submit personal bond of Rs.4,00,000/- together with two sureties of the like amount and shall further deposit security of Rs. 2,00,000/- in compliance of sub rule (3) of Rule 203-B of the UP Motor Vehicle Rules, 1998 (hereinafter referred to as Rules) inasmuch as the vehicle was involved in an accident and was not validly insured for third party risks, on the date of the accident.

5. The contention of the learned counsel for the petitioner is that the aforesaid conditions, as imposed, for release of the Motorcycle are onerous and arbitrary and not warranted in the facts and circumstances of the case. It has been contended that sub rule (3) of Rule 203-B of the Rules was not even applicable as it applies to a case where death or permanent disablement is caused on account of the accident. It has further been submitted that no finding has been recorded by the court below that a claim has been set up before, or awarded by, any court or tribunal, accordingly, imposition of such onerous condition would not only render the release order nugatory but would also deprive the petitioner of his statutory right to seek for release of the vehicle, pending inquiry or trial.

6. Per contra, learned A.G.A. submitted that the conditions imposed by the court below were in accordance with sub-rule (3) of Rule 203-B of the UP Motor Vehicle Rules, 1998, as incorporated vide UP Motor Vehicles (Eleventh Amendment) Rules, 2011, therefore, the conditions are legally justified. It has also been contended that the accident involving the motor cycle had caused fracture to the victim, apart from other injuries, therefore, to secure his claim, the conditions cannot be said to be unjustified.

7. I have perused the orders impugned as also the record. A perusal of the order dated 04.08.2012, which has been affirmed by the revisional court, goes to show that the aforesaid conditions were imposed by the court below by placing reliance on sub rule (3) of Rule 203-B of the U.P. Motor Vehicles Rules, 1998, as inserted by U.P. Motor Vehicles (Eleventh Amendment) Rules, 2011. It would be useful to reproduce the Rule 203-B, which reads as under:-

"203-B. Prohibition against release of vehicle.-*(1) No vehicle, involved in any accident, shall be released by investigating Police Officer or any Police Officer superior to him unless a release order is passed, by the court having jurisdiction.*

(2) No vehicle, involved in any accident shall be released by the Judicial Magistrate, having jurisdiction, unless the compliance of sub-rules (1) to (3) of Rule 203-A is ensured from the investigating Police Officer and duly attested copies of Registration Certificate, Insurance Certificate, Route Permit, Fitness Certificate of vehicle as the case may be and driving license of the driver who was driving at the time of accident, are filed by the applicant.

(3) No court shall release a vehicle involved in accident causing death or permanent disability when such vehicle is not covered by Policy of Insurance against third party risks unless the owner/registered owner of the vehicle furnished sufficient

security to the satisfaction of the court to pay compensation that may be awarded in a claim case arising out of such accident.

(4) Where the vehicle is not covered by a policy of insurance against third party risks, or when the owner/registered owner of the vehicle has failed to furnish sufficient security under sub-rule (3), or the policy of insurance produced by owner is found fake/forged, the vehicle shall be sold in public auction by the Judicial Magistrate, having jurisdiction, on expiry of six months of the vehicle being seized by the investigating Police Officer and proceeds thereof, shall be deposited with the Claims Tribunal, having jurisdiction over the area in question, for the purpose of satisfying the compensation to be awarded in claim case."

8. A perusal of the aforesaid Rule indicates that for invocation of sub rule (3) the accident involving the vehicle must have caused death or permanent disablement. In the instant case, no finding has been recorded by the court below while imposing the onerous conditions that the accident had either caused death or permanent disablement of the victim. There is also no finding as to whether any claim has been set up before, or awarded by, any Court or Tribunal. I, therefore, do not find any basis for imposing condition to furnish security of Rs.4,00,000/- and additional security of Rs.2,00,000/- when neither the market value of the Motorcycle has been determined nor anything has been discussed about the claim or an award, as the case may be. Thus, the conditions imposed in the release order appear to be irrational and arbitrary. Accordingly, I'm of the view that the matter requires to be reconsidered by the court below.

9. While considering the applicability of sub rule (3) of Rule 203-B of the Rules, the Court must first assess whether the injury caused by the accident resulted in death or permanent disablement of the third party (victim). In case it comes to the conclusion that the accident involving the vehicle has resulted in permanent disablement or death of the third party, then it should proceed to examine whether any claim has been set up or not. If it is found that a claim has been set up and awarded, then the security required to be furnished under sub rule (3) of Rule 203-B of the Rules would not be less than the amount awarded. However, where a claim has neither been set up nor awarded, then, in such a situation, discretion has to be exercised by the Court. While exercising such discretion it may also notionally assess the compensation payable by taking the aid of structured formula provided under Section 163A of the Motor Vehicles Act, 1988. While finally assessing the security required to be furnished, the Court must always take into account the value of the vehicle involved in the accident. Because if the security far exceeds the value of the vehicle, no owner would ever seek for its release and ultimately, the vehicle would have to be sold on expiry of six months as per sub rule (4) of Rule 203-B. It is a matter of common knowledge that if the vehicle lies at the police station for six months then its value would drastically depreciate. Further, in a situation contemplated under sub rule (3) of Rule 203-B of the Rules while seeking for security the Court must ensure that the security furnished is worthy of enforcement, when required, and not illusory.

10. For the reasons aforesaid, the order dated 04.08.2012 passed by the Chief Judicial Magistrate, Pilibhit and the order

dated 16.08.2012 passed by the Sessions Judge, Pilibhit are hereby quashed, the learned Magistrate concerned is directed to pass a fresh release order, in accordance with law, after taking into consideration the observations made in this order. It will be open to the learned Magistrate to give opportunity of hearing to the victim of the accident before passing the order. It is expected that the entire exercise shall be completed, preferably, within 15 days from the date of filing of certified copy of this order.

11. With the aforesaid directions, the writ petition stands disposed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.10.2012

BEFORE
THE HON'BLE RAMESH SINHA, J.

Application U/S 482 No. - 22517 Of 2012

Manoj Rana ...Applicant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vivek Kumar Singh
Sri Ajay Kumar Singh

Counsel for the Respondents:
Govt.Advocate

Code of Criminal Procedure-Section 482-cognizance taken by Magistrate on charge sheet-offence under Section 323, 504, 506 I.P.C.-Revisional Court set-a-side the order placing reliance upon Division Bench judgment-the offence under section 506 being Non-cognizable-can be tried as complaint case-held-ignoring Full Bench judgment of Mata Sewak Upadhyay-cognizable offence took place-revisional Court committed great illegality-order taking cognizance by Magistrate restored.

Held: Para-7 and 8

The decision of Mata Sewak Upadhyay (supra) still holds good and has not been overruled nor anything has been argued in this respect by the learned A.G.A. It appears that at the time of hearing of the case of Virendra Singh (supra) the decision of Mata Sewak Upadhyay (supra) was not brought to the notice of the Hon'ble Division Bench. In view of the decision of Full Bench on the same subject, the decision of Division Bench cannot be given effect to.

In view of the foregoing discussions it can safely be said that the offence under Section 506 I.P.C. is not non-cognizable, hence the impugned order passed by the lower revisional court cannot be sustained in the eye of law. The provisions of Section 2(d) of Cr.P.C. do not apply in the present case. The submission of leaned counsel of the applicant in this regard finds force. The impugned order passed by the lower revisional court is set aside and the order of the Magistrate dated 1.4.2010 is hereby restored. Accordingly, the matter is sent back to the Magistrate, who may proceed in the case in accordance with law.

Case Law discussed:
[2002 (45) ACC 609 Alld.]; 1995 JIC 1168 (All) (FB)

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

1. Heard Sri Vivek Kumar Singh, learned counsel for the applicant, learned AGA for the State and perused the record.

2. As the matter involves a pure question of law, is squarely covered by a Full Bench Decision of this Court, hence, no notice is required to be given to the opposite party nos.2 to 5 of the application and the matter is disposed of after hearing the learned AGA on behalf of the State.

3. By invoking the inherent jurisdiction of this Court, the applicant has filed the present application under Section 482 Cr.P.C. with the prayer to quash the impugned order dated 25.5.2012 passed by Additional Sessions Judge, Court No.15, Meerut in Criminal Revision No. 54 of 2012, Hukam Singh and others Vs. State of U.P. and another, Police Station Daurala, District Meerut.

4. Briefly stated, an FIR was lodged by the applicant against opp. parties No. 2 to 5 as Case Crime No. 755 of 2009, under Section 147, 452, 323, 504, 506 I.P.C. at Police Station Daurala, District Meerut on 11.11.2009 regarding the incident dated 15.7.2009. Thereafter, the police investigated the matter and Section 452 I.P.C. was not found to be true by the police but rest case was found to be true and the police submitted charge sheet under Sections 323, 504, 506 I.P.C. against the opp. parties No. 2 to 5. Learned Magistrate took the cognizance of the officence vide order dated 1.4.2010. Thereafter, the opp. parties No. 2 to 5 challenged the aforesaid order in criminal revision No. 54 of 2012 on the ground that the learned Magistrate has wrongly taken cognizance for offence vide order dated 1.4.2010 and the case should not be proceeded as complaint as the offences are non-cognizable offence and the State cannot proceed. Learned Revisinal Court vide order dated 25.5.2012 allowed the criminal revision for the reason that the offence under Section 506 I.P.C. is non-cognizable offence and the case should proceed as complaint case and summoned the applicant to face the trial for the aforesaid offences.

5. It is contended on behalf of the applicant that the lower revisional court has wrongly placed reliance on the Division Bench of this Court in the case of *Virendra Singh and others versus State of U.P. and others [2002 (45) ACC 609 Alld.*, wherein it was held that the offence under Sections 506 IPC was declared cognizable and non-bailable vide U.P. Government Notification no.777/VIII-9-4 (2)-87 dated 31.7.1989, but the same has been held illegal by the Division Bench of this Court in the case of Virendra Singh (supra). Thus, the notification ceases to have any impact and the offence under Section 506 IPC remains to be non-cognizable and bailable. Learned counsel for the applicants submits that the said judgment of the Division Bench is not a good law as it has failed to consider a Full Bench decision of this Court in the case of *Mata Sewak Upadhyay versus State of U.P. 1995 JIC 1168(All) (FB)* where the legality and validity of this notification came for consideration. Without going into the details of the decision, for the purpose of this case, it may be pointed out that the aforesaid Full Bench decision lays down that Criminal Law Amendment Act, 1932 is not merely an Amending Act but that is a blend of substantive provisions as well as the provisions amending Cr.P.C. of 1898. So the Act of 1932 is still on the statute book, notwithstanding the repeal of Cr.P.C. 1898. It was further held that applying the rule of construction as laid down in Section 8 of the General Clauses Act, it becomes clear that the notification issued u/s 10 with reference to Cr.P.C. 1998 should be read as having been issued with reference to the Cr.P.C. 1973. It was held that law has to be construed in such a fashion as to make it workable and enforceable than redundant. It was held that Section 10 of the Criminal Law Amendment Act, 1932 and Government Notification no.777/VIII-9-4 (2)-87 dated 31.7.1989 making Section 506 I.P.C. cognizable and non-bailable offence are valid.

6. The learned A.G.A. could not dispute the aforesaid proposition of law as has been held by the Full Bench decision in the case of *Mata Sewak Upadhyay (supra).*

7. The decision of *Mata Sewak Upadhyay (supra)* still holds good and has not been overruled nor anything has been argued in this respect by the learned A.G.A. It appears that at the time of hearing of the case of *Virendra Singh (supra)* the decision of *Mata Sewak Upadhyay (supra)* was not brought to the notice of the Hon'ble Division Bench. In view of the decision of Full Bench on the same subject, the decision of Division Bench cannot be given effect to.

8. In view of the foregoing discussions it can safely be said that the offence under Section 506 I.P.C. is not non-cognizable, hence the impugned order passed by the lower revisional court cannot be sustained in the eye of law. The provisions of Section 2(d) of Cr.P.C. do not apply in the present case. The submission of leaned counsel of the applicant in this regard finds force. The impugned order passed by the lower revisional court is set aside and the order of the Magistrate dated 1.4.2010 is hereby restored. Accordingly, the matter is sent back to the Magistrate, who may proceed in the case in accordance with law.

9. The application stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.10.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 27624 of 2006

Mohd. Danish ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shailendra Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-cancellation of application-Fire Arm License-on ground no genuine need proved by applicant-inspite of having every positive report-rejection on such frivolous ground-amounts to abuse of power-direction issued to award adverse entry against those guilty officer-if no criminal case found against petitioner-D.M. to grant license.

Held: Para-6

Accordingly, it is directed that if henceforth any such matter comes before the Court where D.M. has refused to grant the arm licence on patent/ frivolous ground that actual need had not been proved by the applicant, direction will be issued for making adverse entry in the service record of the said D.M.

Case Law discussed:
1977 ACC Page 499; 2010 (10) A.D.J. 782; 2012 (8) A.D.J. 170

(Delivered by Hon'ble S. U. Khan, J.)

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

2. Time granted to file counter affidavit has expired long before still no counter affidavit has been filed.

3. Father of the petitioner was holding arm licence to keep a SBBL gun who died on 29.02.2004 and thereupon the petitioner deposited the gun with an arms dealer. Thereafter petitioner applied for grant for licence to him. The application was registered as Case No.73 of 2004. D.M. Fatehpur through order dated 18.01.2006 rejected the application. It is specifically mentioned in the order that the other legal representatives of deceased licence holder had given affidavit in favour of the petitioner and according to the report of the S.P. petitioner had no criminal history and grant of licence was recommended. A.D.M. also reported that there was no objection for grant of licence. Still the D.M. rejected the application for grant of licence on the ground that according to the policy of the government arm licence shall not be given to the persons who do not, necessarily actually require the arm licence. There is absolutely no reference to the details of the said policy. Neither the date nor the number of the communication/ order has been mentioned. It has not been explained what is meant by actual need. Does it mean that the person applying for arm licence must have got several enemies, must have been attacked and received severe injuries etc. ? If the matter had not been quite old, the Court would have required the D.M. concerned to file the copies of the orders which he might have passed while granting licences to allegedly needy persons to discern the meaning of need. Against the order dated 18.01.2006 petitioner filed Appeal No.16 of 2005-06. Commissioner, Allahabad Division, Allahabad through order dated 27.02.2006 dismissed the appeal referring to the judgment of the High Court in **Jagpal Vs. State, 1977 ACC Page 499** holding that D.M. is the best judge to decide whether to grant the licence or not. Even Supreme Court and High Court judges while deciding the matters are duty bound to give valid reasons. To be the best judge does not mean that the authority concerned has got the right to decide the case by toss of coin. In Writ Petition No.21605 of 2006, Abdul Rahman Vs. State of U.P. and others decided on 04.09.2012 I held as follows in the last two paragraphs:

"Probably the authorities below were of the opinion that unless someone very seriously injured the petitioner he could not be granted fire arm licence. Some times first symptom of heart attack is instant death. Similarly some times first evidence of threat to some ones life is his murder. The matter is quite old otherwise the court would have asked the D.M. concerned to produce the orders in which he had allowed the applications for grant of fire arm licence to ascertain that on what basis the D.M. concerned was granting fire arm licences.

Unless there is some thing adverse against the applicant fire arm licence can not be denied to him vide ***Pawan Kumar Jha Vs. State of U.P. & others 2010(10) A.D.J. 782 and Dinesh Kumar Pandey Vs. State of U.P. 2012(8) A.D.J. 170.*** *Accordingly, writ petition is allowed. Impugned orders are set aside. If till date no criminal case has been lodged against the petitioner then he must immediately, in no case beyond one month from the date of production of certified copy of this order before the D.M. Allahabad be*

granted the fire Arm licence. Writ petition is allowed."

4. In the aforesaid authority of **Dinesh Kumar Pandey** referred in the above judgment the matter has very thoroughly been examined by Hon'ble Sudhir Agarwal, J.

5. Innumerable cases are coming before the Court where without any reason grant of licence to hold fire arm is being denied on the ground that there is no actual need. The authorities below must realise that more often than not fire arm is required to prevent a crime and not to commit the same. A person who wants to commit a crime does not wait for grant of fire arm licence.

6. Accordingly, it is directed that if henceforth any such matter comes before the Court where D.M. has refused to grant the arm licence on patent/ frivolous ground that actual need had not been proved by the applicant, direction will be issued for making adverse entry in the service record of the said D.M.

7. Writ Petition is allowed. Impugned orders are set aside. D.M. shall pass fresh order within two weeks from the date of receipt of a certified copy of this order. If no criminal case is pending against the petitioner, licence shall be granted to him.

8. Office is directed to supply copy of this order free of cost to Sri A.S. Rana, learned standing counsel within a week. Sri Rana shall send copies of this order to each and every D.M. of the State as well as to the Home Secretary and Chief Secretary to the government of State.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 35114 of 2005

Roshan Lal and others ...Petitioner
Versus
Rishi Pal Singh and others ...Respondents

Counsel for the Petitioner:
Sri K.M. Garg

Counsel for the Respondents:
Sri Mahipal Singh

Small Causes Court Act, 1887-Section 17 (1) readwith Code of Civil Procedure-Order 9 Rule 13-Setting-a-side-ex-parte-Decree-application neither accompanied with entire decreed amount nor with exemption application-held-furnishing security towards decreed amount being mandatory-application for setting-a-side ex-parte Decree-not maintainable.

Held: Para-7

In my view, Revisional Court has not only misread proviso to Section 17(1) of Act, 1887 but has also ignored catena of decisions of this Court as also that of Apex Court, which have considered proviso to Section 17(1) of Act, 1887 wherein it has been held unambiguously that requirement of deposit or application for security must accompany or precede the application for setting aside ex parte decree and not to be seen on the date of hearing of such application.

Case Law discussed:
1996 (1) ARC 76; 2002 (1) ARC 186; 1978 ALJ 738; 1979 AWC 256; 1983 1 ARC 565; 1985 1 ARC 54; 1988 1 ARC 310; 1988 (1) ARC 341; 1988 (2) ARC 575; 1991 (2) ARC 129; AIR 1991 All 223 : 1991(1) ARC 501; 1996 (27)

ALR 540 : 1996 (1) ARC 414; AIR 1998 All. 125; 2000 (2) ARC 616

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

1. Heard. Since pleadings are complete, the Court proceed to decide the case finally at this stage under the Rules of the Court.

2. The dispute relates to a shop situated at village Tatarpur Laluwala, Mohalla Adarsh Nagar, Najibabad, District Bijnor. The shop is owned by petitioners and respondents No.2 and 3. The aforesaid shop was let out to respondent No.1. Claiming that construction of shop was made in 1989, provisions of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") are not applicable and since there was a default in payment of rent for more than two years i.e. from 1.9.1998, petitioners and respondents No.3 and 4 vide notice dated 8.2.2001 determined tenancy of respondent no.1 and thereafter filed suit no.75 of 2002 for ejectment and recovery of arrears of rent. It was decreed ex parte by the Court of Small Cause, Bijnor vide judgement dated 9.5.2003.

3. The respondent No.1 filed an application dated 21.5.2003 under Order IX, Rule 13 C.P.C. for setting aside ex parte decree, which was registered as Misc. Case No.19 of 2003. It was neither accompanied by deposit in the Court the amount due from defendant-applicant i.e. respondent no.1 under the decree nor any security for performance of the decree nor any application for furnishing such security. In other words there was no compliance of Section 17(1) of Provincial Small Cause Courts Act, 1887 *(hereinafter referred to as "Act, 1887").*

4. Subsequently on 28.10.2003 respondent no.1 filed an application under Section 17 of Act, 1887 seeking permission of Trial Court to furnish security of Rs.9,600/- and deposit of Rs.8003/- by Tender since according to him total amount under decree would come to Rs.17,603/-. The Trial Court, vide order dated 5.12.2003 permitted the deposit by tender subject to the rights of the parties. Besides above, respondent No.1 also filed an application under Section 5 of Indian Limitation Act seeking condonation of delay in filing application for compliance of Section 17 of Act, 1887.

5. The said applications were contested by petitioners. The Trial Court vide order dated 25.8.2004 held that there is no compliance of Section 17 of Act, 1887 and accordingly rejected application under Order IX, Rule 13 C.P.C. for setting aside ex parte decree. The Trial Court besides non compliance of Section 17 also recorded finding of fact that there was no sufficient ground explaining absence on the date fixed when ex parte decree was passed. The respondent no.1 preferred S.C.C. Revision No.27 of 2004 which has been allowed by Additional District Judge, Court No.2, Bijnor by means of impugned judgment dated 18.1.2005 observing that for the purpose of Order IX, Rule 13, the Court must take a liberal view. With respect to compliance of Section 17(1) of Act, 1887 he has held that if decretal amount is deposited on the date of hearing of the application, that is sufficient compliance of proviso to Section 17 (1) of Act, 1887 and taking this view the Revisional Court has relied

decision of this Court in **Ashok Kumar Dhiman Vs. Smt. Chandrawati Mehta 1996(1) ARC 76.**

6. The short issue up for consideration before this Court whether there was compliance of proviso to Section 17(1) of Act, 1887 in the present case or not and whether the view taken by Revisional Court that deposit need not be on the date of submission of the application for setting aside ex parte order but if it is so on the date of hearing of application, that would be sufficient compliance of proviso to Section 17(1) of Act, 1887, is correct?

7. In my view, Revisional Court has not only misread proviso to Section 17(1) of Act, 1887 but has also ignored catena of decisions of this Court as also that of Apex Court, which have considered proviso to Section 17(1) of Act, 1887 wherein it has been held unambiguously that requirement of deposit or application for security must accompany or precede the application for setting aside ex parte decree and not to be seen on the date of hearing of such application.

8. The Apex Court has considered this aspect in **Kedarnath Vs. Mohan Lal Kesarwani & Ors., 2002(1) ARC 186**. The Court has clearly held that an application moved for compliance of Section 17 at a later stage after filing the application for setting aside ex parte decree cannot be considered as due compliance since it would not fall within the ambit of strict compliance of proviso to Section 17. Paras 9 and 10 of judgment reads as under:

"9. A bare reading of the provision shows that the legislature have chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret construe and hold the nature of the proviso as directory. An application seeking to set aside an ex-parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time up to the time of presentation of application for setting aside ex-parte decree or for review and the Court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court.

10. In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the applicant under the decree. The applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The application for setting aside the decree was therefore

incompetent. It could not have bee entertained and allowed."

9. The Apex court has referred to the several decisions of this Court which were cited and has approved in the above judgment which are **Krishan Kumar v. Hakim Mohd., 1978 ALJ 738, Sharif v. Suresh Chand and Ors. 1979 AWC 256, Roop Basant v. Durga Prasad and Anr. 1983 1 ARC 565, Mohd. Islam v. Faquir Mohammad 1985 1 ARC 54, Krishan Chandra Seth v. K.P. Agarwal and Anr. 1988 1 ARC 310, Mamta Sharma v. Hari Shankar Srivastava and Ors. 1988 (1) ARC 341, Mohd. Yasin v. Jai Prakash 1988 (2) ARC 575, Purshottam v. Special Additional Sessions Judge, Mathura and Ors. 1991 (2) ARC 129, Ram Chandra (deceased Lrs.) and Ors. v. IXth Additional District Judge, Varanasi and Ors. AIR 1991 All 223 : 1991(1) ARC 501, Sagir Khan v. The District Judge, Farrukhabad and Ors. 1996 (27) ALR 540 : 1996 (1) ARC 414, Mohammad Nasem v. Third Additional District Judge, Faizabad and Ors. AIR 1998 All. 125 and Beena Khare v. VIIIth Additional District Judge, Allahabad and Anr. 2000 (2) ARC 616.**

10. It is not disputed that at the time of filing of application i.e. 21.5.2003 neither decretal amount was deposited nor it preceded or accompanied any application for furnishing security for performance of decree. The decisions of this Court in **Ashok Kumar Dhiman (supra)** relied by Revisional Court would not lend any help to respondent no.1 in view of authoritative pronouncement on the question by Apex Court in **Kedarnath (supra).** A belated application for purported compliance of Section 17(1) of Act, 1887 has been deprecated by Apex Court in **Kedarnath (supra)** as is evident from para 11 of the judgment:

"11. The trial court was therefore right in rejecting the application. The District Judge in exercise of its revisional jurisdiction could not have interfered with the order of the trial court. The illegality in exercise of jurisdiction by the District Court disposing of the revision petition was brought to notice of the High Court and it was a fit case where the High Court ought to have in exercise of its supervisory jurisdiction set aside the order of the District Court by holding the application filed by the respondent as incompetent and hence not entertainable. We need not examine the other question whether a sufficient cause for condoning the delay in moving the application for leave of the court to furnish security for performance was made out or not and whether such an application moved at a highly belated stage and hence not being a 'previous application' was at all entertainable or not."

11. In view of the above, impugned revisional judgment cannot sustain. The writ petition is allowed. The judgment dated 18.01.2005 (Annexure No.14 to the writ petition) passed by Revisional Court is hereby set aside. The decree of ejectment and recovery for arrears of rent passed by Trial Court dated 25.8.2004 passed by Judge Small Cause Court, Bijnor is hereby restored and confirmed.

12. No Costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 35608 of 1997

Bharat Singh and others ...Petitioner
Versus
District Basic Shiksha Adhikari, Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri V. Singh
Sri J.P.S. Chauhan
Sri Vivik Saran
Sri Abishek Srivastava
Sri Prasoon Tiwari

Counsel for the Respondents:
Sri P.D. Tripathi
S.C.

U.P. Basic Education Act 1972-Rule-8- Exemption from B.T.C. Training-granted to those teachers who had completed 10 years continuous service as per Government Order-can not be made applicable-with regards to fresh appointment-no relief for exemption can be granted contrary to statutory provisions-petition dismissed.

Held: Para-7

This government Order does not apply to the fresh appointment. In the case of fresh appointment, it is always open to the employer to fix the qualification. The qualification for the assistant teacher for Basic Education is provided under Rule 8 of Rules, 1981. There is neither any Government Order nor any notification relaxing such qualification provided in Rule 8. The qualification mentioned in the advertisement is in consonance with qualification provided in Rule 8. Therefore, the submission of learned counsel for the petitioner that the exemption from BTC training granted in pursuance of the Government Order dated 06.09.1994 should also be considered for the purposes of advertisement dated 31.08.1997 has no substance.

Case Law discussed:
(2010) 8 SCC 701 (Para 36); J.T. 1994 (4) SC 532

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

1. All the petitioners passed Intermediate examination conducted by U.P. Board. The petitioner nos.1 and 2 are of OBC category and petitioner nos.3 and 4 are of General Category. All the petitioner were appointed as Assistant Teachers on 01.07.1984 in Indira Shishu Niketan Noorpur, Bijnor, a recognized primary institution by U.P. Basic Shiksha Parishad. They have completed their ten years service in the said institution on 01.07.1994. The State Government issued Government Order on 06.09.1994 and in compliance thereof the Director of Education passed an order on 30.09.1994 by which it was directed that all those un-trained teachers working in a recognized institution of the Basic Shiksha Parisiad would be entitled for exemption from BTC training on completion of ten years service in a recognized institution of Basic Shiksha Parishad. In compliance of the said Government Order and the order of Director Education, the respondent no.3 by order dated 28.02.1995 has granted exemption to the petitioner nos.1 and 3 from BTC training from 01.07.1994 and by his order dated 10.03.1995 has granted exemption to the petitioner no.2 and by his order dated 04.04.1995 has granted exemption to the petitioner no.4 from BTC training from 01.07.1994.

2. The Director of Education by order dated 30.10.1995 has clarified that all those Assistant Teachers, who are working in a recognized institution of Basic Shiksha Parisahd would be entitled for exemption from BTC training and they would be entitled for all benefits of BTC training and entitled for the benefit of BTC training available to the working BTC trained teachers.

3. It appears that for the post of Assistant Teachers an advertisement was issued on 17.08.1997. The petitioners applications for Assistant Teacher under the aforesaid advertisement have not been considered. Being aggrieved, the petitioners filed the present writ petition seeking direction to the respondent no.1 to consider the case of the petitioners for appointment on the post of Assistant Teachers in respect of which advertisement has been made on 17.08.1997 and for direction to the respondent no.1 to treat the petitioners at par with BTC trained persons on 01.07.1994 in view of the Government Order dated 06.09.1994 issued by the State Government and the order dated 30.09.1994 and 30.10.1995 issued by Director of Education. This Court has directed to the respondent no.1 to file counter affidavit and as an interim measure the petitioners have been permitted to appear for selection to the post of Assistant Teachers in Junior Basic Schools run by U.P. Basic Shiksha Parishad but their result shall not be declared till further orders. Counter and rejoinder affidavits have been exchanged.

4. Heard Sri Vivek Saran, Advocate holding brief of Sri Abhishek Srivastava, learned counsel for the petitioner and Sri P.D.Tripathi, learned counsel appearing on behalf of Basic Shiksha Parishad and learned Standing Counsel appearing on behalf of respondent no.3.

5. Learned counsel for the petitioners submitted that :

(i) Government Order dated 06.09.1994 provided that those Assistant Teachers, who have completed ten years' of continuous service in a recognized institution shall be entitled for exemption from BTC training. The said Government Order provided that separate order of exemption be issued in respect of the Teachers concerned by the competent authority. In pursuance of the aforesaid Government Order, the petitioners have been exempted from BTC training by orders dated 28.02.1995, 10.03.1995 and 04.04.1995 respectively;

(ii) State Government under Section 19 of U.P. Basic Education Act, 1972 has power to make rules in respect of the condition of service of teachers to be appointed under the Act. In exercise of power under Section 19 of the Act, the respondents have framed the U.P. Basic Education (Teachers) Service Rules, 1981. Rule 8 of the said Rules provide the academic qualifications for appointment. Rule 10 gives power of relaxations for a particular class. The qualification provided in advertisement dated 31.08.1997 was with reference to the Rule 8. The exemption granted to the petitioners should be treated in exercise of power under Rule 10 and also for the purposes of advertisement dated 31.08.1997;

(iii) The Apex Court has held that the Government Order should be read in plain and simply language in order to

understand its meaning and intention. Reliance is placed on the decision in the case of **Bhakka Beas Management Board Vs. Krishan Kumar Vij and another, reported in (2010) 8 SCC, 701. (Para 36).**

6. Learned counsel appearing on behalf of the Basic Shiksha Parishad submitted that the exemption from BTC training provided to the petitioners under the Government Order dated 06.09.1994 was only for the limited purposes to regularise their services in the institution even in the absence of BTC training but it does not apply to the fresh appointment by the advertisement. Unless the candidate fulfils the qualifications mentioned in the advertisement, which is also required under Rule 8, they are not eligible to apply for the post and can not be considered.

7. I have considered the rival submissions and perused the record.

8. Government Order dated 06.09.1994 was only to regularize the services of those teachers who were already working and the exemption from BTC training has been granted only to those teachers, who have completed ten years continuous service. This government Order does not apply to the fresh appointment. In the case of fresh appointment, it is always open to the employer to fix the qualification. The qualification for the assistant teacher for Basic Education is provided under Rule 8 of Rules, 1981. There is neither any Government Order nor any notification relaxing such qualification provided in Rule 8. The qualification mentioned in the advertisement is in consonance with qualification provided in Rule 8. Therefore, the submission of learned counsel for the petitioner that the exemption from BTC training granted in pursuance of the Government Order dated 06.09.1994 should also be considered for the purposes of advertisement dated 31.08.1997 has no substance.

9. In the case of ***Tata Cellular v Union of India, reported in J.T. 1994 (4) SC 532,*** the Apex Court has held that there should be judicial restraint in administrative decision. This principle will apply all the more to a Rule under Article 309 of the Constitution of India.

10. In the case of ***Dilip Kumar Garg and another vs. State of U.P. and others*** (supra), the Apex Court has held that Article 14 should not be stretched too far, otherwise it will make the functioning of the administration impossible. The administrative authorities are in the best position to decide the requisite qualifications for promotion from Junior Engineer to Assistant Engineer and it is not for this Court to sit over their decision like a Court of Appeal. The administrative authorities have experience in administration, and the Court must respect this, and should not interfere readily with administrative decisions.

11. In the case of ***Union of India vs. Pushpa Rani and others*** (Supra), the Apex Court has held as follows:

"Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of

selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to malafides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

11. In the case of ***State of M.P. and others vs. Raghuveer Singh Yadav and others*** (supra), the Apex Court has held as follows:

"It is not in dispute that Statutory Rules have been made introducing Degree in Science or Engineering or Diploma in Technology as qualifications for recruitment to the posts of Inspector of Weights and Measures. It is settled law that the State has got power to prescribe qualifications for recruitment. Hear is a case that pursuant to amend Rules, the Government has withdrawn the earlier notification and wants to proceed with the recruitment afresh. It is not a case of any accrued right. The candidates who had appeared for the examination and passed the written examination had only legitimate expectation to be considered of their claims according to the rules then in vogue. The amended Rules have only prospective operation. The Government is entitled to conduct selection in accordance with the changed rules and make final recruitment. Obviously no candidate acquired any vested right against the State. Therefore, the State is entitled to withdraw the notification by which it had previously notified recruitment and to issue fresh notification in that regard on the basis of the amended Rules."

12. In the case of ***V.K. Sood vs. Secretary, Civil Aviation and others*** (supra), the Apex Court has held as follows:

"Thus it would be clear that, in the exercise of the rule making power, the President or authorized person is entitled to prescribe method of recruitment, qualifications both educational as well as technical for appointment or conditions of service to an office or a post under the State. The rules thus having been made in exercise of the power under proviso to Article 309 of the Constitution, being statutory cannot be impeached on the ground that the authorities have prescribed tailor made qualifications to suit the stated individuals whose names have been mentioned in the appeal. Suffice to state that it is settled law that no motives can be attributed to the Legislature in making the law. The Rules prescribed qualifications for eligibility and the suitability of the appellant would be tested by the Union Public Service Commission.

It is next contended that several persons whose names have been

copiously mentioned in the appeal were not qualified to hold the post of examiner and they were not capable even to set the test papers to the examinees nor capable to evaluate the papers. We are not called upon to decide the legality of their appointments nor their credentials in this appeal as that question does not arise nor are they before the Court. It is next mentioned by Mr. Yogeshwar Prasad, the learned Senior counsel that on account of inefficiency in the posts' operational capability repeatedly air accidents have been occurring endangering the lives of innocent travellers and this Court should regulate the prescription of higher qualifications and strict standards to the navigators or to the pilots be insisted on. We are afraid that we cannot enter into nor undertake the responsibility in that behalf. It is for the expert body and this Court does not have the assistance of experts. Moreover it is for the rule making authority or for the Legislature to regulate the method of recruitment, prescribe qualifications etc. It is open to the President or the authorized person to undertake such exercise and that necessary tests should be conducted by U.P.S.C. before giving the certificates to them. This not the province of this Court to trench into and prescribe qualifications in particular when the matters are of the technical nature. It is stated in the counter affidavit that due to advancement of technology of the flight aviations the navigators are no longer required and therefore they are not coming in large number. Despite the repeated advertisements no suitable candidate is coming forward. We do not go into that aspect also and it is not necessary for the purpose of this case. Suffice to state that pursuant to another advancement made in July, 1992, the appellant is stated to have admittedly applied for and appeared before the U.P.S.C. for selection and that he is awaiting the result thereof. Under these circumstances, we do not find any substance in this appeal. The appeal is accordingly dismissed. No costs."

13. In the case of ***Col. A.S. Sangwan vs. Union of India and others*** (supra), the Apex Court has held as follows :

".....A policy once formulated is not good for ever; it is perfectly within the competence of the Union of India to change it, rechange it, adjust it and readjust it according to the compulsions of national considerations. We cannot, as Court, give directives as to how the Defence Ministry should function except to state that the obligation not to act arbitrarily and to treat employees equally is binding on the Union of India because it functions under the Constitution and not over it. In this view, we agree with the submission of the Union of India that there is no bar to its changing the policy formulated in 1964 if these are good and weighty reasons for doing so.....It must do so fairly and should not give the impression that it is acting by any ulterior criteria or arbitrarily.....So, whatever policy is made should be done fairly and made known to those concerned....."

14. In the result, the writ petition fails and is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2012

BEFORE
THE HON'BLE RAVINDRA SINGH, J.
THE HON'BLE ANIL KUMAR AGARWAL, J.

Civil Misc. Habeas Corpus Writ Petition
No. 42114 of 2012

Smt. Meenashi @ Pinki and another ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri V.P. Gupta

Counsel for the Respondents:
Sri Rajiv Sisodia
A.G.A.

Constitution of India, Article 226-Habeas Corpus Petition-petitioner No. 1 alleging herself as major and living as husband and wife after marriage by Arya Samaj-challenging the order passed by S.D.M. by which send in Nari Niketan-according to High School marksheet petitioner No. 1 being minor-but in facts and circumstances of case being married with Narendra Singh-she may join the company of her husband Narendra or her parents- detention of Nari Niketan not proper-quashed.

Held: Para-6

This court is cautious about the welfare of the corpus. The learned SDM Hasanpur passed two orders dated 24.6.2012 and 21.7.2012 by which she has been sent to Nari Niktan Moradabad which does not appear to be proper therefore, the orders dated 24.6.2012 and 21.7.2012 are hereby set aside. The corpus is directed to be released from Nari Niketan Muzaffarnagar forthwith in the presence of the Officer-in-Charge of P.S. Hasanpur, the corpus shall be free to go to his father's house or her husband Narendra Singh's house, the Officer-in-charge of P.S. Hasanpur shall ensure that no hurt may be caused to the corpus either at her parent's house or her husband's house.

(Delivered by Hon'ble Ravindra Singh, J.)

1. Heard Sri V.P. Gupta, learned counsel for the petitioners, learned A.G.A. for the State of U.P. and Sri Rajiv Sisodia, appearing on behalf of respondent no.4 Vijai Pal Singh.

2. This Habeas Corpus Writ petition has been filed on behalf of Smt. Meenashi @ Pinki by petitioner no 2 Tek Chandra with the prayers:-

1.Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 21.7.2012 passed by respondent no.2 (Annexure no.3 to the writ petition).

2.issue a writ, order or direction in the nature of habeas corpus directing the respondent no. 3 to produce the corpus before this Hon'ble Court and set him free on her own desire.

3.Issue any other writ order or direction in favour of the petitioner, which this Hon'ble court may deem fit and proper under the facts and circumstances of the case.

4.To award the cost of the present writ petition to the petitioner.

3. The facts of this case is that an FIR has been lodged by Bal Kishan on 22.6.2012 at 8.05 P.M. in respect of the incident allegedly occurred on 22.6.2012 at about 6.30 P.M., it has been lodged against Sri Chandra, Jai Chandra sons of Atar

Singh, Manoj brother in law of Sri Chandra, Narendra, Vijay Singh and driver of *Qualis Vehicle* under section 264 I.P.C. alleging therein that his son Tek Chandra, petitioner No.2 was forcibly taken away by the above mentioned accused persons, his son Tek Chandra was abducted because they were having suspicion of abduction of Km. Meenakshi. Tek Chandra was working at the house of Vijay Pal Singh, the father of the corpus for the last many years, he was residing at his house also, due to which he developed relationship with corpus Meenakshi, about 2 months prior to the lodging FIR, Meenakshi was taken away by him but she was taken back from Delhi and she was handed over to her family members. About one month prior to lodging the FIR, the corpus Meenakshi has been married with Narendra, the corpus Meenakshi left her Sasural and had gone to some unknown place. The corpus was recovered by the police and all the accused persons sent to jail. The petitioner no. 2 was also challaned under section 151 Cr.P.C. The corpus was sent to Nari Niketan Moradabad. Thereafter, the petitioner no. 2 and mother of petitioner no. 1 moved an applications before the SDM Hasanpur for releasing the petitioner in their favour, on those applications, both the parties and petitioner no. 1 were summoned by SDM Hasanpur who recorded the statement of corpus on 21.7.2012 in which she stated that she was aged about 19 years, she was an educated girl, she had passed High School Examination, in the marksheet the date of birth 1997 was mentioned, she was having the physical relationship with Tek Chandra. Tek Chandra was belonging to Saini caste and she was belonging to Chauhan caste. She remained along with Tek Chandra in Delhi for about a month. Her family members have developed the pressure upon the family members of Tek Chandra then she and Tek Chandra came from Delhi. She did not want to go with her parents, she had performed the marriage with Tek Chandra in a temple of Delhi. The marriage certificate was also issued from the temple, the same has been torn by her family members. She wanted to go with Tek Chandra. She was having the pregnancy of three months. She further stated that her date of birth is of year 1995. The S.D.M. Hasanpur passed the order dated 21.7.2012 by which she was sent to Preveshalay/ Nari Niketan, Moradabad. According to the order dated 21.7.2012 the date of birth of the corpus was 10.12.1995 recorded in the marksheet issued by Lala Satya Prakash Saraswati Vidya Mandir, Hasanpur. There was apprehension of breech of peace, on account of the custody of the corpus and the corpus was about 17 years that is why she was sent to Nari Niketan.

4. It is contended by learned counsel for the petitioner that the corpus had performed the marriage with petitioner No. 2 Tek Chandra, she remained in his company at Delhi and she developed the physical relationship with him with her free will and consent and she wanted to go in the company of her husband Tek Chandra, she is major and she is pregnant. Her detention in Nari Niketan is illegal, she may be released forthwith from Nari Niketan and she may be given in the custody of petitioner No. 2 Tek Chandra who is her natural guardian being her husband.

5. In reply of the above contention, it is submitted by learned A.G.A., Sri Rajiv Sisodiya and Sri Shashank Kumar appearing on behalf of respondent no. 4 that according to the FIR lodged by father of the petitioner No. 2 the corpus has already been married with Narendra son of Jai Singh, the corpus remained at the house of the

Narendra as his wife but she fled away from there. After marriage with Narendra son of Jai Singh she may be handed over either to Narendra son of Jai Singh or to the parents of the corpus. In any case she may not be handed over to the petitioner No. 2 Tek Chandra who has developed illicit relationship with the corpus and without divorce the corpus may not perform the second marriage with Tek Chandra. In the present case no divorce has taken place. Narendra the husband of the corpus has already been summoned by this court who clearly stated that he wanted to have his wife. The father of the corpus has also stated that his daughter Meenakshi has been married with Narendra Singh and the marriage of the corpus has not been performed with Tek Chandra. The learned Magistrate concerned has committed error by sending the corpus to Nari Niketan, she may be handed over to her husband Narendra Singh.

6. Considering the facts, circumstances of the case, submissions made by learned counsel for the petitioner, learned A.G.A., Sri Rajiv Singh Sisodiya, Sri Shashank Kumar, learned counsel for respondent No. 4 Vijay Pal Singh and from the from the perusal of the record it appears that in the present case the corpus has been sent to Nari Niketan, Moradabad from where she was summoned by this court, she was produced before this court on 20.9.2012. On query made by the court the corpus stated that she was not knowing the Narendra Singh, her marriage was not performed with him, she had performed the marriage with Tek Chandra in Arya Samaj Mandir, Hariyali Baag, Delhi, her date of birth was 10.12.1993, she had passed high school examination whereas her father Vijay Pal also appeared before this court on 20.9.2012 who stated that the corpus was married with Narendra Singh according to Hindu Marriage rites, after marriage she remained in the house of Narendra Singh for about two months, thereafter she fled away from his house. Narendra Singh also appeared before this court on 20.9.2012. On query made by the court he stated that he was married with corpus, he wanted to have the corpus, she may be released in his favour. The statement of the corpus was recorded by S.D.M. Hasanpur on 24.6.2012 also, its copy has not been filed by the petitioner, its copy has been filed by learned A.G.A. as C.A.-1 of supplementary counter affidavit in which she stated that she was having love affairs with Tek Chandra, she had gone to Delhi in his company about three months back where she remained for three months, her family members pressurising the family members of Tek Chandra then she came from Delhi to Hasanpur and she was handed over to her family members, she had appeared in the High School Examination, in education certificates her date of birth was mentioned as of year 1995, in fact she was aged about 20 years, her marriage was performed by her parents with Narendra Singh, she was living in the company of Narendra Singh but after taking the liquor she was expelled by Narendra Singh from his house then she went to the railway station, Gajraula and there after she met a with person, who was knowing Tek Chandra, along with him she reached Hasanpur and came to the police station, Hasanpur from where she was produced before the court of S.D.M., she wanted to go in the company of Tek Chandra, after considering her statement she was sent to Nari Niketan by S.D.M., Hasanpur on 24.6.2012. The statement of corpus was recorded by S.D.M. Hasanpur on 24.6.2012.The order dated 24.6.2012 passed by S.D.M., Hasanpur has not been deliberately filed by the petitioner because

the corpus had admitted that she was married with Narendra Singh. The subsequent statement of the corpus recorded by the SDM Hasanpur on 27.7.2012, does not show that she was already married with Narendra Singh. The petitioner has not come with clean hand. The corpus is a minor, according to the school record, she herself has stated that in the school record, her date of birth is of 1995 and she has already married with Narendra Singh. The married wife cannot be handed over to any other persons for having illicit relationship. The corpus does not want to go with her parents and with her husband Narendra Singh, in such circumstance, she may not be left at the mercy of others because she is not a fully matured girl and is not having any employment. Her natural guardian are her parents and even she has nowhere stated in her statement recorded on 24.6.2012 and 21.7.2012 by the S.D.M. Hasanpur that she was having any danger to her life from her parents whereas she has made an allegation that her husband Narendra expelled her from the house after taking liquor. According to the High School marksheet her date of birth is 10.12.1995, she is minor, her father is ready to take her in his custody. She may not be detained in Nari Niketan for a long period and no fruitful purpose may be served in keeping her in Nari Niketan. This court is cautious about the welfare of the corpus. The learned SDM Hasanpur passed two orders dated 24.6.2012 and 21.7.2012 by which she has been sent to Nari Niktan Moradabad which does not appear to be proper therefore, the orders dated 24.6.2012 and 21.7.2012 are hereby set aside. The corpus is directed to be released from Nari Niketan Muzaffarnagar forthwith in the presence of the Officer-in-Charge of P.S. Hasanpur, the corpus shall be free to go to his father's house or her husband Narendra Singh's house, the Officer-in-charge of P.S. Hasanpur shall ensure that no hurt may be caused to the corpus either at her parent's house or her husband's house. In case, the officer-in-charge of P.S. Hasanpur is reported that she is not properly behaved or maintained either by her parents their family members or her husband as the case may be legal action shall be taken against such persons/persons.

7. With this direction this petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2012

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 51133 of 2008

Ravindra Pal Singh ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri S.K. Mishra

Counsel for the Respondents:
C.S.C.
Sri R.M.Pandey

<u>Civil Services Regulations-Regulation 351-A-Disciplinary</u> Proceeding-after 3 years of retirement-for alleged misconduct relating to year 1998-2000-nothing whisper in counter affidavit about pendency of any proceeding during service period-charge sheet-quashed direction release entire post retiral benefits issued.

Held: Para-13

The petitioner was a technician and he retired in the year 2005. After three years of his retirement the memorandum of charge has been issued to him

wherein some of the allegations with regard to the alleged loss pertaining to the year 1998-2000, 2002, 2003 & 2004. The respondent nos. 2 and 3 have initiated disciplinary proceeding even after three years of his retirement. There is no explanation in the counter affidavit that the disciplinary proceeding was not initiated when the petitioner was in service particularly when the charges were pertaining to the year 1998-2000. There is no explanation also initiating the disciplinary proceeding after a lapse of three years of his retirement. A meagre amount has been paid to the petitioner after his retirement. In the counter affidavit there is no reference that the petitioner's service record was unsatisfactory and in past he was awarded any adverse entry in respect of negligence or misconduct. The charge sheet also indicates that along with the petitioner, names of some other employees have been mentioned for causing the peculiar loss with the Corporation. It is not clear whether those employees also retired or in the service.

Case Law discussed:

Writ-A No. 19390 of 2011 decided on 18.01.2012; Writ A No. 24752 of 2012 decided on 22.05.2012; 2008 UPLBEC (1) 808

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. By way of this writ petition under Article 226 of the Constitution, the petitioner has sought issuance of writ of certiorari for quashing the charge memo dated 26.04.2008. A further direction has also been sought to be issued upon the respondent no. 2 to pay the provident fund, gratuity and leave encashment etc. to the petitioner.

2. Shorn of unnecessary details, the material facts are that the petitioner was posted as Technical Officer in U.P. Warehousing Corporation, Bareilly. He retired on reaching his age of superannuation on 31.05.2005. On his retirement he was paid only Rs. 2,60,000/- and his other dues as provident fund, gratuity, leave encashment and group insurance have been withheld.

3. The petitioner made several representations and reminders for the payment of dues. Those representations and reminders did not find any favour from the concerned officers. It is stated that after two years of his retirement on 23.01.2007 a charge memo has been issued against him in respect of alleged loss caused to the Ware House. The petitioner challenged the said charge memo mainly on the ground that the charges against the petitioner relates to more than four years old. The same charges are of 1998 & 2000.

4. A perusal of various charges would indicate that the alleged loss mentioned in the charge memo relates back to almost four years prior to the petitioner's retirement.

5. I have heard Sri Ashutosh Tripathi, learned counsel for the petitioner and learned standing counsel for the respondents.

6. Learned counsel for the petitioner submits that under Regulations 351-A & 470 of Civil Services Regulations, the departmental proceedings would have been initiated after the retirement in respect to the charges, which relates back, within four years. In the present case the charges are of 1998, 2002, 2003 & 2004.

7. He further urged that he stood retired in the year 2005. However, the department proceedings have been initiated on 26.04.2008, after three years of his retirement.

8. He further urged that the decision to initiate the disciplinary proceeding against the petitioner is arbitrary and unfair as after three years of his retirement, he has been denied his all post retiral benefits and he has been called upon to answer some of the charges pertaining to year 1998-2000. At this distance of time, he further urged that the petitioner is unable to submit his reply after his retirement.

9. Learned counsel for the petitioner has placed reliance on similar fact on a Division Bench judgements in **Writ-A No. 19390 of 2011** decided on 18.01.2012 **(Girish Chandra Dubey Vs. State of U.P. And Another), Writ A No. 24752 of 2012** decided on 22.05.2012 (**Lal Babu Vs. State of U.P. And Another)** and in the case of **2008 UPLBEC (1) 808 Rajya Krishi Utpandan Mandi Parishad Vs. Public Services Tribunal U.P.**

10. Learned counsel for respondent nos. 2 & 3 submitted that the service conditions of the petitioner is governed by the U.P. State Warehousing Corporation Staff Regulation. He had drawn the attention of the Court towards the Regulations which deals with imposition of penalty. The regulation 16(1)(e) provides "recovery from pay, security deposit or otherwise of the whole or part of the pecuniary loss caused to the Corporation by the employee."

11. He has further submitted that the writ petition is pre mature as petitioner can participate in the disciplinary proceeding.

12. I have heard learned counsel for the parties, considered their submissions and have also perused the record.

13. The petitioner was a technician and he retired in the year 2005. After three years of his retirement the memorandum of charge has been issued to him wherein some of the allegations with regard to the alleged loss pertaining to the year 1998-2000, 2002, 2003 & 2004. The respondent nos. 2 and 3 have initiated disciplinary proceeding even after three years of his retirement. There is no explanation in the counter affidavit that the disciplinary proceeding was not initiated when the petitioner was in service particularly when the charges were pertaining to the year 1998-2000. There is no explanation also initiating the disciplinary proceeding after a lapse of three years of his retirement. A meagre amount has been paid to the petitioner after his retirement. In the counter affidavit there is no reference that the petitioner's service record was unsatisfactory and in past he was awarded any adverse entry in respect of negligence or misconduct. The charge sheet also indicates that along with the petitioner, names of some other employees have been mentioned for causing the peculiar loss with the Corporation. It is not clear whether those employees also retired or in the service.

14. In the case of **Girish Chandra Dubey** (Supra), the petitioner was

Assistant Store Keeper in U.P. State Warehousing Corporation at Siddharth Nagar. He retired in the year 2009 and disciplinary proceeding was initiated against him within one year of his retirement on 20.02.2010 for the loss caused on wheat & rice of the Food and Civil Supplies Department in the year 2000-2001, 2001-2002 & 2002-2003 and the total value of the loss caused by the petitioner was worked out as Rs. 19 Lac. A Division Bench of this Court quashed the disciplinary proceeding and took a view that no disciplinary inquiry can be initiated against the employee as the incident was more than four years old prior to the retirement of the employee and the show cause notice was issued to the petitioner in the year 2010. It is apt to extract the relevant part of the order:

"So far as petitioner is concerned, no disciplinary enquiry can be initiated against him as the incident is more than four years old, prior to the retirement of the petitioner as well as show cause notice dated 20.2.2010. In the show cause it is not stated as to when the amount was deducted by the Food and Civil Supplies Department from the bills of the Corporation. Further there is no explanation as to why the proceedings were not initiated against the petitioner, upto the date of his retirement, or even thereafter. "

15. Likewise in the case of Lal Babu (Supra), the petitioner was employee of the same corporation and in the said case also after his retirement in the year 2010 the alleged loss caused by him and which was intended to be recovered by the Corporation. A Division Bench of this Court has observed as under:

"In our opinion, after the retirement of the petitioner on 31.12.2010 he cannot be proceeded with or held liable for the alleged loss caused to the Corporation more than six years prior to his retirement. The respondents are thus not justified in withholding the amount of leave encashment, contributory provident fund and security. "

16. The same view has been taken by a Division Bench in the case of **Rajya Krishi Utpadan Mandi Parishad** (Supra).

17. Learned counsel for the Corporation was unable to point out any provision under the U.P. Warehousing Corporation Staff Regulation which empowers the Management to initiate the disciplinary proceeding after three years of the retirement.

18. For the reasons given here in above, the disciplinary proceeding in pursuance of the charge memo dated 26.04.2008, which relates to the petitioner is quashed.

19. Respondents are directed to pay the entire outstanding dues payable to the petitioner as expeditiously as possible preferably within a period of three months from the date of communication of this order.

20. The writ petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.10.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.52072 of 2012

Smt. Madhulika Sameer Azad
...Petitioner
Versus
Sri Sameer Mohan Azad
...Respondents

Counsel for the Petitioner:
Sri H.P. Dube
Sri Sanjay Mishra

Counsel for the Respondents:
.....

Family Court Act, 1984-Section 13 read with Rule 28 of Family Courts Rule 2006- Service of legal Petitioner-when can be allowed-contingencies explained-strictly prohibited during re cancellation-exemption from personal appearance-not mean to exemption for ever-Family Court rightly exercised its desecration-where the husband residing in U.S.A.-can not be interfered under writ jurisdiction.

Held: Para-19

In the instant case, the respondent is working and living in USA and it is not practically possible for him to attend the proceedings at Agra on every date. He is not denying his appearance whenever it would be required by the court. Thus, in the circumstances, if the family court has permitted him to engage a lawyer, no exception to it can be taken so as to require any interference in exercise of extra ordinary discretionary jurisdiction.

Case Law discussed:
1992 Crl.L.J. 1592; 1998 (2) AWC 1551

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

1. Heard Sri H.P. Dubey, learned counsel for the petitioner.

2. Petitioner wife has filed this petition aggrieved by the order dated 4.9.2012 passed by the family court Agra allowing the respondent husband to engage a lawyer for prosecuting the divorce case on his behalf.

3. A little experience of the matrimonial disputes on a bare glance on the facts and circumstances of this petition would reveal that the petitioner wife has invoked the writ jurisdiction of this Court not because the order impugned is illegal or causes prejudice to her or infringes her rights but to harass the respondent husband which is sheer abuse of the process of law.

4. The petitioner and respondent are husband and wife.The marriage between them was solemnized and registered at Mumbai sometime in the year 2006. There was a discord between them. They started living separately. The wife at Agra whereas the husband in job at California (USA). The husband appears to be a resident of Mumbai.

5. The husband initiated proceedings for divorce against the wife at Mumbai. The said proceedings at the instance of wife were ordered to be transferred by the Apex Court to the family court at Agra where she is residing.

6. Previously, on behalf of the husband his power of attorney holder moved two applications for engaging a lawyer.The said applications were rejected on the ground that the husband

himself had not appeared before the Court for seeking permission to engage a lawyer.

7. The present application paper no. 27 Ga seeking permission of the Court for engaging a lawyer to represent him before the family court was moved by him in person. In the said application supported by an affidavit it is stated that he has come from USA wherein he is in job to attend the proceedings. It is not practically possible for him to be present in court on each and every date fixed in the proceedings but he undertakes to appear in person whenever it would be desired and felt necessary by the court. He is also unable to pursue the proceedings himself without the aid of legal expert.

8. The aforesaid application has been allowed and he has been permitted to engage the services of a lawyer.

9. The submission of the learned counsel for the petitioner is three fold; first, that in the past two similar applications moved on behalf of the respondent have been rejected; second, in view of Section 13 of the Family Court Act, 1984 (hereinafter referred to as an Act) the court can not permit engagement of a lawyer in a routine manner particularly when the the matter is yet to be reconciled; lastly, the discretion of engagement of a lawyer can not be exercised in violation of Rule 28 of the Rules framed under the Act.

10. The earlier applications filed on behalf of the husband for engaging a lawyer were rejected on a technical ground that they were not moved by the husband in person. The merits of the applications were not considered. The rejection of the said applications therefore would not hamper or vitiate the merits of the order passed on the present application. The submission in this regard is of no value.

11. Section 13 of the Family Court Act reads as under:-

13. **Right to legal representation:-**

" Notwithstanding anything contained in any law, no party to a suit or proceedings before a Family court shall be entitled, as of right, to be represented by a legal practitioner:

Provided that if the Family Court considers it necessary in the interest of justice, it may seek the assistance of a legal expert as amicus curaie."

12. A plain reading of the aforesaid provision indicates that it does not place an absolute bar upon the engagement of a lawyer and that the family court at its discretion can always seek assistance of a lawyer. In other words, engagement of a lawyer in family court is not permissible as of right but nonetheless in certain contingencies a party can be allowed to be represented by a legal practitioner.

13. Rule 24 of The Uttar Pradesh Family Court Rules, 1995 provides that where family court considers necessary in the interest of justice, it may seek the assistance of a legal expert on legal issues. At the same time, Rule 27 of the U.P. Family Court (Courts) Rules, 2006 which have been framed in exercise of powers under Section 21 of the Act, empowers the family court to permit the parties to be represented by a lawyer in court not only where the cases involve

complicated questions of law but also where the court is of the view that the party will not be in a position to conduct his or her case himself/herself adequately or for any other reason. The above Rule widens the scope for granting permission to parties to be represented by a lawyer before the family court by using the term "or for any other reason.

14. In short, the conjoint reading of Section 13 of the Act and the aforesaid Rules in no way completely prohibits the presence of lawyers in family courts rather it authorizes family court in its wisdom and discretion to permit the parties to engage lawyers even for any reason other than the reasons specified.

15. A Division Bench of this Court in ***Banshidhar Vs. Seema 1992 Crl.L.J. 1592*** considered the provision of Section 13 of the Act and held that a representation of a party by a legal practitioner depends upon the discretion of the family court. The aforesaid provision does not impose a complete ban on the representation of the party by a legal practitioner rather it allows the family court to permit parties to be represented by counsel in the interest of justice.

16. In ***Prabhat Narain Tickoo Vs. Mrs. Mamta Tickoo 1998 (2) AWC 1551*** a division Bench of this Court which has been relied upon by the learned counsel for the petitioner it has opined that Section 13 of the Act gives a discretion to the Family court to permit a lawyer to appear on behalf of a party, though ordinarily lawyers are not permitted. The court further observed that service of a lawyer should not be permitted when the court is trying reconciliation between the parties and where divorce is being sought by mutual consent of the parties. However, as divorce law and other family laws have become complicated branch of law and an ordinary person can not be expected to know it, the court should ordinarily allow the lawyers to appear on behalf of the parties.

17. The legal position that emerges from the above discussion can be summerised as under:-

(i) Ordinarily, lawyers are not permitted before family court especially where the court is in the process of reconciliation of the dispute between the parties and the divorce is applied by mutual consent;

(ii) There is no absolute prohibition in engaging a lawyer where complicated legal issues are involved or where parties are not in a position to conduct there case for want of legal knowledge or of any other reason; and

(iii) The court can always seek legal assistance of a lawyer, if considered necessary;

18. Thus, the family court in addition to the above specified occasions in its discretion and wisdom can allow engagement of lawyers for any other reason which may include conditions of the nature where it is practically not possible for a party to attend the proceedings personally on every date/dates in the present case.

19. In the instant case, the respondent is working and living in USA and it is not practically possible for him to attend the proceedings at Agra on every

date. He is not denying his appearance whenever it would be required by the court. Thus, in the circumstances, if the family court has permitted him to engage a lawyer, no exception to it can be taken so as to require any interference in exercise of extra ordinary discretionary jurisdiction.

20. Rule 28 of Rules 2006 provides for notice to other side on the application by a party seeking permission for representation by a lawyer. It reads as under:-

"Rule 28- *Any application for representation by a lawyer in Court shall be made by such party to Court after notice to the other side, not less than one week prior to the date fixed for hearing of the petition. The case shall not be adjourned on this ground."*

21. It mandates for filing such application at least a week prior to the date fixed for hearing of the petition after notice to the other party. The aforesaid Rule contemplates notice of the application a week before hearing but not a week's notice.

22. The said rule is to intimate the other side that a party is thinking of engaging a lawyer/legal expert so that the other side may not be taken by surprise and is pitted against a legal expert unarmed or unprepared.

23. In the present case, a copy of the application to engage a lawyer moved by the respondent was served upon the petitioner well before hearing as by then no date was fixed for hearing. Therefore, there is violation of the aforesaid Rule.

24. Learned counsel for the petitioner submits that the petitioner wanted to file objections against the said application.

25. The Court inquired from the learned counsel for the petitioner as to what possible objections the petitioner wanted to take against the engagement of lawyer by the respondent. He appears to be in a predicament and unable to point out any possible objections to it. He could not inform the Court as to the prejudice the petitioner would suffer, if the respondent is allowed to engage a lawyer.

26. In the totality of the facts and circumstances, as the petitioner can not legally deny the respondent the services of a lawyer and that she is unable to show any prejudice to her, I am of the view that matter requires no intervention of this Court in exercise of discretionary jurisdiction under Article 226 of the Constitution of India. However, it goes without saying that in case the court below enters into an exercise for reconciliation it can always insist for the personal appearance of the parties and deny participation of the lawyer during reconciliation. The engagement of lawyer should not be taken to mean that the personal appearance of the party is exempted for all times. The court is always free to have the attendance of the parties, if considered necessary, despite permitting engagement of lawyers.

27. The writ petition lacks merit and is dismissed with the above observation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MUSHAFFEY AHMAD, J.

Civil Misc. Writ Petition No. 53273 of 2012

Raja Ram ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar Singh
Sri J.P. Singh

Counsel for the Respondents:
C.S.C.
Sri S.S. Yadav

Constitution of India-Article 226-Alternative Remedy-Licence of Fair Price Shop dealer-suspended-order withdrawn with fine of Rs. 3000/-again revocation of suspension withdrawn-without opportunity of hearing-quashed by High Court-on second time consideration without opportunity of hearing cancellation order passed-normally where statutory appeal provided High Court declined to interfere violation of principle of Natural Justice-cancellation order-held-not sustainable-alternative remedy-no bar where principle of Natural Justice violated.

Held: Para-6

A bare perusal of the impugned order would go to show that prior to the passing of the said order, no opportunity was given to the petitioner. In the said order, discussion has been made that the petitioner was given opportunity by the inquiry officer, but nowhere it has been mentioned that after accepting the inquiry report, a copy of the same was served on the petitioner or any opportunity was given to the petitioner to explain his position, after submission of such report. As we have already held in earlier order dated 6.9.2012 passed in Writ Petition No. 44900 of 2012 that opportunity given by the inquiry officer would not be sufficient opportunity having been given to the petitioner as he would have a right to be heard before any final order is passed against him.

(Delivered by Hon'ble Vineet Saran, J.)

1. Heard learned counsel for the petitioner, learned Standing Counsel for the State, Sri S.S. Yadav for complainant-respondent no. 6 and perused the record.With the consent of the learned counsel for the parties, this writ petition is disposed of at this stage without calling for a counter affidavit.

2. The petitioner is a Fair Price Shop Dealer. On complaint made by the respondent nos. 6 to 8 against the petitioner, by order dated 8.6.2012, the dealership of the petitioner was placed under suspension. On considering the reply of the petitioner, vide order dated 25.7.2012, the suspension of the dealership of the petitioner was withdrawn with the condition that the petitioner shall deposit a sum of Rs. 3000/-, which the petitioner deposited and thereafter continued running his fair price shop. Then by the order dated 18.8.2012, the earlier order dated 25.7.2012 withdrawing the suspension order was withdrawn, meaning thereby that the suspension of the dealership of the petitioner was to continue.

3. Challenging the same, petitioner filed Writ Petition No. 44900 of 2012, which was allowed by this Court vide judgment and order dated 6.9.2012 and the order dated 18.8.2012 was quashed. In

the said judgment, it was held that the petitioner was not given any opportunity of hearing before passing of the impugned order dated 18.8.2012. It was also observed in the said order that giving opportunity by the inquiry officer would not amount to complying with the principles of natural justice, as opportunity has to be given before passing of the final order, which in that case was the order dated 18.8.2012. The said order dated 6.9.2012 was served on the Sub Divisional Magistrate as well as District Supply Officer. However, in the meantime, on 11/12.9.2012, the Sub Divisional Magistrate has cancelled the dealership of the petitioner.

4. Aggrieved by the said order, this writ petition has been filed.

5. Normally, this Court does not interfere in matters where the dealership has been cancelled, as the party has a right to file an appeal before the Commissioner of the Division. However, in the facts and circumstances of this case, where the order dated 18.8.2012 has itself been quashed in the earlier writ petition and the impugned order has been passed on the basis of such order/notice, we have entertained this petition.

6. The submission of the learned counsel for the petitioner is that the entire action of the respondent smacks of bias as firstly the respondent officials attempted to recall the order of withdrawl passed on 25.7.2012 and being unsuccessful in the same as the writ petition challenging the said order was allowed, they have passed the impugned order in haste, again without complying with the principles of natural justice. A bare perusal of the impugned order would go to show that prior to the passing of the said order, no opportunity was given to the petitioner. In the said order, discussion has been made that the petitioner was given opportunity by the inquiry officer, but nowhere it has been mentioned that after accepting the inquiry report, a copy of the same was served on the petitioner or any opportunity was given to the petitioner to explain his position, after submission of such report. As we have already held in earlier order dated 6.9.2012 passed in Writ Petition No. 44900 of 2012 that opportunity given by the inquiry officer would not be sufficient opportunity having been given to the petitioner as he would have a right to be heard before any final order is passed against him.

7. In the present case, no such opportunity has been given to the petitioner, as such, we are of the view that the impugned order dated 11/12.9.2012 passed by respondent no. 4 deserves to be quashed.

8. Accordingly, this petition stands allowed. The order dated 11/12.9.2012 is quashed. The order dated 18.8.2012 has already been set aside in the earlier writ petition. Show cause notice issued under the said order requiring the petitioner to submit his explanation would no longer survive. The respondent authorities shall, however, be at liberty to initiate fresh proceedings against the petitioner after giving proper show cause notice/ charge-sheet and on receipt of the explanation submitted by the petitioner, proceed against him in accordance with law and pass appropriate orders.

9. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 53351 of 2012

Mohd. Firoj ...Petitioner
Versus
Ataullah ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Mishra
Sri Rakesh Chandra Tiwari

Counsel for the Respondents:
.....

Constitution of India-Article 226-suit for permanent injunction-temporary injunction rejected by T/C-reversed by Lower Appellate Court-in present facts of case when pliantiff was in possession-entitled for interim injunction-order passed by Appellate Court modified by restraining both parties from transferring any part of land-T/C to decide suit on its merit without being prejudice with observation of Appellate Court-on event plaintiff's possession found without title-would be disposed without any further suit by defendant-petition disposed of.

Held: Para-5

It is further directed that in view of Supreme Court authority reported in Maria M.S. Fernandes vs. E.J. De Sequeria A.I.R. 2012 S.C. 1727 (paragraphs 82 and 83) in case in the suit in question it is found that plaintiff has got no title then defendant will not be required to file a separate suit for dis-possession of the plaintiff and in execution of such decree in this very suit plaintiff would be liable to be dis-possessed.

Case Law discussed:
A.I.R. 2012 S.C. 1727 (paragraph 82 and 83)

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Respondent has filed Original suit no.115 of 2010 against the petitioner. Alongwith the plaint application for temporary injunction was filed by the plaintiff. Civil Judge (Senior Division), Sonebhadra refused to grant temporary injunction to the plaintiff respondent through order dated 27.9.2010. Against the said order plaintiff-respondent filed Misc. Civil Appeal No.33 of 2010. Appeal has been allowed through order dated 13.7.2012 by District Judge, Sonebhadra. The said order has been challenged through this writ petition.

2. Learned counsel for the petitioner states that plaintiff was permitted to reside in a part of the accommodation in dispute by the defendant only as a licencee as he was relation of defendant-petitioner's ancestors. The lower appellate court has directed that plaintiff shall not be evicted during pendency of the suit from the portion shown to be in his possession in the Amin's report and petitioner defendant has been restrained from selling any part of plot nos. 1173 and 1174.

3. In my opinion as plaintiff was in possession hence at least he was entitled to the temporary injunction against forcible eviction. Accordingly, I do not find any error in the said part of the order. However, as far as question of restraining the defendant from selling any part of plot no.1173 and 1174 is concerned, the lower appellate court should have restrained both the parties. Accordingly, that part of the order

passed by the lower appellate court is modified and it is directed that both the parties are restrained from transferring any part of plot nos. 1173 and 1174 during the pendency of the suit. This direction is being issued without issuing any notice to the respondent. If he feels aggrieved by it he is at liberty to apply for its recall.

4. Learned counsel for the petitioner has expressed apprehension that the findings recorded in the order dated 13.7.2012 by the District Judge may jeopardise his case in the suit. It is clarified that while deciding the suit trial court shall not take into consideration the findings recorded in the impugned order by the lower appellate court.

5. It is further directed that in view of Supreme Court authority reported in **Maria M.S. Fernandes vs. E.J. De Sequeria A.I.R. 2012 S.C. 1727 (paragraphs 82 and 83)** in case in the suit in question it is found that plaintiff has got no title then defendant will not be required to file a separate suit for dis-possession of the plaintiff and in execution of such decree in this very suit plaintiff would be liable to be dis-possessed.

6. Writ petition is accordingly disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.10.2012

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

Civil Misc. Writ Petition No. 53613 Of 2012

Sudhir Ojha ....Applicant
Versus
State of U.P. & Others .Respondents

Counsel for the Petitioner:
Sri H.N. Singh
Sri I.K. Upadhyaya
Sri Vineet Kumar Singh

Counsel for the Respondents:
C.S.C.
Sri Vinod Kumar Sharma
Sri Vivek Varma
Sri R.N.Ojha
Sri O.P.Ojha

Constitution Of India Art.-226-M.G. Vidyapeeth Ordinance-Chapter XIII Para 4A(9)- Election of Student union-disqualification-to participate in election-on ground charge sheet for offence under Section 323,504,506 IPC filed against petitioner-held such union is nursery for future politics-permitting such person with criminal background would frustrate the purpose of reports of Lingdoh Committee-contesting election merely a legal and not the fundamental right-held can not be allowed to contest.

Held: Para-10

Apart from this, it has already been held in the judgment delivered by this Court in the case of Vishal Yadav (supra) that contesting elections is only a legal right and not a fundamental right. In the aforesaid circumstances, the restrictions, which have been placed by virtue of the said Ordinances, are perfectly saved under the circumstances and they do not

deserve to be tinkered with by this Court on the judicial side or else this would encourage students of criminal background to spoil the academic atmosphere of institutions that are meant to cater to higher education.

Case Law discussed:

(2006) 8 SCC 304

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

1. Heard Sri H.N. Singh, learned counsel for the petitioner, who is a student of M.A. Previous Political Science of Satish Chand College, Ballia, and he has filed his nomination for contesting the elections of the post of President of the Students Union of the said College which is scheduled to be held on 14.10.2012. The nomination of the petitioner has been rejected on the ground that he is involved in a criminal case.

2. Sri H.N. Singh contends that this rejection is not based on a correct interpretation of para 6.5.7 of Lyngdoh Committee report and further he relies on the proposed Ordinances of Respondent No.2 - University to contend that the same has been erroneously incorporated in the election notification programme and, therefore, the rejection of the nomination is invalid.

3. On facts, it is undisputed that a charge-sheet has been submitted against the petitioner in case Crime No.786 of 2011 under Sections 323/504/506 IPC.

4. Sri Singh submits that this appears to have been done on an investigation having been carried out on an order passed in an application under Section 156 (3) Cr.P.C. He, therefore, submits that in essence, there is no criminal case pending in terms of the aforesaid para 6.5.7 of the Lyngdoh Committee report so as to disqualify the petitioner from contesting the elections. Sri Singh contends that the petitioner has neither been tried nor convicted and in the circumstances attribution of disqualification is unjustified.

5. Sri Vivek Varma for the respondent No.2 - University relies on a judgment of this Court dated 5.10.2012, Vishal Yadav and another Vs. State of U.P. and others, Writ Petition No.51542 of 2012, to urge that the matter is no longer res-integra and that in view of the admitted fact that a charge-sheet has already been submitted against the petitioner, he is disqualified and ineligible from contesting the election in terms of para 4 (A) (9) of the Ordinances contained in Chapter XIII of the Ordinances framed for the Students Union elections. He submits that reliance placed on the proposed Ordinances is misplaced and in view of the decision referred to herein above, this petition is also squarely covered by the said decision and accordingly be dismissed.

6. Sri Vinod Kumar Sharma has been heard for the Caveator - Ashutosh Kumar Pandey and the learned Standing Counsel for the respondent No.1. It is not necessary to issue notice to the respondent Nos. 3 and 4 in view of the order that is proposed to be passed.

7. Having heard learned counsel for the parties, the question of applying moral values was also under consideration by the Lyngdoh Committee while submitting its report. In the opinion of the Court, the Committee was well aware of the fact that such Students Union are perceived as the nursery for the rearing for future Politicians and Leaders of the nation. It is for this purpose that persons with high moral character and ethical values get themselves involved in student politics so that they are

able to lead the nation in future and accordingly the Lyngdoh Committee report clearly indicates that the persons of a shady character or having a criminal background or antecedents should not be allowed to contest the elections. This philosophy is already contained in the Lyngdoh Committee report, which has been incorporated in the judgment of the Apex Court in the case of University of Kerala Vs. Council, Principals' Colleges Kerala and others, (2006) 8 SCC 304.

8. The paragraph relied upon by Sri H.N. Singh is a clear indicator and the same should not be interpreted so as to take out the essence of the aforesaid philosophy for preventing persons of criminal background from entering into Students politics. In the opinion of the Court, if the suggestion of Sri Singh is accepted, then the entire Society will be faced with whatever is happening today when an University or a College faces Students Union elections. Judicial notice can be taken of wide spread reports of arson and rampage in University and College campuses when such elections take place and for this, candidates with criminal background appear to be responsible.

9. In such a situation, the contention of Sri Singh is neither acceptable legally or even morally in the larger interest of the Society. The rules, which have been framed, indicate a laudable object, and not a nursery to generate criminals or politicians with criminal background. This will be against public policy and would also be against the interest of the Society at large. Not only this, it will be against the interest of the students and also against the interest of future generations. Students Union elections are contested for the purpose of projecting a political figure who may in future be involved in active politics of the nation and the State. Such persons cannot be expected to be of a criminal background as they have to lead Society. Allowing persons with a criminal background would defeat this same purpose and laudable object as contained in the Lyngdoh Committee report that has been accepted by the Supreme Court. In the aforesaid circumstances, this Court finds that allowing such candidates to contest main elections would be putting a premium to the on going rampage in College campuses and University grounds. Accordingly, I am of the firm opinion that such persons, who have a criminal background, should be strictly prohibited from entering this field of nursery of a students politics. The petitioner is already chargesheeted and so long he is not discharged, a proceeding is pending against him which clearly attracts the ineligibility clause 4 (A) 9 of the Ordinances. He, therefore, has been rightly prevented from contesting elections.

10. Apart from this, it has already been held in the judgment delivered by this Court in the case of Vishal Yadav (supra) that contesting elections is only a legal right and not a fundamental right. In the aforesaid circumstances, the restrictions, which have been placed by virtue of the said Ordinances, are perfectly saved under the circumstances and they do not deserve to be tinkered with by this Court on the judicial side or else this would encourage students of criminal background to spoil the academic atmosphere of institutions that are meant to cater to higher education.

11. In view of the reasons herein above, the writ petition deserves to be dismissed as it lacks complete merit and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MUSHAFFEY AHMAD, J.

Civil Misc. Writ Petition No. 54168 of 2012

Sahajram Maurya ...Petitioner
Versus
The State of U.P. and others
...Respondents

Counsel for the Petitioner:
Sri Tripathi B.G. Bhai

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Communal Tension-S.D.O. By impugned order refused permission to hold Durga Puja-on ground of communal tension-right of every citizen to profess their religion-direction issued to ensure Durga Puja-by providing alternate Plot at distance of 0.5 Km from Masjid-within 24 hours-refusal order quashed.

Held: Para-8

In view of the aforesaid, we are of the opinion that the impugned order dated 26.9.2012 deserves to be quashed and is, accordingly, set aside. We, however, direct that the respondents no. 2, 3 and 4, the District Magistrate, Siddharth Nagar, Sub-Divisional Magistrate, Dumariyaganj, district Siddharth Nagar and the Station Officer Incharge, Police Station, Trilokpur, district Siddharth Nagar to ensure that the petitioner is permitted to hold Durga Puja for the remaining days of this Navratri at the place which may be in the same village around 500 meters away from the Masjid and ensure that there is no disturbance amongst the residents of the village.

(Delivered by Hon'ble Vineet Saran, J.)

1. This writ petition has been filed with the prayer for quashing the order dated 26.9.2012 passed by the Sub-Divisional Magistrate, respondent no. 3 whereby permission to hold the Durga Puja during Navratri from 16.10.2012 to 24.10.2012 has been refused on the ground that there is likelihood of the communal tension. Challenging the said order as well as praying that the security be provided for celebrating the Durga Puja festival in the village in question, this writ petition has been filed.

2. We have heard Sri Tripathi B.G. Bhai, learned counsel for the petitioner as well as Sri Yashwant Varma, learned Chief Standing Counsel appearing for the respondents and have perused the record.

3. m Time was granted to Sri Varma for obtaining instructions, which he states that he has received, and the same are taken on record. With consent of the learned counsel for the parties, we dispose of this writ petition at this stage without calling for a counter affidavit.

4. The submission of the learned counsel for the petitioner is that the plot in question where the Durga Puja celebrations are to be held, belongs to the petitioner and is at a distance of over 100 meters from the Masjid in the village. The learned Chief Standing Counsel disputes the same and as per his instructions, the plot is in the vicinity of the Masjid, at a distance of about 50 meters.

5. The ground taken in the order passed by the Sub-Divisional Magistrate is that since similar attempt of holding Durga Puja during previoius Navratri in

2011 was made on the same the plot and since there was tension in the village, hence the permission to hold the Durga Puja this year was being denied.

6. It is unfortunate that the administration refuses permission for holding Puja in our secular State especially during festival season. Merely because there is likelihood of communal tension as there is large population of Muslims in the village, as has been stated in the order, should not prevent the other community from holding their religious festivals. Every citizen has a right to profess his religion. If this stand, as have been taken by the authorities, is permitted then in an area where there are persons of other religion in majority, the persons of those who are of different religion and in minority, will never be permitted to hold their religious functions and festivals. It is for the administration to assess as to where such function for celebrating the festivals can be permitted. If the same is not possible on a plot which is adjacent or in the vicinity of a religious place of the other religion, the correct approach of the authorities should have been to require the petitioner to shift the venue of the Durga Puja to a place which is at a reasonable distance from the Masjid. This Court would also not want that there should be communal tension because of Durga Puja being celebrated close to a Masjid but at the same time the Court cannot shut its eyes to the fact that all communities have to live in this country, cities and villages in harmony. If a particular group of persons tries to create any hindrance in holding of Durga Puja, which is to be held only once in a year for nine days during Navratri, then it is for the administration to check the same and take necessary steps in that direction. Denying permission to hold puja during Navratri or holding festivities during 'id' or Christmas on the apprehension that there could be communal tension would only go to show the incompetence of the administration. It would be something like the administration asking citizens not to move out of their homes after sunset to avoid being robbed. We are of the opinion that the State administration cannot be permitted to take such a stand.

7. In our view, denial of holding Durga Puja in the village, as has been done by the impugned order, cannot be justified in law. If at all there is some difficulty in permitting to hold Durga Puja during Navratri at a place where the petitioner is wanting to hold such function because of it being close to the Masjid, the administration ought to have given an alternative site where the Durga Puja could be held during such period.

8. In view of the aforesaid, we are of the opinion that the impugned order dated 26.9.2012 deserves to be quashed and is, accordingly, set aside. We, however, direct that the respondents no. 2, 3 and 4, the District Magistrate, Siddharth Nagar, Sub-Divisional Magistrate, Dumariyaganj, district Siddharth Nagar and the Station Officer Incharge, Police Station, Trilokpur, district Siddharth Nagar to ensure that the petitioner is permitted to hold Durga Puja for the remaining days of this Navratri at the place which may be in the same village around 500

meters away from the Masjid and ensure that there is no disturbance amongst the residents of the village. Since the petitioner was proposing to hold Durga Puja on his own plot which was measuring 650 Sq. meters, and the petitioner is not being permitted to hold Puja on the said plot, as such, we direct that the Sub-Divisional Magistrate, respondent no. 3 shall ensure that adequate land measuring about 500 Sq. meters shall be provided to the petitioner at a distance of around 0.5 kilometers from the Masjid of the village where the Durga Puja can be held for the remaining period. Such arrangement shall be ensured by the respondent no. 3 within 24 hours of the petitioner filing a certified copy of this order before the respondent no. 3. The petitioner undertakes that the performance of the Durga Puja will be peaceful and without use of loudspeakers.

9. This writ petition stands allowed to the extent indicated as above. No order as to costs.

10. Let a copy of this order be issued to the learned counsel for the parties today on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.10.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 54399 of 2012

Ram Surat ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri Chandra Shekhar Srivastav
Sri Sudhanshu Srivastava

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holding Act-1953-Section 42-A-Revisional Court-set-a-side the order passed by C.O.-on ground the order of correction alterations in Chak in garb of correction-beyond jurisdiction-Writ Court declined to interfere.

Held: Para-7

Here in the present case, as has been observed by the Deputy Director of Consolidation, the Consolidation Officer while passing the impugned order dated 6.11.2001 has not corrected the arithmetical or clerical error but he has amended the chak of the petitioner which, in his opinion, was not ambit of Section 42 (A). I am of the view that the view taken by the Deputy Director of Consolidation cannot be said to be unjustified for the simple reason that the order passed by the Consolidation Officer will not fall in the ambit of correction of clerical or arithmetical error but he has done the amendment in the chak. Therefore, the order passed by him in my considered opinion is without jurisdiction.

Case Law discussed:
(1997) 9 SCC 69; AIR 2011 SC 514; Special Appeal No. 164 of 2012 Committee of

Management Shri Jawahar Inter College and another Vs. State of U.P. and others

(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 order dated 22.5.2012 passed by Deputy Director of Consolidation (in short D.D.C) by which he has allowed the revisions being Revision No. 1674 Surya Narain and others Vs. Ram Surat and others and Revision No. 1940 Sachidanand Vs. Surya Narain and others. The said revisions were filed against order dated 6.11.2001 passed by Consolidation Officer in Case No. 307 under Section 42 (A) of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as 'the Act'). The D.D.C. allowed the revision on the ground that the order impugned in the revisions was beyond the scope of Section 42 (A) as by that order, amendment has been made in the chak which is beyond the scope of Section 42 (A) of the Act.

2. Sri Sudhanshu Srivastava, learned counsel for the petitioner has vehemently contended that the order passed by the Consolidation Officer is on merit and there was nothing to disturb the aforesaid order even if the Deputy Director of Consolidation was of the opinion that the order could not have been passed under Section 42 (A). It is also contended that the Deputy Director of Consolidation has ample power under sub-Section 1 of Section 48 to do justice to the parties by the summoning the record of the courts below even if the order passed by the C.O. was without jurisdiction.

3. On the contrary, learned Standing Counsel has submitted that since the application was filed under Section 42 (A) and the Deputy Director of Consolidation was only examining the illegality or impropriety in the order passed by the Consolidation Officer therefore it cannot be said that the order passed by the Deputy Director of Consolidation is anyway illegal order. In his submissions, the writ petition deserves to be dismissed.

4. For appreciating the controversy, the language used in Section 42 (A) would be necessary to be looked into which is reproduced herein under :-

Correction of clerical or arithmetical errors. *Notwithstanding anything contained in any law for the time being in force, if the Consolidation Officer or the Settlement Officer, Consolidation is satisfied that a clerical or arithmetical error apparent on the fact of the record exists in any document prepared under any provision of this Act, he shall, either on his own motion, or on the application of any person interest, correct the same.*

5. From the perusal of the language used in Section 42 (A) it is apparent that if the Consolidation Officer or the Settlement Officer, Consolidation is satisfied that a clerical or arithmetical error apparent on the face of the record exists in any document prepared under any provision of this Act, he shall, either on his own motion, or on the application of any person interested, correct the same. This section not only confers right upon the litigant to approach the Consolidation

Officer/Settlement Officer Consolidation for correction of the clerical or arithmetical error, but it also confers suo motu power upon the consolidation authorities to correct the clerical or arithmetical error if they find it while examining the record of any proceeding. In Section 42 (A), the word 'correct' has been mentioned which amounts to correction of defects. The word correction has been defined in ***Law Lexicon the Encyclopaedic Law Dictionary (Justice YV Chandrachud) 1997 Edition*** as under :-

Removal, amendment, errors, defects, mistakes.

6. From the perusal of the meaning of the word 'correction" it is clear that it is removal of defects and it does not include any addition or deletion.

7. Here in the present case, as has been observed by the Deputy Director of Consolidation, the Consolidation Officer while passing the impugned order dated 6.11.2001 has not corrected the arithmetical or clerical error but he has amended the chak of the petitioner which, in his opinion, was not ambit of Section 42 (A). I am of the view that the view taken by the Deputy Director of Consolidation cannot be said to be unjustified for the simple reason that the order passed by the Consolidation Officer will not fall in the ambit of correction of clerical or arithmetical error but he has done the amendment in the chak. Therefore, the order passed by him in my considered opinion is without jurisdiction. The Apex Court in the case of ***Union of India Vs. Sube Ram and Ors reported in (1997) 9 SCC 69*** has held thus :

5. [...] here is the case of entertaining the application itself; in other words, the question of jurisdiction of the court. Since the appellate court has no power to amend the decree and grant the enhanced compensation by way of solatium and interest under section 23(2) and proviso to Section 28 of the Act, as amended by Act 68 of 1984, it is a question of jurisdiction of the court. Since courts have no jurisdiction, it is the settled legal position that it is a nullity and it can be raised at any stage.

21. In yet another case of Amrit Bhikaji Kale and Ors. V. Kashinath Janardhan Trade and Anr's reported in (1983) 3 SCC 437 this Court has held that when a Tribunal of limited jurisdiction erroneously assumes jurisdiction by ignoring a statutory provision and its consequences in law on the status of parties or by a decision are wholly unwarranted with regard to the jurisdictional fact, its decision is a nullity and its validity can be raised in collateral proceeding.

22. In Balvant N. Viswamitra and Ors. V. Yadav Sadashiv Mule (Dead) through Lrs. and Ors. reported in (2004) 8 SCC 706 this Court stated thus:

9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be "null" and "void". In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court

lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction, nonest and void abinitio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

23. In Chiranjilal Shrilal Goenka (deceased) through LRs. V. Jasjit Singh and Ors. reported in (1993) 2 SCC 507 this Court stated thus:

18. It is settled law that a decree passed by a court without jurisdiction on the subject-matter or on the grounds on which the decree made while goes to the root of its jurisdiction or lacks inherent jurisdiction is coram non judice. A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the very authority of the court to pass decree which cannot be cured by consent or waiver of the party ....."

8. The same view has been reiterated in ***AIR 2011 SC 514 Sarup Singh and another vs. Union of India and another*** whereas the Apex Court has observed as under :-

"19. But, it a decree is found to be nullity, the same could be challenged and interfered with at any subsequent stage, say, at the execution stage or even in a collateral proceeding. This is in view of the fact that if a particular Court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such Court would be without jurisdiction and the same is nonest and void abinitio.

20. The aforesaid position is well-settled and not open for any dispute as the defect of jurisdiction strikes at the very root and authority of the Court to pass decree which cannot be cured by consent or waiver of the parties. This Court in several decisions has specifically laid down that validity of any such decree or order could be challenged at any stage.

9. This Court while deciding the ***Special Appeal No. 164 of 2012 Committee of Management Shri Jawahar Inter College and another Vs. State of U.P. and others*** has also taken the same view by observing as under :-

Jurisdiction can neither be assumed nor presumed nor conferred nor acquired by acquiescence of the parties.

10. In view of the foregoing discussions, I am not inclined to interfere with impugned order passed by learned D.D.C. The writ petition is dismissed. However the dismissal of the writ petition will not preclude the petitioner to approach the appropriate court/authority for redressal of his grievance under the provisions of U.P. Consolidation of Holdings Act, 1953

and the Rules framed thereunder in the year 1954. In case such an application is filed along with certified copy of the order of this Court before the appropriate court/authority, he shall look into the same and pass appropriate order in accordance with law after hearing all concerned within a period of six months from the date of filing of such application .

11. It may be clarified that I have neither addressed myself on the maintainability of the application nor its merit and the appropriate court/authority is free to pass independent order in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No.55711 OF 2012

Adeed Nawaz ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Rakesh Pande
Sri Madan Lal Srivastava

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

Constitution of India-Art-226- Change of option-on allegations the restrictions contained in clause 31 of Admission Guide-ultra vires-petitioner once taken admission in B.A.L.L.B. Course-based upon his first preference-can not be permitted to turned around-giving three options to ensure getting admission-mandamus for alteration can not be issued.

Held: Para 11

Coming to the argument with regard to the vires of paragraphs 31 and 32 this court is clearly of the opinion that it does not suffer from any arbitrariness, inasmuch as, such a clause has been included to secure the final option of a candidate who after getting admission should not be allowed to change the same. This in no way prejudices a candidate who has already been given three options and he has availed of the benefit of admission accordingly. This also facilitates the adjustment of options of the candidates.

Case Law discussed:
(2008) 4 SCC 171

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

1. Heard Sri Rakesh Pandey, learned counsel for the petitioner.

2. The petitioner has been admitted in the B.A. LL.B. Course of the Aligarh Muslim University and has been allocated the campus of Malappuram in Kerala. The petitioner while filling his option had given his first preference for the Aligarh University Campus, for Murshidabad in West Bengal in the second place and Malappuram Kerala in the third place.

3. The revision of such an option is governed by Clause 31 of the Guide to Admissions 2012-13 quoted herein under:-

"31. A candidate provisionally admitted to a Course/ Branch/ Main Subject/ Stream/ Specialization of lower preference as mentioned in the Application Form, may be upgraded to

a Course/ Branch/ Main Subject/ Stream/ Specialization of higher preference as mentioned in the Application Form in the event of a vacancy arising therein.

A candidate provisionally admitted to a Course/ Branch/ Main Subject/ Stream/ Specialization over and above the preferences as indicated in his/her Application Form may be upgraded to a Course/ Branch/ Main Subject/ Stream/ Specialization over and above the preferences as indicated in the Application Form or to a preference as mentioned in the Application Form in the event of a vacancy arising therein.

A candidate who wants to retain the Course/ Branch/ Main Subject/ Stream/ Specialization, in which he/she has been admitted, shall submit an undertaking on Notary Public Affidavit to the Deputy/Assistant Controller (Admissions), Admission Section, A.M.U., Aligarh on the same date of admission for not upgrading his/her Course/ Branch/ Main Subject/ Stream/Specialization in which he/she was originally admitted."

4. The petitioner was admittedly given admission at Malappuram and he deposited his fee and started pursuing his course there.

5. The petitioner contends that one of his brothers Nadeem Ahmad is also studying in the same campus and therefore he wanted to continue in Kerala.

6. The third paragraph of Clause 31 quoted hereinabove clearly requires the filing of an affidavit giving an undertaking that a candidate does not wish to get his place and campus of admission upgraded against which he was originally admitted.

7. The petitioner admittedly did not file any such affidavit and therefore since he had given his second option for Murshidabad his admission has been upgraded by the impugned order and the petitioner has been called upon to now pursue his course finally at Murshidabad. It is this communication dated 8th October, 2012 Annexure 9 to the writ petition which is being challenged contending that had the petitioner been given any information earlier he would have opted for Malappuram itself, even though it was his third option.

8. In the alternative, there is a challenge to paragraphs 31 and 32 of the Admission Guideline to declare it as ultra-vires contending that it is absolutely arbitrary and the filing of the affidavit has no rational nexus with the object of upgradation.

9. Having heard Sri Pandey so far as the rules are concerned they are clear and if the petitioner had failed to give an undertaking on a notary public affidavit his allotment could have been altered in terms thereof.

10. The petitioner had given his second option for Murshidabad, and therefore, he has been upgraded from Malappuram to Murshidabad as Malappuram was his third option.

11. Coming to the argument with regard to the vires of paragraphs 31 and 32 this court is clearly of the opinion

that it does not suffer from any arbitrariness, inasmuch as, such a clause has been included to secure the final option of a candidate who after getting admission should not be allowed to change the same. This in no way prejudices a candidate who has already been given three options and he has availed of the benefit of admission accordingly. This also facilitates the adjustment of options of the candidates.

12. Even otherwise after having sought admission under the rules, the petitioner cannot be permitted to turn around and challenge the provisions of the rules itself to which he will be deemed to have acquiesced and waived his right of challenge in view of the law laid down by the apex court in the case of **Dhananjay Malik and others Vs. State of Uttaranchal and others reported in (2008) 4 SCC 171.**

13. In the aforesaid circumstances, the prayer made by the petitioner cannot be accepted.

14. The writ petition is however disposed of with liberty to the petitioner to approach the Vice Chancellor who may sympathetically consider the reallocation in case it is possible in view of the fact that the petitioner's brother is also studying at Malappuram.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.10.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE MUSHAFFEY AHMAD, J.

Civil Misc. Writ Petition No. 56016 of 2012

Smt. Gainda Devi ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Gopal Verma

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-allotment of Fair Price Shop-Gaon Sabha passed resolution in favor of petitioner-send information to Tehsil level committee-Headed by S.D.O.-on basis of complaint on Tehsil Diwas-without opportunity of hearing-by impugned order proposal canceled by accepting the version of complaint as gospel truth-held-illegal-quashed.

Held: Para-7 and 8

It is true that the Committee had the authority to entertain the complaint and take cognizance, but the same would not mean that the Committee can proceed to act solely on the basis of the complaint without testing its veracity. The committee cannot be permitted to proceed in such arbitrary manner and if the same is permitted, in every case at the last moment complaint can be filed and treating the same as correct without enquiring into the complaint and without giving the affected party any opportunity of hearing, each and every resolution of the Gram Sabha can be set aside.

In such view of the matter, we are of the opinion that the decision of the Tehsil

level Committee insofar as it relates to the case of the petitioner deserves to be quashed.

(Delivered by Hon'ble Vineet Saran, J.)

1. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and perused the record.

2. By consent of the learned counsel for the parties, we dispose of this writ petition at this stage without calling for a counter affidavit.

3. The case of the petitioner is that on a vacancy of fair price shop in the village in question, the Gram Sabha passed a resolution in favour of the petitioner, which was duly communicated by the Block Development Officer to the Sub-Divisional Magistrate, who is the Chairman of the Tehsil Level Committee and who has to take a decision in the matter.

4. The petitioner is aggrieved by the order dated 17.07.2012 passed by the Tehsil Level Committee including the Sub-Divisional Magistrate as respondent No. 2, who is the Chairman of the said Committee.

5. The submission of the learned counsel for the petitioner is that the said order has been passed on a complaint received on 17.07.2012 at the Tehsil Diwas and on the same date the meeting of the Tehsil Level Committee was held and averments made in the compliant were accepted as gospel truth and the recommendation made by the Gram Sabha has been turned down and direction has been issued to the Gram Sabha to pass a fresh resolution.

6. It is contended that neither enquiry with regard to contents of the complaint had been made by the Sub-Divisional Magistrate or by any other competent officer nor the petitioner was given any opportunity of hearing prior to the decision having been taken by the Committee.

7. It is true that the Committee had the authority to entertain the complaint and take cognizance, but the same would not mean that the Committee can proceed to act solely on the basis of the complaint without testing its veracity. The committee cannot be permitted to proceed in such arbitrary manner and if the same is permitted, in every case at the last moment complaint can be filed and treating the same as correct without enquiring into the complaint and without giving the affected party any opportunity of hearing, each and every resolution of the Gram Sabha can be set aside.

8. In such view of the matter, we are of the opinion that the decision of the Tehsil level Committee insofar as it relates to the case of the petitioner deserves to be quashed.

9. Accordingly, this writ petition stands allowed. The decision of the Tehsil Level Committee dated 17.07.2012 insofar as it relates to the petitioner is quashed. The Tehsil Level Committee shall have to take a fresh decision in accordance with law, after getting the contents of the complaint made on 17.07.2012 verified and if necessary, after giving opportunity of hearing to the petitioner. Such decision

would be taken as expeditiously as possible, preferably within six weeks from the date of filing of certified copy of this order before respondent No. 2-Sub-Divisional Magistrate, Lalganj, district Mirzapur.

10. No order as to costs.
