ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE VIKRAM SINGH RATHORE, J.

Review Petition No.92 of 2012

Alok Saini... Petitioner
Versus
Remote Sensing Application Centre U.P. & Anr ...Respondents

Counsel for the Petitioner:
Sri Faisal Ahmad Khan

Counsel for the Respondents:
Sri Dipak Seth

High Court Rules, Chapter V Rules 12 readwith Order 47 Rule I and section 114 of C.P.C.-Review whether subsequent judgment even by superior Court or coordinal Bench would be basis for review? held-'No'.

Held: Para-13
Keeping in view the law on this point, this Court is of the considered view that the subsequent decision of a co-ordinate Bench would not be a ground to review the judgment, which is the scope of appeal.

Case Law discussed:
MANU/PH/0162/1960;MANU/GJ/0074/1972; MANU/KE/0042/1969;MANU/SC/0217/1963; MANU/SC/1360/1997;MANU/SC/8039/2006; MANU/HP/0001/1981.

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

1. Heard learned counsel for the review petitioner, learned counsel for the opposite party and perused the material available on record.

2. The instant review petition has been filed under Chapter V, Rule 12 of the Allahabad High Court Rules for reviewing the judgment and order dated 13.2.2012 passed in Writ Petition No. 27 (SB) of 2005 (Alok Saini Vs. Remote Sensing Application Centre and another). In the aforesaid writ petition, challenge of the review petitioner was his suspension order. While disposing of the aforesaid writ petition, this Court passed the following orders:-

"It is pertinent to mention that in exercise of the powers conferred upon the State Government under Rule 23 (1) of Rules of Association of the Centre, the State Government had conferred upon the Secretary, Science & Technology, the administrative, financial and legal powers of the Director of the Centre. Moreover, from the record, it also comes out that the action taken by the Secretary has been rectified by the Governing Body. Thus, the assertion of the petitioner that the impugned order is without jurisdiction and non est, is not acceptable.

In view of the above, we do not find any illegality or infirmity in the impugned order of suspension. The writ petition is dismissed accordingly. However, it will be open to the opposite parties to pass appropriate order of punishment as the enquiry has already been concluded."

3. The instant review petition has been filed inter alia on the ground that Division Bench of this Court was ceased with the same question regarding validity of the order dated 13.2.2012 and vide judgment and order dated 6.9.2013, passed in Writ Petition No. 11 (SB) of 2004 (Amrednra Narayan Singh Vs. Remote Sensing Application Centre, Lucknow) passed the following orders:-

"103. In view of the facts and circumstances and discussion, made

hereinabove, the finding is summarised as under:-

(i) .....
(ii) .....
(iii) .....
(iv) .....
(v) .....
(vi) .....
(vii) ..... The Division Bench of this Court by judgment and order passed in Writ Petition No. 1191 of 1991 (R.S. Chaturvedi Versus State of U.P.) has rightly held that the government lacks jurisdiction to interfere with the functioning of the Centre and only the Governing Council possess jurisdiction to initiate disciplinary proceedings and punish an officer of the Centre.

105. the writ petitions are allowed. A writ in the nature of certiorari is issued quashing the impugned orders dated 14.10.2003 (Annexure -1) 15.11.2003 (Annexure-2), 25.1.2003 (Annexure-3), passed in writ petition No. 11(S/B) of 2004, Office Memorandum dated 13.2.2004 (Annexure No.1 to the writ petition No.507 of 2004), Impugned order dated 15.11.2003 (Annexure No.1 to the writ petition No.1487 of 2003), impugned orders dated 15.11.2003 (Annexures 1 and 2), 14.10.2003 (Annexure No.3 passed in writ petition No. 1486 of 2003), impugned orders dated 15.11.2003, 25.11.2003 (Annexures 1 and 2), 14.10.2003 (Annexure No.3 to writ petition No. 1599 of 2003) with consequential benefits."

4. It is submitted that the judgment of co-ordinate Bench of this Court, dated 6.9.2013 fully covers the controversy involved in the writ petition and on the same basis, this review petition deserves to be allowed.

5. Now the question that arise for consideration of this Court is whether the subsequent judgment passed by a co-ordinate Bench of the same Court or by a superior Court would be a ground for review of the judgment passed on merits.

6. Before proceeding further, We have considered the case laws on the point and we find that there were different opinion among different High Courts, on the question whether the subsequent contrary judgment by the same court or by a superior Court on the point of law can be treated as an error apparent on the face of the record, for the purpose of review of an earlier judgment. In Lachhmi Narain Balu v. Ghisa Bihari and Anr., MANU/PH/0162/1960 the learned Single Judge of the then Punjab High Court held that the Court cannot review its judgment merely because in a subsequent judgment different view was expressed on the same subject matter. In P.N. Jinabhai v. P.G. Venidas MANU/GJ/0074/1972, the learned Single Judge of the Gujarat High Court considered the question whether the Court can revise its view on the question of pecuniary jurisdiction simply because the same has been rendered doubtful in the light of subsequent decision of the High Court and answered the same in negative. However, a contrary view was expressed in Thadikulangar Pylee's son Pathrose v. Ayyazhiveettil Lakshmi Amma's son Kuttan and Ors MANU/KE/0042/1969. In that case, the learned Single Judge of the Kerala High Court opined that a subsequent decision authoritatively declaring the law can be made basis for reviewing an earlier judgment.

7. The law is settled on the point of the review petitions are covered by order XLVII, Rule 1 of the C.P.C. and Section 114 of the C.P.C. Under order XLVII, Rule 1 C.P.C. a judgment may be reviewed inter alia on the

ground if there is a mistake apparent on the face of record.

8. In Aribam Tuleshwar Sharam v. Aribam Pishak Sharam (supra), Hon'ble Apex Court considered the scope of the High Courts' power to review an order passed under Article 226 of the Constitution, referred to an earlier decision in Shivdeo Singh v. State of Punjab MANU/SC/0395/1961 and observed:

"It is true as observed by this Court in Shivdeo Singh v. MANU/SC/0395/1961 State of Punjab, there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power to review which is inherent in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all matters or errors committed by the Subordinate Court."

9. Keeping in view the difference of opinion of different courts on the point, an explanation was added under Order XLVII, Rule 1 by the amendment of the C.P.C. by the Central Act No. 104 of 1976, which reads as under:-

"The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. This explanation was added on the recommendation of the law Commission to put an end to the controversy which had arisen on the point whether a judgment could be reviewed merely on the ground that the decision on a question of law on which the same was founded has been reversed or modified by the subsequent decision of a superior Court. Almost all the High Courts, save for the solitary exception of Kerala High Court, were unanimous in their opinion that the fact that the view of law taken in a judgment has been altered by a subsequent decision of a superior Court in another case could not afford a valid ground for the review of the judgment.

11. That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order XLVII, Rule 1, Civil Procedure Code.

In the case of Thungabhadra Industries Ltd. v. Govt. of A.P. MANU/SC/0217/1963 it was held that a review is by no means an appeal in disguise whereby an erroneous decision can be corrected.

In Parsion Devi and Ors. v. Sumitri Devi and Ors MANU/SC/1360/1997, it was held as under:-

"Under Order 47, Rule 1 CPC a judgment may be open to review inter alia if there is a mistake by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power to review under Order 47, Rule 1 CPC. In exercise of the jurisdiction under Order 47, Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the later only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise."

In Haridas Das v. Usha Rani Banik and Ors. MANU/SC/8039/2006, Hon'ble Apex Court made a reference to the explanation added to Order 47 by the Code of Civil Procedure (Amendment) Act, 1976 and held:

"In order to appreciate the scope of a review, Section 114 CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the court since it merely states that it "may make such order thereon as it thinks fit". The parameters are prescribed in Order 47 CPC and for the purpose of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict. This is amply evident from the Explanation to Rule 1 of Order 47 which states that the fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the court should exercise the power to review its order with the greatest circumspection."

The similar question was considered by the Full Bench of Himachal Pradesh High Court in the case of The Nalagarh Dehati Co-operative Transport Soceity Ltd., Nalagarh Vs. Beli Ram etc. reported in MANU/HP/0001/1981 the question before the Full Bench were as under:-

(i) Where after a judgment is pronounced by a court, the Supreme Court or a larger bench of the same court renders a decision taking a different or contrary view on a point covered by the said judgment; or

(ii) Where the court so pronouncing a judgment has, for whatever reason, missed to take into consideration a decision of the Supreme Court or a High Court taking a different or contrary view on a point covered by the said judgment."

12. After considering the law on the point, the Full Bench of Himachal Pradesh High Court has held in paragraph no. 24 as under:-

"24. The result is that we will answer the first part of the question in the

negative, that is, a subsequent decision of the Supreme Court or a larger Bench of the same court rendering a decision taking a different or contrary view on a point covered by the said judgment, does not amount to a mistake or error apparent on the face of the record. The answer to the second part of the question is that failure of the court to take into consideration an existing decision of the Supreme Court taking a different or contrary view on a point covered by its judgment would amount to a mistake or error apparent on the face of the record. But a failure to take into consideration a decision of the High Court would not amount to any mistake or error apparent on the face of the record."

13. Keeping in view the law on this point, this Court is of the considered view that the subsequent decision of a co-ordinate Bench would not be a ground to review the judgment, which is the scope of appeal.

14. Accordingly, the review on the basis of a subsequent judgment of a co-ordinate Bench deciding the controversy otherwise cannot be a ground to allow the review petition.

15. As discussed above, this review sans merits, deserves to be dismissed and is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2013

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

First Appeal No. 467 of 2012

Ramrao Singh... Petitioner
Versus
Usha Singh... .Respondent

Counsel for the Petitioner:
Sri Arvind Kumar Singh, Sri R.K. Singh

Counsel for the Respondent:
Sri Ali Hasan, Sri Ishtiyaq Ali

Hindu Marriage Act-1955-Section 28-First Appeal against the order passed under section 13 of Hindu Marriage Act-by Civil Court-appeal under section 28 of Hindu Marriage Act-not maintainable.

Held: Para-3-
From a perusal of the provisions of Section 28 of the Act, it is clear that no appeal lies against an order passed under Section 24 of the Act. It is not disputed by the learned counsel for the appellant or by Sri Ishtiyaq Ali , learned counsel for the respondent that proceedings under Section 13 of the Act for divorce are still pending in the civil court. It is also admitted by both the parties that these are not proceedings under Section 19 of the Family Court Act.

Case Law discussed:
2006 All. C.J. 1936

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

1. I have heard Sri Arvind Kumar Singh, learned counsel for the appellant and Sri Istiyaq Ali, learned counsel for the respondent.

2. This appeal has been filed under Section 28 of the Hindu Marriage Act, 1955 against the impugned judgment dated 2.7.2011 passed under Section 24 of the Hindu Marriage Act, 1955. The provision of appeal under the Hindu Marriage Act , 1955 (hereinafter referred to as the 'Act') is laid down under Section 28 of the Act which reads as under:-

"28. Appeals from decrees and orders.-(1) All decrees made by the court in any proceeding under this Act shall, subject to

the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of [ninety] days from the date of the decree or order."

3. From a perusal of the provisions of Section 28 of the Act, it is clear that no appeal lies against an order passed under Section 24 of the Act. It is not disputed by the learned counsel for the appellant or by Sri Ishtiyaq Ali , learned counsel for the respondent that proceedings under Section 13 of the Act for divorce are still pending in the civil court. It is also admitted by both the parties that these are not proceedings under Section 19 of the Family Court Act.

4. Learned counsel for the appellant has placed reliance upon the Full Bench decision of this Court reported in 2006 All. C.J, 1936, Kiran Bala Srivastava (Smt) vs. Jai Prakash Srivastava. Proceedings in that case arose under the Family Court Act and it was against an order passed under Section 24 of the Hindu Marriage Act, 1955, that the appeal was filed under Section 19 of the Family Court Act. Present proceedings are not under the Family Court Act but under Section 28 of the Hindu Marriage Act, 1955.

5. Even otherwise the appeal under the Family Court Act is cognizable by a Division Bench as per the provisions of the Act itself.

6. In view of the above legal position, the present appeal under Section 28 of the Hindu Marriage Act, 1955 is not maintainable and is accordingly dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.11.2013

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

Criminal Revision No. 523 of 2013

Preeti Srivastava... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri T.N. Tiwari

Counsel for the Respondents:
Govt. Advocate

Cr.P.C. Section-397(2)-Criminal Revision-Against order rejecting application under section 156(3) Cr.P.C.-being interlocutory in nature-revision-held-barred.

Held: Para-18
Considering the above decisions of the Apex Court and after a careful reading of the decision of Full Bench of this in Court Father Thomas (supra), it is abundantly clear that an order rejecting the application under Section156(3) Cr.P.C.

is also an interlocutory order and remedy of revision is barred.

Case Law discussed:
2011 Crl. Law Journal 2278; 2000(41) Allahabad Law Journal 2730; (2009) 1 SCC 801 (AIR 2008) SC Supplementary 706); 2007 Criminal Law Journal 3729; 1996(4) Crimes 189 SC; 2006 Criminal Law Journal 3283.

(Delivered by Hon'ble Arvind Kumar Tripathi (II), J.)

1. This criminal revision has been filed by Preeti Srivastava challenging the order dated 23.9.2013 passed by Additional Chief Judicial Magistrate, Court No.27, Lucknow by which an application under Section156(3) Cr.P.C. was rejected.

2. Heard Sri T. N. Tiwari, learned counsel for the revisionist assisted by Sri Vishnu Kumar Srivastava, learned counsel and Shri Faisal Ahmad Khan, learned AGA for the State.

3. Brief facts of the case is essential for this revision is that an application under Section 156(3) Cr.P.C. was moved by Preeti Srivastava before the Court of Additional Chief Judicial Magistrate, Court No.27, Lucknow for directing the police station concerned to register an FIR and for investigating the matter this application was rejected by which Magistrate. Feeling aggrieved this criminal revision has been filed.

4. It was submitted by learned counsel for the revisionist that as the contents of the application constitute a cognizable offence hence the magistrate was bound to allow the application and direct the Station Incharge concerned to register and investigate the case.

5. Learned AGA argued that in view of the case of Father Thomas Vs. State of U.P. and Anr. 2011 Crl. Law Journal 2278 criminal revision is not maintainable.

6. Replying to the argument learned counsel for the revisionist argued that the case of Father Thomas relates to the case where application under Section 156(3) Cr.P.C. has been allowed and it has been held by the Full Bench that revision is not maintainable at the instance of proposed accused.

7. In the case Father Thomas Vs. State of U.P. and Anr. 2011 Crl. Law Journal 2278 though the matter was that an application under Section 156(3) Cr.P.C. was allowed and when revision came before learned Single Judge for decision, he was of the view that the accused has no locus standi to challenge an order passed, and an order directing investigation is purely interlocutory in nature in view of statutory bar contain under section 397(2) of the Code the said order was not reviseable. However in the case of Ajay Malviya V. State of U.P. and others 2000(41) Allahabad Law Journal 2730; in which has been held by Division Bench that under Section 156(3) Cr.P.C. is a judicial order. Hence any FIR registered on the basis cannot be challenged by means of writ petition, learned Single Judge raised doubts about the correctness of the decision of Division Bench Ajay Malviya V. State of U.P. and others and the matter was referred before the Larger Bench. While referring the matter to the Larger Bench, learned Single Judge formulated following questions for consideration:-

(A) Whether the order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C. directing the

police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued ?

B. Whether an order made under Section 156(3) Code of Criminal Procedure is an interlocutory order and remedy of revision against such order is barred under Subsection (2) of Section 397 of the Code of Criminal Procedure, 1973 ?

C. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P. and Ors.(XLI) 2000 ACC 435, that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R. registered on the basis of the order will be maintainable, is correct?

8. While answering the three questions the Full Bench has held in para 65 is that;

65. A. The order of the Magistrate made in exercise of powers under Section 156(3) Code of Criminal Procedure directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Code of Criminal Procedure is an interlocutory order and remedy of revision against such order is barred under Subsection (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya v. State of U.P. and Ors. 2000(41) ACC 435:(200 Allahabad Law Journal 2730) that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct.

9. The Full Bench's answer to question no.1 is that if an application under Section 156(3) Cr.P.C. has been allowed then it is on open to revision by proposed accused.

10. If the intention of learned Single Judge was only to refer the controversy regarding the decision of Ajay Malviya's case (supra) then learned Single Judge would not have formulated Question 'B' and the matter would have been ended only after formulating Questions A and B. When learned Single Judge formulated Question 'B' then it was the intention of learned Single Judge to get the controversy decided once for all and thus they framed Question 'B'.

11. The Full Bench while giving opinion to this Question B has answered in a very categorical term that an order passed under Section 156(3) Cr.P.C. is an interlocutory order and remedy is revision is barred.

12. "An order made under Section 156(3) Cr.P.C." clearly includes an order rejecting the application under Section156(3) Cr.P.C. otherwise the Full Bench would not have answered the Question 'B'.

13. Learned counsel for the revisionist argued on the strength of the decision of Apex Court in Raghu Raj Singh Rousha v. Shiva Sundaram Promoters Private limited and Anr. MANU/SC/0357/2009 : (2009) 1 SCC 801 (AIR 2008 SC Supplementary 706)

that criminal revision is maintainable against an order rejecting the application under Section156(3) Cr.P.C.

14. The Full Bench of this High Court discussed the matter of Raghu Raj Singh Rousha's case and held para 28 as under:-

28. It may be noted that the backdrop of Raghu Raj Singh Rousha's case was that the complainant company had filed a complaint petition accompanied by an application under Section 156(3) of the Code before the Metropolitan Magistrate alleging commission of offences under Sections 323, 382, 420, 465, 471, 120-B, 506 and 34 IPC against the accused. The Magistrate refused to direct investigation in terms of Section 156(3) Code of Criminal Procedure but directed the complainant to lead pre-summoning evidence. The High Court however in a criminal revision against the order of the Magistrate, where only the State was impleaded, without giving any opportunity to the accused to be heard set aside the order of the Magistrate and directed the Magistrate to examine the matter afresh after calling for a police report The High Court's order was set aside by the Apex Court on two counts. One that there was an infringement of Section 401(2) of the Code as the right of hearing to an accused, or any other person who may be aggrieved mandated by the aforesaid provision, was denied to the aggrieved party as a result of the High Court's order. Two, according to the Apex Court the initial order of the Magistrate, who declined to entertain the application under Section 156(3) of the Code, but directed that the procedure of a complaint case be followed, and that the witnesses be examined under Section 200 and 202 Code of Criminal Procedure indicated that cognizance had been taken, hence a right of hearing had accrued to the accused. That would not have been the case, if only a pre-cognizance order of the Magistrate refusing to issue a direction under Section 156(3) Code of Criminal Procedure had been challenged in the High Court by the informant, where right of hearing had been denied to the accused in a Criminal Revision. These are the two basic distinctions from a direct order by a Magistrate to the police to investigate an offence. Here the direction under Section 156(3) Code of Criminal Procedure has not been issued consequent to any direction by the High Court in a criminal revision at the instance of the informant where only the State is made a party, and the aggrieved accused is denied the opportunity of hearing contemplated under Section 401(2) Code of Criminal Procedure. Also it is a pre-cognizance order only containing a direction of the Magistrate for investigation by the police, where no valuable right has accrued to the prospective accused, which is distinct from the post cognizance order in Rousha's cases, where the Magistrate had decided to follow the procedure of a complaint case under Section 200 and 202 Code of Criminal Procedure. We therefore find that Rousha's case is no authority for the proposition that any right of hearing accrues to a prospective accused or that any criminal revision is maintainable against an order of the Magistrate simply directing the police officer in-charge of a police station to investigate a case in exercise of powers under Section 156(3) of the Code.

15. In the case of Aleque Padamsee and Ors. Vs. Union of India (UOI) and Ors. 2007 Criminal Law Journal 3729; the

Apex Court has held that Whenever any information is received by the police about the alleged commission of offence which is a cognizable one there is a duty to register the FIR. There can be no dispute on that score. The only question is whether a writ can be issued to the police authorities to register the same. The basic question is as to what course is to be adopted if the police does not do it. The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code.

16. In the case of All Institute of Medical Sciences Employees Union Vs. Union of India 1996 (4) Crimes 189 (Supreme Court), the Apex Court has held Para 4:

"4. When the information is laid with the police but no action in that behalf was taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Megistrate is required to inquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the concerned police to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/ evidence recorded prima facie discloses offence, he is empowered to take cognisance of the offence and would issue process to the accused."

17. Similarly, the Apex Court has again in the Case of Hari Singh Vs. State of U.P. 2006 Criminal Law Journal 3283 held that para 4:

"4. When the information is laid with the police, but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees' Union (Reg) through its President v. Union of India and Ors. MANU/SC/1769/1996 : (1996)11SCC582 . It was specifically observed that a writ petition in such cases is not to be entertained. The above position was again highlighted recently in Gangadhar Janardan Mhatre v. State of Maharashtra MANU/SC/0830/2004 : 2004CriLJ4623 and in Minu Kumari and Anr. v. State of Bihar and Ors. MANU/SC/8098/2006: 2006CriLJ2468."

18. Considering the above decisions of the Apex Court and after a careful reading of the decision of Full Bench of this in Court Father Thomas (supra), it is abundantly clear that an order rejecting the application under Section156(3) Cr.P.C. is also an interlocutory order and remedy of revision is barred.

19. From the above discussion, this criminal revision is liable to be dismissed, and is hereby dismissed as being barred under subsection(2) of Section 397 Cr.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ(TAX) Petition No. 620 of 2009
alongwith W.P. No. 619 of 2009, W.P. No. 621 of 2009

Drawing & Disbursement Officer, LIC of India & Ors.... Petitioners
Versus
Asst. Commissioner of Income Tax & Ors.... Respondents

Counsel for the PetitionerS:
Sri Rakesh Ranjan Agarwal

Counsel for the Respondents:
A.S.G.I., C.S.C (I. Tax)., G.Krishna

Income Tax Act-1961-Section 192-Petitioner being Drawing and Disbursing officer-paying salaries to the employees-deducted income tax at source from estimated income of employees-allowed allowance of donation-given by the employees to the institution for rural development programe-obliged to have broad picture of estimated income-circular relied by department also nowhere provides any guidance for deduction under section 80 GGA-held-once employees found subjected to regular income tax-no liability could be fastened upon petitioner-petition allowed.

Held: Para-26
The petitioner had made bona fide allowance of the donation made by the employees for rural development programme while making deduction of tax at source and as such there was no occasion for any order under Section 201 read with Section 201 (1A) of the Act. It may be pertinent to note that the employer while making deduction of tax at source is only required to have a broad picture of the estimated income on which tax is to be deducted. He is not supposed to calculate the income minutely to precession.

Case Law discussed:
2009(6) SCC 735; AIR 1978 SC 851; 2003(129) STC 526; 2058 ITR 529; [2000] 243 ITR 0435; [1983] 140 ITR 0832.

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

1. Heard Sri Rakesh Ranjan Agrawal, Senior Advocate, assisted by Sri Suyash Agrawal, learned counsel for the petitioner and Sri Govind Krishna, learned Standing Counsel for the Income Tax Department.

2. The above three petitions relate to the assessment years 2003-04, 2004-05 and 2005-06 and are based upon identical facts involving the same assessee.

3. In all the writ petitions separate but identical orders dated 28.3.2007 passed by the Assistant Commissioner of Income Tax, TDS, Varanasi and a common order dated 29.12.08 passed by the Commissioner of Income Tax, TDS, Lucknow dismissing the three revisions arising there-from have been impugned.

4. The petitioner is a drawing and disbursing Officer of the Life Insurance Corporation of India responsible for the payment of salary to its employees. He is obliged under Section 192 of the Income Tax Act, 1961 (hereinafter referred to as the Act) to deduct income tax at source from the estimated income of its employees under the head 'salaries' and to furnish return thereof under Section 206 of the Act.

5. The petitioner filed the annual returns of the relevant years regarding the income of its employees and the tax deducted on source. The Assistant Commissioner of Income Tax, TDS, found that the tax deducted by him at source was short. Therefore, after issuing show cause notices to the petitioner, the Assistant Commissioner of Income Tax, TDS, passed orders under Section 201 of the Act treating the petitioner as an assessee in default and demanding shortage in tax deducted and interest thereon as per Section 201 (1A) of the Act. The orders so passed by the Assistant Commissioner of Income Tax, TDS were upheld by the Commissioner of Income Tax, TDS in revisions filed under Section 264 of the Act.

6. The petitioner while deducting tax at source under Section 192 of the Act allowed the benefit of donations made by the employees to the two institutions M/s Manav Kalyan Sansthan, Kabir Road, Varanasi and Swami Sahjanand Educational Trust, Kamachha, Varanasi for integral rural development work as envisaged under Section 35 CCA of the Act on the basis of the certificate of Commissioner of Income Tax dated 11.3.2003 and 1.4.2003 issued under Section 80GGA of the Act to the said institutions.

7. The two authorities aforesaid held that the benefit so accorded by the petitioner was not permissible at his level and as such he failed to make proper deduction of tax at source from the income from salaries of the employees. It was further held that the petitioner in computing the total income of its employees has acted in contravention of the instructions issued by the department on the subject. It was further held that the representative of the petitioner admitted the default in deducting tax at source and therefore, petitioner is liable to make good the short fall and to pay interest thereon.

8. In these petitions basically only two points need consideration:-

(i) Whether the petitioner in making deduction of tax at source could have allowed deductions under Section 80GGA to the employees of the LIC; and

(ii) Whether the deduction on account of the donations made to the institutions for carrying rural development programmes were in contravention of the departmental instructions?

9. Section 192 of the Act provides that any person responsible for paying any income chargeable under the head 'salaries' shall deduct from the amount payable tax on the estimated income of the assessee under the head salaries for that financial year.

10. Section 192(1) of the Act for the sake of convenience is quoted below:-

192(1) "Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income tax on the amount payable at the average rate of

income tax computed on the basis of the [rates in force] for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year."

11. The use of words "estimated income of the assessee" in Section 192 of the Act is of great importance. It means that the employer or the person responsible for the payment of salary to the employees has to deduct tax from the amount payable on the estimated income of the assessee under the head salary. In the computation of the estimated income of the assessee it is but natural that statutory deductions provided under the Act have to given effect to.

12. The estimated income of the employees referred to in Section 192(1) of the Act is the income of the employees from salaries after according benefits of the deductions permissible under Section 80GGA of the Act or similar other provisions under the Act.

13. In this view of the matter, the submission that the computation of income was to be left upon the assessing officer is not correct. The assessing officer computes the net income chargeable to tax whereas the petitioner was only obliged to make an estimation of the income of the employees for the purposes of deducting tax at source which is subject to final assessment to be made by the assessing officer. In making the estimation of the income under the head salaries, the petitioner was required to act honestly, bonafidely and in just and proper manner. The petitioner has allowed allowance of the donation made by the employees under Section 80GGA of the Act on the basis of the certificates issued by the prescribed authority and as such it cannot be said that he had acted in a dishonest or unfair manner. At least, there is no finding to this effect by any of the authorities.

14. The reliance placed by Sri Govind Krishna, on the decision of the Supreme Court in the case of Dr. Ram Deen Maurya Vs. State of U.P. and others 2009(6) SCC 735 to the effect that the assessing authority draws his power under Section 120 of the Act and the deduction from the income if any has to be made by him and not by the drawing and disbursing officer is of no substance inasmuch as the petitioner acting as a drawing and disbursing officer has not allowed any deduction for the purposes of computing the net taxable income. He has only permitted allowance for the contribution made by the employees to certain institutions permissible under Section 80GGA of the Act for the purposes of estimating the broad taxable income of the employees for the limited purposes of deducting tax at source under Section 192 of the Act which is always subject to the final computation of the taxable income by the assessing authority.

15. The instructions contained in the circulars Nos. 6, 9 & 13 dated 23.12.02, 18.11.03 and 6.12.2004 for the assessment years 2003-04, 2004-05 and 2005-06 respectively which are identical in nature in relation to the deduction of tax at source under Section 192 of the Act provides guidelines for making deduction under Section 80G and 80GG of the Act. The said circular nowhere provides for any guidance for making deduction under Section 80GGA of the Act. None of the impugned orders specifies the relevant condition of any of the aforesaid circulars which had been violated by the petitioner

in giving allowance under Section 80GGA of the Act.

16. In view of the fact that the above circulars nowhere prescribes any guidance for making deduction under Section 80GGA of the Act, the said circulars cannot be treated to have been violated or contravened by the petitioner.

17. In the counter affidavit the department has taken a stand that the certificate issued to associations/institutions under Section 35CCA of the Act has been withdrawn subsequently with retrospective effect and as such the petitioner was not justified in giving the allowance to the employees.

18. The said ground has not been taken by any of the authorities in passing the impugned orders.

19. None of the impugned orders have non-suited the petitioner on the ground of withdrawal of certificate of approval. It is well settled vide Mohinder Singh Gil and another Vs. The Chief Election Commissioner, New Delhi and others AIR 1978 SC 851 that the validity of the impugned order is to be judged from the reasoning and the grounds taken in the order itself and that nothing can be substituted or read in it by counter affidavit. Therefore, the stand taken in the counter affidavit that the certificate of approval was withdrawn subsequently with retrospective effect is meaningless.

20. Moreover, in the case of Commissioner of Income Tax, West Bengal-II Vs. Ethelbari Tea Co. (1931) Ltd. 2003 (129) STC 526 (Calcutta) it has been held that deduction for donation to association for carrying out work of rural development programme which has been approved when payment was made would not be affected by the subsequent withdrawal of the approval of the society even with the retrospective effect.

21. Thus, the allowance given to the employee under Section 80GGA of the Act would not be affected by the subsequent withdrawal of the approval of the society.

22. The Supreme Court in Commissioner of Income Tax Vs. Chotatingrai Tea and others 2058 ITR 529 held that once the conditions of allowing the expenditure under Section 35CCA of the Act are satisfied it is no obligation of the employee or the assessee to see the proper utilization of the funds by the institution. It means that deduction from the income on account of the donation made to the association or institution recognized for integral rural development programme is permissible provided the institution is recognized and a certificate to that effect issued by the prescribed authority irrespective as to whether the said donation has been actually utilized for that purpose or not.

23. In view of the aforesaid since the institution to which donations were made by the employees were recognized for rural development programme and were having valid certificate from the prescribed authority at the relevant time, the subsequent withdrawal would not effect the eligibility of the employees for getting benefit of the said donation in the computation of their income under the head salaries.

24. As far as the acceptance of the default by the representative of the

petitioner is concerned, the same cannot be held to be binding for the simple reason that if a statute permits a particular allowance that cannot be taken away by admission of one of the parties. It is settled law that there is no estopple against the statute.

25. In Commissioner of Income-tax Vs. Nestle India Ltd. [2000] 243 ITR 0435, a Division Bench of the Delhi High Court while dealing with the deduction at tax at source in relation to the income under the head salaries held that where the assessee was under a bona fide belief that conveyance allowance was not taxable then neither penalty under Section 201 of the Act nor interest under Section 201 (1A) of the Act was leviable.

26. The petitioner had made bona fide allowance of the donation made by the employees for rural development programme while making deduction of tax at source and as such there was no occasion for any order under Section 201 read with Section 201 (1A) of the Act. It may be pertinent to note that the employer while making deduction of tax at source is only required to have a broad picture of the estimated income on which tax is to be deducted. He is not supposed to calculate the income minutely to precession.

27. A similar view was expressed by the Division of the Madhya Pradesh High Court in the case of Gwalior Rayon Silk Co. Ltd. Vs. Commissioner of Income Tax [1983] 140 ITR 0832 and it was further held that where the regular assessment of an employee had been completed the Commissioner of Income Tax, TDS has no jurisdiction under Section 201 of the Act to demand further tax from the employer in respect of tax shortly deducted at source relating to such employees.

28. The revisional order dated 29.12.2008 makes a reference to the fact that the employees have been subjected to regular assessment in which case no liability could have been fastened upon the petitioner in respect of any tax which may have been deducted less at source. The assessing authority could have taken care for realizing such shortage while making the regular assessment.

29. Sri Govind Krishna, in the end made a request that the authorities should be given liberty to proceed to recover the shortage of tax if any from the defaulting employees.

30. I am afraid such liberty at this stage is not warranted, in view of the fact that all the employees have furnished regular returns for the relevant years and by now the assessment may have been finalized leaving no scope for any further recoveries against them.

31. In view of above the impugned orders dated 28.3.2007 and 29.12.2008 are quashed.

32. The petitions succeeds and are allowed without any costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.12.2013

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

Special Appeal (D) No. 845 of 2013

State of U.P. & Ors.... Appellants
Versus
Pankaj Srivastava.... Respondent

Counsel for the Appellants:
C.S.C.

Counsel for the Respondent:
Sri Ramesh Kumar Srivastava

U.P. Collection Amin Service Rule 1974-Rule-5-Regularisation-seasonal collection Amin-committee rejected claim-as the petitioner/respondent was not working on relevant time of consideration-held-learned Single Judge rightly quashed committee decision-in absence of such requirement-can not be interpreted otherwise than statuary enactment-appeal dismissed.

Held: Para-6
The last four fasals does not mean that the Seasonal Collection Amin must be actually working on the date on which the Selection Committee applies its mind to the claim for regularization. Such a condition is not found in the Rules and to introduce such a condition, would amount to a modification or amendment of the statutory rule, which is impermissible for this Court. The Rule has to be read as it stands. The learned Single Judge was, in our opinion, correct in holding that the ground which has weighed with the Selection Committee was extraneous to the Rules.

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

1. The special appeal arises from a judgment of the learned Single Judge dated 04 October 2013. By the impugned judgment, the learned Single Judge has quashed the decision, which was taken in a meeting of a Selection Committee dated 15 December 2001 for considering the regularization of the services of the respondent as a Collection Amin against a 35% quota prescribed for regular appointment on the post of Collection Amin from amongst the Seasonal Collection Amins under the U.P. Collection Amins' Service Rules, 1974 (hereinafter referred to as 'the Rules, 1974'). The learned Single Judge has directed consideration afresh. Hence, the State is in appeal.

2. The respondent worked as a Seasonal Collection Amin since the year 1989 from time to time. He claimed regular appointment on the post of Collection Amin under the Rules, 1974. The State Government has regular posts of Collection Amins and also engages Seasonal Collection Amins. The Seasonal Collection Amins are required to carry out the work of collection of revenue during the Rabi and Khareef crops. A provision was introduced in the Rules,1974 for regularization of Seasonal Collection Amins as Collection Amins against 35% of vacancies. Rule 5 of the Rules, 1974, which provides for regularization, is in the following terms:-

"प्रतिबन्ध यह है कि पैंतीस प्रतिशत रिक्तियॉ ऐसे सीजनल कलेक्शन अमीनों में से चयन द्वारा भरी जायेंगी–

;कद्ध जिन्होंने कम से कम चार फसलों तक सन्तोषजनक रूप से कार्य किया हो य

;खद्ध जिनकी आयु उस वर्ष की पहली जुलाई को, जिस वर्ष चयन किया जाय, 45 वर्ष से अधिक न होः

प्रतिबन्ध यह भी है कि यदि उपयुक्त अभ्यर्थी उपलब्ध न हों तो शेष रिक्तियॉ सीधी भर्ती के माध्यम से सामान्य अभ्यर्थियों द्वारा भरी जायेंगी।

स्पष्टीकरण– सन्तोषजनक कार्य का तात्पर्य होगा शुरू से अन्त तक अच्छे आचरण को सम्मिलित करते हुए अन्तिम चार फसलों के दौरान विहित स्तर के अनुसार कम से कम सत्तर प्रतिशत वसूली।"

3. Earlier the respondent had filed a writ petition (Writ Petition No.3280 (S/S) of 2001) since his claim for regularization had not been considered. By a judgment and order dated 12 July 2001, a learned Single Judge of this Court disposed of the petition with a direction that the claim of

the respondent for regularization shall be considered in accordance with the relevant Government Orders and the Rules against 35% of the total vacancies. Since in pursuance of the aforesaid order dated 12 July 2001 no intimation was furnished to the respondent, he initiated contempt proceedings before this Court. In the contempt proceedings, a counter affidavit was filed on behalf of the State on 12 October 2009 in which there was a disclosure that the claim of the respondent for regularization had been considered and rejected by the Selection Committee in its meeting dated 15 December 2001. Thereupon, the respondent instituted another petition challenging the decision of the Selection Committee in 2009. The only ground on which the Selection Committee rejected the claim of the respondent was that he was not working as a Seasonal Collection Amin on the date on which the claim was considered (the exact words used by the Selection Committee being "dk;Zjr ugha"). When the petition was filed before the learned Single Judge, a counter affidavit was filed on behalf of the State in which, besides the ground which weighed with the Selection Committee, an additional ground was sought to be taken, namely, that the performance of the respondent was not commensurate with the requirement spelt out in the explanation to Rule 5 of the Rules, 1974.

4. The learned Single Judge held that the ground which weighed with the Selection Committee, namely, that the respondent was not working on the date of consideration, was extraneous to Rule 5 of the Rules, 1974 since the Rules do not contain any such requirement. The learned Single Judge noted that the additional ground, which was urged in the counter affidavit in regard to the lack of performance, had not weighed with the Selection Committee. In the circumstances, the learned Single Judge set aside the decision of the Selection Committee dated 15 December 2001 and directed a fresh consideration of the claim of the respondent. However, the learned Single Judge clarified that as regards the figures of recovery, there was a Circular of the Board of Revenue dated 29 September 2000, by which the percentage of realization/recovery made by the Seasonal Collection Amins must be calculated in relation to the total demand which was entrusted to the given individual.

5. Learned counsel appearing on behalf of the appellants submits that the finding of the learned Single Judge that there is no requirement in the Rules to the effect that the Seasonal Collection Amin should be working on the date of consideration of his proposal is erroneous. It was sought to be urged that the explanation to Rule 5 of the Rules, 1974 defines satisfactory service as the extent of recovery in the last four fasals. Hence, it is urged that the expression 'last four fasals' if duly taken note of, should mean the last four fasals immediately before consideration of the claim for regularization by the Selection Committee.

6. In assessing the submission, which is urged on behalf of the State, Rule 5 of the Rules, 1974, as it held the field at the material time, has to be interpreted. As noted earlier, the Rule contemplates regularization of the Seasonal Collection Amins against 35% of the vacancies. The Rule prescribes the following conditions, namely, (i) the Seasonal Collection Amins must have rendered satisfactory work in at least four

fasals; and (ii) the Seasonal Collection Amins should not have attained the age of 45 years by the 1st July of the relevant year. The explanation states that 'satisfactory service' would mean that in the last four fasals, the Seasonal Collection Amins should have attained the recovery in accordance with the prescribed norms of at least 70%. Now the explanation has to be harmoniously construed with the main provision which is made in the Rules of 1974. The requirement of the Rules is that the Seasonal Collection Amins should have worked for at least four fasals. Where a Seasonal Collection Amin has worked for more than four fasals, in assessing whether he has rendered satisfactory performance within the meaning of the explanation, the extent of recovery has to be assessed with reference to the last four fasals during which he has worked. In a situation where the Seasonal Collection Amin has worked for only four fasals, obviously the recovery has to be assessed with reference to those four fasals. Hence, the expression 'last four fasals' would mean the last four fasals out of the total number of fasals in which the Seasonal Collection Amin has worked. The last four fasals does not mean that the Seasonal Collection Amin must be actually working on the date on which the Selection Committee applies its mind to the claim for regularization. Such a condition is not found in the Rules and to introduce such a condition, would amount to a modification or amendment of the statutory rule, which is impermissible for this Court. The Rule has to be read as it stands. The learned Single Judge was, in our opinion, correct in holding that the ground which has weighed with the Selection Committee was extraneous to the Rules.

7. For the reasons indicated above, this finding of the learned Single Judge is correct. Having so held, the learned Single Judge directed consideration afresh by the Selection Committee, which again, in our opinion, is in accordance with law.

8. The State had filed a counter affidavit before the learned Single Judge in which an additional ground was sought to be set up for denying regularization, namely, that the respondent has not attained the level of recovery of 70% as prescribed in the explanation. This has not weighed with the Selection Committee. However, the learned Single Judge has clarified that this issue would be taken into consideration by the Selection Committee during the course of consideration of the claim of the respondent for regularization, afresh. However, the norms of 70% recovery, as clarified, must relate to the demand which was actually entrusted to the employee. The satisfactory performance has to be read with reference to the work, which is actually entrusted to the Seasonal Collection Amin.

9. Learned counsel appearing on behalf of the appellants has submitted that in the memo of appeal, the State has taken a ground that the respondent would not meet the norms of 70% with reference to the work which was entrusted to him.

10. We make no observation in this regard since it would be open to the Selection Committee, upon remand, to re-consider the entire issue, namely, as to whether the respondent has rendered satisfactory service and fulfilled the requirement of the norms of 70% recovery with reference to the work which was entrusted to him as prescribed in the explanation to Rule 5 of the Rules of 1974. The time for consideration of the claim of the respondent for regularization is extended by a further period of three months from today.

11. We find no reason to deviate from the order of the learned Single Judge imposing costs. The learned Single Judge was justifiably dismayed with the conduct of the State in disclosing the minutes of the meeting of the Selection Committee of 2001 only when a contempt petition was filed. The minutes of the meeting of the Selection Committee were not immediately disclosed to the respondent and were disclosed only on the request of the respondent after an inordinate delay. Hence, there is no reason to interfere with the order of the learned Single Judge imposing costs.

12. For the aforesaid reasons, we find no error in the judgment of the learned Single Judge. The appeal shall, accordingly, stand dismissed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2013

BEFORE
THE HON'BLE DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SANJAY MISRA, J.

Special Appeal (D) No. 1278 of 2013

State of U.P. and Ors... .Appellants
Versus
Jai Prakash.... Respondent

Counsel for the Petitioners:
Sri Pankaj Saxena, S.C.

Counsel for the Respondent:
Sri R.K. Dwivedi

Civil Service Regulation-Regulation 351 Aa read with Police Regulation 919-A-Withholding gratuity-during pendency of criminal case-held-proper-however entitled for provisional pension-direction otherwise by Hon'ble Single Judge-set-a-side.

Held: Para-11

In the circumstances, we are of the view that the order passed by the Superintendent of Police, Etah withholding the payment of gratuity until the conclusion of the criminal trial was correct and proper and was in accordance with the provisions of regulation 351-AA read with regulation 919-A (3). The respondent would however be entitled to the payment of provisional pension as contemplated in law.

Case Law discussed:
Shri Pal Vaish Vs. U.P. Power Corporation Limited and another; State of Jharkhand & Ors. Vs. Jitendra Kumar Srivastava.

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

1. The special appeal arises from a judgement of the learned Single Judge by which an order passed by the Superintendent of Police, Etah on 22 July 2010 withholding the payment of gratuity to the respondent has been set aside and a direction has been issued to the appellants herein to release the gratuity together with statutory interest.

2. The respondent was appointed on 5 February 1969 as a fireman in the fire services of the State and was regularised in service. He attained the age of superannuation on 30 June 2010. On 22 July 2010, an order was passed by the Superintendent of Police, Etah allowing to the respondent a provisional pension of Rs.9025/- per month. The payment of gratuity was however withdrawn on the ground of the pendency of a criminal case which has been registered under Section 498-A of the Penal Code read with Section 304-B and Section 3/4 of the Dowry Prohibition Act. There is no dispute about the factual position that an FIR was registered on 3 May 2009 against

the respondent and a charge sheet had been filed before the competent court on 11 December 2009.

3. The learned Single Judge held that the proceedings which are pending before the competent criminal court are in reference to the Dowry Prohibition Act and not in regard to any loss having been caused to the Government and even a final judgement in the criminal trial would not result in any quantification of an alleged loss sustained by the Government. In the view of the learned Single Judge, the power under regulation 351 of the Civil Service Regulations could be exercised by the State Government for withholding or withdrawing a pension or a part thereof, if a pensioner is convicted of a serious crime or is guilty of grave misconduct whereas in regulation 351-A, the State Government is empowered to recover from the pension the amount of loss found in judicial or departmental proceedings to have been sustained by the Government by the negligence or fraud during his service. In the present case, it was held that mere pendency of a criminal case could not justify the withholding of gratuity.

4. The learned counsel appearing on behalf of the appellants has submitted that regulations 351, 351-A and 351-AA operate in different fields. Regulation 351-AA, it was submitted specifically provides that where a departmental or judicial proceeding or any enquiry by the Administrative Tribunal is pending on the date of retirement, a provisional pension under regulation 919-A may be sanctioned. Regulation 919-A (3) contains a specific prohibition on the payment of death-cum-retirement gratuity to a government servant until the conclusion of departmental or judicial proceedings and the issue of final orders thereon. Hence, it was submitted that in view of a specific prohibition contained in regulation 351-AA and regulation 919-A (3), gratuity could not have been paid during the pendency of a criminal case but as required by law, a provisional pension has been sanctioned.

5. On the other hand, it has been urged on behalf of the respondent that there was no warrant or justification to retain the payment of gratuity and the directions issued by the learned Single Judge are just and proper.

6. Regulation 351 provides as follows:

"351. Future good conduct is an implied condition of every grant of a pension. The State Government reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

The decision of the State Government on any question of withholding or withdrawing the whole or any part of pension under this regulation shall be final and conclusive."

Regulation 351-A insofar as is material to this proceeding is as follows:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused Government, if the pensioner is found in departmental or Judicial proceedings to

have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement."

Explanation (b) to the second proviso of Regulation 351-A, inter alia, provides as follows:

"(b) judicial proceedings shall be deemed to have been instituted:

(i)in the case of criminal proceedings, on the date on which complaint is made, or a charge-sheet is submitted, to a criminal court ; and

(ii)in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made to a civil court."

Regulation 351-AA is as follows:

"351-AA. In the case of a Government Servant who retires on attaining the age of superannuation or otherwise and against whom any departmental or Judicial proceedings or any enquiry by Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement a provisional pension as provided in Regulation 919-A may be sanctioned."

Finally, for the sake of a complete appreciation of the applicable regulations, it would be necessary to refer to regulation 919-A, which reads as follows:

"919-A. (1) In case referred to in Regulation 351-AA the Head of Department may authorise the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the Government servant or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension.

(2) The provisional pension shall be authorised for the period commencing from the date of retirement upto and including the date on which after conclusion of departmental or judicial proceeding or the enquiry by the administrative Tribunal; as the case may be, final orders are passed by the competent authority.

(3) No death-cum-retirement gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings or the enquiry by the Administrative Tribunal and issue of final orders thereon.

(4)Payment of provisional pension made under clause (1) above shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of the proceedings or enquiry referred to in clause (3) but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or withheld either permanently or for special period."

7. Now, regulation 351 reserves to the State Government the right to withhold or withdraw pension or a part thereof upon a pensioner being convicted of a serious crime or being guilty of a grave misconduct. Conviction of a serious crime within the meaning of regulation 351 postulates that after a criminal trial, a pensioner has been found guilty of an

offence involving a serious crime. In other words, there has to be a judicial determination by which the pensioner is convicted of a serious crime. Regulation 351-A reserves to government the right to withholding or withdrawing of pension and the right to order a recovery from the pension, if a pensioner is found in departmental or judicial proceedings to be guilty of grave misconduct or to have caused a pecuniary loss to the Government by his misconduct or negligence. Hence, regulation 351-A operates in two areas:

(i) if the pensioner is found in departmental or judicial proceedings to be guilty of grave misconduct;

or

(ii) if the pensioner is found in departmental or judicial proceedings to have caused pecuniary loss to the government by his misconduct or negligence, during service or on re-employment.

Government has the power to withhold or withdraw the pension and a power to recover any pecuniary loss suffered. Regulation 351-A postulates that there has to be a determination in departmental or judicial proceedings. Regulation 351-AA deals with a situation where a departmental or judicial proceeding or any enquiry by the Administrative Tribunal is pending on the date of retirement or is to be instituted after retirement in which case a provisional pension under regulation 919-A may be sanctioned. Where a departmental or judicial proceeding is pending on the date of retirement, regulation 351-AA stipulates that a provisional pension would be admissible and the modalities for the payment of a provisional pension are prescribed under regulation 919-A. Regulation 919-A (1) makes a reference to the situation which is referred in regulation 351-AA and authorises the payment of a provisional pension by the Head of Department. The provisional pension is to be authorised for the period commencing from the date of retirement upto and including the date of conclusion of departmental or judicial proceedings or, as the case may be, the enquiry by the Administrative Tribunal. Regulation 919-A (3) contains an expression prohibition on the payment of death-cum-retirement gratuity to a government servant until the conclusion of the departmental proceeding, judicial proceeding or as the case may be, an enquiry by the Administrative Tribunal. Regulation 41 provides that except when the term 'Pension' is used in contradistinction to gratuity, 'Pension' would include gratuity. Consequently, regulation 919 (3) which contains a bar on the payment of gratuity till the conclusion of a departmental or judicial proceeding would allow the payment of a provisional pension stipulated in clause (1) of regulation 919-A.

8. The learned Single Judge, in the present case, has proceeded on the basis that neither in regulation 351 nor in regulation 351-A is a withholding of gratuity contemplated during the pendency of a judicial proceeding. The learned Single Judge, with respect, has overlooked the provisions of regulation 351-AA and a specific bar which is contained in regulation 919-A (3). In view of the specific prohibition which is contained in regulation 919-A (3), no death-cum-retirement gratuity would be admissible until the conclusion of a departmental or judicial proceeding. The expression 'judicial proceeding' would

necessarily include the pendency of a criminal case.

9. In a judgement of a Division Bench of this Court in Shri Pal Vaish vs. U.P. Power Corporation Limited and another1, it has been held that clause 3 of regulation 919-A is a provision which specifically deals with the payment of gratuity during pendency of departmental or judicial proceedings and in view thereof, the payment of gratuity has to be deferred until the conclusion of such a proceeding. The Division Bench also held that the payment of gratuity cannot be made in view of the bar contained in regulation 919-A during the pendency of a criminal case.

10. In a recent judgement of the Supreme Court in State of Jharkhand & Ors. vs. Jitendra Kumar Srivastava & Anr2, the Supreme Court dealt with the provisions of Rule 43 (b) of the Pension Rules of the State of Bihar as applicable to the State of Jharkhand. Regulation 43(b) was pari materia to regulation 351-A of the Civil Service Regulations in the State of U.P. In that context, the Supreme Court held that Rule 43(b) made it clear that it was permissible for the Government to withhold pension only when a finding is recorded in a departmental inquiry or judicial proceeding in regard to the commission of misconduct while in service and rule 43(b) contains no provision for withholding gratuity when departmental or judicial proceedings are still pending. However, the Supreme Court clarified that though there was no provision for withholding pension or gratuity in the given situation, had there been any such provision in the rules, the position would have been different. In the present case, there is a specific provision contained in regulation 351-AA read with regulation 919-A(3).

11. In the circumstances, we are of the view that the order passed by the Superintendent of Police, Etah withholding the payment of gratuity until the conclusion of the criminal trial was correct and proper and was in accordance with the provisions of regulation 351-AA read with regulation 919-A (3). The respondent would however be entitled to the payment of provisional pension as contemplated in law.

12. In view of the above, we allow the appeal and set aside the impugned order of the learned Single Judge dated 10 May 2013. In consequence, the petition which has been filed under Article 226 of the Constitution shall stand dismissed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.12.2013

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SANJAY MISRA, J.

Special Appeal (D) No. 1286 of 2013

Committee of Management,Anjuman Kherul Almin & Anr. ...Appellants
Versus
State of U.P. and Ors... .Respondents

Counsel for the Appellants:
Sri Yogish Kumar Saxena

Counsel for the Respondents:
C.S.C., Sri N.L. Pandey

<u>High Court Rules-Chapter VIII Rule-5-Special Appeal-Societies Registration Act, 1860-Section 25(i)-</u> Order passed by Deputy Registrar-accepting the claim of rival-claimant-writ petition dismissed on ground of alternative remedy to approach

before prescribed authority-held-D.R. can not transgress it jurisdiction-by entertaining claim and enter into merit-only course open to refer the matter before prescribed authority-appeal allowed with certain directions.

Held: Para-9

In the present case, a list was submitted by the third respondent, of office bearers under Section 4 for 2013-14. The list was objected too. The Deputy Registrar had conflicting claims between the appellants on the one hand and the third respondent on the other hand. Hence when an application for taking on record the names of the officer bearers was filed and an objection to the validity of the elected office bearers was placed before him, the Registrar ought to have referred the dispute to the Prescribed Authority under Section 25(1). In entertaining the dispute himself and going into merits of the rival claims, the Deputy Registrar has clearly transgressed his jurisdiction. The jurisdiction to decide any doubt or dispute in respect of an election of the office bearers of the Society lies with the Prescribed Authority and the Registrar ought to have made a reference to the Prescribed Authority.

Case Law discussed:

2009(5) ESC 3506

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

1. The special appeal arises from a judgment of the learned Single Judge dated 3 October 2013, declining to entertain a petition filed by the appellants under Article 226 of the Constitution on the ground that the appellants have a remedy of moving the Prescribed Authority under Section 25(1) of the Societies' Registration Act, 1860. The appellants, claiming to be the Committee of Management of Anjuman Kherul Almin Allahganj and its Manager Mr. Abbash Khan sought to question the legality of an order dated 26 July 2013 passed by the Deputy Registrar, Firms Societies and Chits, Kanpur. By his order, the Deputy Registrar rejected the claim of the appellants and accepted the list of office bearers submitted by the third respondent for the year 2013 and issued consequential directions for registration of the list of office bearers under Section 4 of the Act. When the petition came up an objection was raised on behalf of the third respondent that the appellants can avail of a statutory alternative remedy under Section 25(1). This objection was accepted by the learned Single Judge while dismissing the petition.

2. The contention of the appellants is that the Deputy Registrar, who passed the order dated 26 July 2013 which was called into question before the learned Single Judge had no jurisdiction to entertain an election dispute about which of the rival claims was sustainable. Hence it has been submitted that when the list of office bearers is submitted to the Deputy Registrar under Section 4 and he finds that there is a dispute in regard to the validity of the elections set up by the rival contestants, the Deputy Registrar cannot decide that question but he has to make a reference to the Prescribed Authority under Section 25(1). In the present case it was submitted that the Deputy Registrar transgressed the limitation on his jurisdiction by going into the merits of the rival claims when he ought to have referred the dispute to the Prescribed Authority. In this regard reliance was placed on the judgments of two Division Benches of this Court in All-India Council through Bharat Dharam Maha Mandal, Bahura Bir Varanasi and another Vs. Assistant Registrar, Firms, Societies and Chits, Varanasi Region, Varanasi and

another, 1988 AWC 1154 and in Gram Shiksha Sudhar Samiti Junior High School, Sikandra District Kanpur Dehat Vs. Registrar, Firms, Societies and Chits, U.P. Lucknow, 2010-ADJ-7-643.

3. On the other hand it was urged on behalf of the third respondent that it has been held in a subsequent decision of the Division Bench in the Committee of Management, Adarsh Krishak Junior High School, Mauaima, Allahabad Vs. State of U.P. and others, 2009(5) ESC 3506 that the Deputy Registrar, when he is seized with a proceeding under Section 4 is not a "mere post office" who must refer any and every dispute. In the present case, it was urged that the third respondent had set up an election and a list had been submitted for 2013-14 the validity of which was within the jurisdiction of the Deputy Registrar to determine.

4. Under Section 4 of the Societies' Registration Act, 1860, as amended in the State of U.P. the following provision has been made:-

"4. (1) Annual list of managing body to be filed.-Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Provided that if the managing body is elected after the last submission of the list, the counter signature of the old members, shall, as far as possible, be obtained on the list. If the old office-bearers do not counter-sign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shall decide all objections received within the said period.

(2) Together with list mentioned in sub-section (1) there shall be sent to the Registrar a copy of the memorandum of association including any alteration, extension or abridgment of purposes made under section 12, and of the rules of the society corrected up to date and certified by not less than three of the members of the said governing body to be a correct copy and also a copy of the balance-sheet for the proceeding year of account."

5. The proviso to Section 4, as amended in the State of U.P., states that if the managing body is elected after the last submission of the list the counter signature of the old members, shall, as far as possible, be obtained on the list. If the old office bearers do not countersign the list the Registrar may in his discretion issue a public notice inviting objections and decide all the objections received within the said period.

6. Section 25(1) as applicable in the State of U.P. provides as follows:-

"25.Dispute regarding election of office-bearers.-(1) The prescribed authority may, on a reference made to it by the Registrar or by at least one-fourth of the members of a society registered in the Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in

office of an officer-bearers of such society, and may pass such orders in respect thereof as it deems fit:

[Provided that the election of an office-bearer shall be set aside where the prescribed authority is satisfied-

(a) that any corrupt practice has been committed by such office-bearer; or

(b) that the nomination of any candidate has been improperly rejected; or

(c) that the result of the election in so far as it concerns such office-bearer has been materially affected by the improper acceptance of any nomination or by the improper reception, refusal or rejection of any vote or the reception of any vote which is void or by any non-compliance with the provisions of any rules of the society."

7. Both these provisions have been harmonized in the judgment of the Division Bench in All-India Council (Supra) where it was held as follows:-

"Section 25 of the Societies Registration Act as amended by the State Legislature enacts a comprehensive code and creates a designated forum or tribunal for adjudication in a summary manner of all disputes or doubts in respect of the election or continuance in office of an office-bearer of such society. It also provides the grounds upon which the election of an office-bearer can be set aside. The procedure to be followed for filling up of the vacancies arising from the decisions rendered by the Prescribed Authority under Sub-section (i)of Section 25 has also been laid down(Section 25(2).)

7.It will, therefore, be seen that insofar as disputes or doubts in respect of the election or continuance in office of the office-bearers of a society registered in Uttar Pradesh are concerned, the Legislature has created a specific forum and laid down an exhaustive procedure for determination of the same under Section 25. There is no other provision, express or otherwise, providing for determination of such disputes specifically. It is settled law that where, as here, the Legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the statute, such disputes can be determined only in that forum and in the manner prescribed thereunder and not otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same has to be decided only by the Prescribed Authority under Section 25(1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit."

8. The judgment of the Division Bench came up for consideration in Gram Shiksha Sudhar Samiti (Supra). In the subsequent judgment the Division Bench held that the earlier judgment has harmonized the provisions of both Sections 4 and 25 and what can be inquired into under Section 25 of the Act, cannot be gone into under the proviso to Section 4. In that case, the Division Bench held that the learned Single Judge ought to have set aside an order of the Registrar dated 11 July 2010 and ought to have directed the Registrar to refer the objection to the Prescribed Authority under Section 25(1). The Division Bench held that once an application for taking on record the

name of the office bearers and an objection as to the validity of the office bearers who were duly elected has been filed, the Registrar considering under Section 25(1) ought to refer the matter to the Prescribed Authority. Undoubtedly, in the subsequent decision in the Committee of Management (Supra) it has been held that the Registrar "is not a post office for referring any and every dispute". The Division Bench there held that more than three years after the holding of an election there was no reason to entertain a petition at the belated stage.

9. In the present case, a list was submitted by the third respondent, of office bearers under Section 4 for 2013-14. The list was objected too. The Deputy Registrar had conflicting claims between the appellants on the one hand and the third respondent on the other hand. Hence when an application for taking on record the names of the officer bearers was filed and an objection to the validity of the elected office bearers was placed before him, the Registrar ought to have referred the dispute to the Prescribed Authority under Section 25(1). In entertaining the dispute himself and going into merits of the rival claims, the Deputy Registrar has clearly transgressed his jurisdiction. The jurisdiction to decide any doubt or dispute in respect of an election of the office bearers of the Society lies with the Prescribed Authority and the Registrar ought to have made a reference to the Prescribed Authority.

10. The learned Single Judge is right in holding that the Prescribed Authority would have to decide under Section 25(1) upon the dispute which is raised. To that extent the observations of the learned Single Judge are justified. However, we find merit in the contention of the appellants that the petition could not have been dismissed merely with liberty to move the Prescribed Authority. The appropriate direction to pass, was to set aside the order of the Deputy Registrar which is an order without jurisdiction since the Deputy Registrar has decided an issue which fell within exclusive domain of the Prescribed Authority.

11. In consequence and while allowing the special appeal, we modify the order of the learned Single Judge in the following terms:-

(1) The order passed by the Deputy Registrar on 26 July 2013 is quashed and set aside as being without jurisdiction;

(2) The Deputy Registrar is directed to make a reference under Section 25(1) of the Societies' Registration Act, 1860 to the Prescribed Authority within a period of two weeks of the receipt of a certified copy of this order;

(3) The Prescribed Authority shall upon receipt of the reference under Section 25(1) decide upon the reference within a period of three months of the receipt of the reference;

(4) The Deputy Registrar shall thereafter take necessary steps under Section 4 upon receipt of the order of the Prescribed Authority expeditiously.

12. The special appeal is accordingly disposed of.

13. There shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.12.2013

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE MRS. SUNITA AGARWAL, J.

Criminal Jail Appeal No. 1845 of 2011

Ratan Lal... Appellant

Versus

State of U.P..... Opposite Party

Counsel for the Appellant:
From Jail, Sri Akhilesh Singh, Sri Noor Mohd. Sri Shivam Yadav

Counsel for the Respondents:
A.G.A.

Jail Appeal-Release on bail accused-in jail for 28 years-considering direction of Hon'ble High Court-although bail granted-but in absence of security of Rs. 1000000/-could not get the fruit-prayer for release on execution of personal bond of Rs. 20,000/-granted-subject to appearance in concerned police station on every falling three months.

Held: Para-5
In view of above decision of the Apex Court as the appellant has been in jail for such a long time., it would be difficult for him to arrange for personal sureties for him. We, therefore direct the trial Court Judge to comply with our order. We direct that the appellant shall be released on bail on his furnishing a personal bond for Rs.20,000/-. However, he is required to appear at the police station Sadar Bazar, Jhansi after every three months. In case of failure to appear at the police station as directed above, it would be open to the authorities of the court concerned to take steps for cancellation of his bail.

Case Law discussed:
(1978)4 SCC 47; (1980) 1 SCC 81.

(Delivered by Hon'ble Amar Saran, J.)

1. Heard learned counsel for the appellant/applicant and the learned AGA.

2. It is submitted by the learned counsel for the appellant that this Court had passed an order on 7.10.2013 directing the appellant, who had been in jail for 28 years, to be enlarged on bail on his furnishing a personal bond to the satisfaction of the court concerned. However, learned Additional Sessions Judge, Court No. 1, Jhansi passed an order on 23.10.2013 pursuant to our order dated 7.10.2013 that the appellant Ratan Lal be released in ST No. 46 of 1986 under Section 302 IPC, Police Station Sadar Bazar, District Jhansi on a personal bond for an amount of Rs.1,00,000/- and two sureties of the like amount.

3. Learned counsel for the applicant submits that as the appellant could not arrange for said sureties, he could not be released on bail. Therefore, the said order is clear violation of order dated 7.10.2013 passed by this Court. In the said order for releasing the appellant on bail, a personal bond was required to be furnished.

4. In Moti Ram & Ors. v. State of M.P., (1978) 4 SCC 47 and Hussainara Khatoon (1) v. State of Bihar, (1980) 1 SCC 81 the Apex Court has reproached subordinate Courts for considering the obligation to pay a sum of money on forfeiture of the bonds or sureties for non-appearance to be the only means for enforcing the attendance of the accused to face trial or to receive sentence, and for fixing bail amounts only in terms of the nature of the crime, which approach favours the wealthy and discriminates against the impecunious litigant, and eschews other criteria, such as the roots of an accused in the community, his financial standing, or other features, such as the incapacity of an accused to abscond on account of his young or old age, or being a woman, or physically infirm or ailing. For failure of a penurious accused to arrange for the heavy bail amount or local sureties, he is forced to remain in jail for long periods of time even after being granted bail. Krishna Iyer J speaking for the bench in paragraph 30 in Moti Ram (supra) has directed: "Even so, poor men-Indians are in

monetary terms indigents, young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances put whatever reasonable condition you may."

5. In view of above decision of the Apex Court as the appellant has been in jail for such a long time., it would be difficult for him to arrange for personal sureties for him. We, therefore direct the trial Court Judge to comply with our order. We direct that the appellant shall be released on bail on his furnishing a personal bond for Rs.20,000/-. However, he is required to appear at the police station Sadar Bazar, Jhansi after every three months. In case of failure to appear at the police station as directed above, it would be open to the authorities of the court concerned to take steps for cancellation of his bail.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2013

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, CJ.
THE HON'BLE SANJAY MISRA, J.

Special Appeal No. 1933 of 2013

Om Prakash.. .Appellant
Versus
State of U.P. and Ors.... Respondents

Counsel for the Appellant:
Sri Rajeev Giri

Counsel for the Respondents:
C.S.C., Sri R.R. Shukla, Sri V.C. Naik, Sri Vivek Pandey

High Court Rules-Chapter VIII-Rule-5-Special Appeal-against order issuance notice-order involving question of jurisdiction-within meaning of judgment-held-special appeal maintainable-mere issue notice can not be treated as tied up or part-heard-after change of roster learned Single Judge ceased with every jurisdiction-except the jurisdiction assigned by roster by Hon'ble the Chief Justice-order passed by Single Judge-set-a-side-consequential direction issued.

Held: Para-12
In Prof. Y.C. Simhadri (supra), it has been held by the Division Bench that the contempt jurisdiction is an independent jurisdiction of an original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India. Consequently, it has been held that where the assumption of jurisdiction by the learned Single Judge is contrary to the Rules of the Court, the order would be appealable under Clause 10 of the Letters Patent as continued by Clause 15 of the United Provinces High Courts (Amalgamation) Order, 1948 and Rule 5 of Chapter VIII of the Allahabad High Court Rules, 1952. Such an order involving the exercise of jurisdiction not vested in the learned Single Judge has been held to fall within the definition of the expression 'judgment' since it decides a matter of moment or affects the vital and valuable rights of the parties, thereby working serious injustice as explained in the judgment of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.5.

Case Law discussed:
Prof. Y.C. Simhadri, Vice Chancellor, B.H.U. & Ors Vs. Deen Bandhu Pathak, Suudent; Sanjay Kumar Srivastava Vs. Acting Chief Justice & Ors.; Awadh Naresh Sharma Vs. State of U.P. & Ors; State of Rajashthan Vs. Prakash Chand; Prof. Y.C. Simhadra(supra); Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.

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

1. This special appeal has been filed by the eighth respondent, who is the

officiating Joint Director of Education, Varanasi Region, Varanasi against an order of the learned Single Judge dated 25 November 2013 which reads as follows:-

"After hearing Sri R.B. Pradhan, learned Additional Chief Standing Counsel, this Court is satisfied that there has been an attempt on the part of the then Regional Joint Director of Education to over reach the directions issued by this Court vide judgment dated 22nd October, 1997 passed in Civil Misc. Writ Petition No. 28384 of 1993 (Committee of Management, Gangadin Ram Km. Intermediate College, Ramgarh, Jaunpur & others vs. Sri Amit Prakash, Deputy Director of Education, Vth Region, Varanasi & others along with connected petition), and to bring disrepute to the final judgment, which has been made in the matter. Therefore, the then Regional Joint Director of Education, Sri O.P. Dwivedi is prima facie liable for contempt and for the purposes of framing of charge his presence is required.

Let the then Regional Joint Director of Education, Sri O.P. Dwivedi appear before this Court on 18th December, 2013.

List this matter on 18th December, 2013."

2. The writ petition under Article 226 of the Constitution has been filed by the twelfth and thirteenth respondents to this appeal, who are respectively the Committee of Management, Ganga Din Ram Kumar Inter College, Ramgarh Barawan, Jaunpur and Virendra Kumar Pandey, its Manager. The petition seeks a writ of certiorari calling for the records of an alleged election held on 23 October 2011 and for quashing and setting aside the election and an order of the District Inspector of Schools, Jaunpur dated 29 October 2011, attesting the signature of Smt. Vimla Tripathi (respondent 11 in the writ proceedings and respondent 10 in the present appeal). The petition was initially put up as a fresh matter before a learned Single Judge on 6 February 2012 and thereafter was adjourned from time to time until 15 March 2012 when the learned Single Judge (Justice A.P. Sahi) directed that the petition be placed before a Bench of which he is not a Member after obtaining a nomination from Hon'ble the Chief Justice. The Chief Justice, on 16 March 2012, directed that the petition should be placed before Hon'ble Mr. Justice Dilip Gupta before whom the petition appeared on board on 12 April 2012, 10 May 2012, 2 July 2012, 18 September 2012, 3 October 2012, 10 October 2012, 21 November 2012, 29 November, 2012, 22 March 2013 and 5 April 2013. Eventually on 5 April 2013, the learned Single Judge directed that since he was now sitting in a Division Bench, the matter may be placed before the Hon'ble the Chief Justice for appropriate orders. Accordingly, the Hon'ble the then Chief Justice issued a direction on 9 April 2013 to the effect that the petition may be laid/listed before the appropriate Bench. Accordingly, on 9 May 2013, the petition was listed before the learned Single Judge in accordance with the prevailing roster of work. On that day, the order sheet records that the petition was heard in part and on the request of the counsel for the eleventh respondent (in the writ proceedings) who sought an adjournment to study the matter, the petition was directed to be placed on 13 May 2013. On 20 May 2013, the petition appeared on board before the learned Single Judge. While referring to the fact that the petition had been heard "at length on 9 May 2013", the learned Single Judge directed the petition to stand over to 29 May 2013 peremptorily. The petition was not heard on 29 May 2013.

3. The admitted position is that the assignments of work under the roster prepared under the directions of Hon'ble the Chief Justice changed after the summer recess of 2013. However, the same learned Single Judge, who had heard the matter on 9 May 2013 and 20 May 2013, heard the proceedings on 10 July 2013. For the first time, notice was issued on that date when the learned Standing Counsel representing respondents 1 to 7 and the counsel representing respondents 11 and 12 accepted notice. The appellant, being an officer of the Education Department, the learned Standing Counsel was directed to take notice on his behalf. A further direction for listing the matter on 25 July 2013 was issued. Thereafter, the learned Single Judge heard the petition on diverse dates between 25 July 2013 and 10 October 2013. Eventually, on 25 November 2013, an order was passed by the learned Single Judge observing that the Court was satisfied that there had been an attempt on the part of the then Regional Joint Director of Education to overreach the directions issued by this Court in a judgment dated 22 October 1997 and to bring disrepute to the final judgment. Consequently, the then Regional Joint Director of Education was prima facie held liable for contempt and his presence has been directed to be secured before the Court on 18 December 2013 for framing of charges.

4. Two submissions have been urged in support of the appeal. First, it has been submitted that under the directions of Hon'ble the then Chief Justice, the hearing of the petition was directed to be laid/listed before the appropriate Bench (by an administrative direction dated 9 April 2013). Accordingly, the petition came up before the learned Single Judge on 9 May and 20 May 2013. This was before the issuance of notice. Once the roster changed after the reassembling of the Court at the end of summer recess in July 2013, it has been urged that the learned Single Judge had no jurisdiction to further proceed with the hearing of the petition and, hence, the assumption of jurisdiction was improper and the order which has been passed on 25 November 2013 is a nullity. Second, it has been urged that even if the assumption of jurisdiction was correct and proper, the learned Single Judge had no jurisdiction to hold the Regional Joint Director of Education prima facie liable for contempt and to require his presence for framing of charges since the learned Judge was not assigned contempt matters. In this regard, reliance was placed on a Division Bench judgment of this Court in Prof. Y.C. Simhadri, Vice Chancellor, B.H.U. & Ors. Vs. Deen Bandhu Pathak, Student1.

5. On the other hand, it has been urged on behalf of the respondents that (i) the learned Single Judge had heard the matter in part on 9 May 2013 and consequently was acting within jurisdiction in continuing to retain control over the matter despite the change in the roster. Once the petition was heard in part, the learned Single Judge was justified in entertaining the petition; (ii) under Section 15 of the Contempt of Courts Act, 1971, the Court has jurisdiction to take cognizance on its own motion of a case of criminal contempt. That Court necessarily has to be the Court in respect of whom a case of criminal contempt arises and hence the learned Single Judge before whose court prima facie a criminal contempt had been found was entitled to exercise jurisdiction.

6. The rival submissions now fall for consideration.

7. In the present case, as the order sheet indicates, the first administrative assignment, after a learned Single Judge had recused himself, was issued on 16 March 2012 when there was a direction that the case would be laid/listed before Hon'ble Mr. Justice Dilip Gupta. When Hon'ble Mr. Justice Dilip Gupta observed in an order dated 5 April 2013 that he was unable to take up the matter since he was sitting in a Division Bench, the Hon'ble the then Chief Justice, by an administrative order on 9 April 2013, directed that the case would be laid/listed before the appropriate Bench. Clearly, therefore, the direction of Hon'ble the then Chief Justice was not to tie the case with a particular Judge eo nominee but the case would now be heard by the learned Single Judge who was presiding over the relevant assignment under the roster. It was in accord with the aforesaid administrative direction that the case came to be placed before the learned Single Judge on 9 May 2013 when it was heard in part. The case was thereafter directed to be placed on board on 13 May 2013 since the counsel for the eleventh respondent sought time to study the matter. The petition did not thereafter appear before the learned Single Judge on 13 May 2013. Again on 20 May 2013, it was passed over on the illness of one of the Advocates who was appearing for a contesting party and was directed to be listed on 29 May 2013. The term of the court ended on account of the summer recess in June 2013. After the roster changed with the assembling of the court after the summer recess, it was for the first time that by an order dated 10 July 2013, the learned Single Judge directed issuance of notices. Consequently, from the order sheet, it would be evident that prior to 10 July 2013, even notices had not been issued and, as a matter of fact, though the case had been heard on 9 May 2013, the counter affidavits had yet not been filed. It was only on 10 July 2013 that the learned Single Judge granted time to the respondents to file their counter affidavits within a period of two weeks. Obviously, there could be no substantial hearing of a case unless the defence in the form of a counter was placed on the record and which, upon the directions of the Court, could take place after 10 July 2013. Now, it is in this background of the facts which have emerged before the Court on the basis of the orders, that we have to deal with the submission in regard to the assumption of jurisdiction by the learned Single Judge.

8. Rule 14 (1) of Chapter V of the Allahabad High Court Rules, 1952 provides as follows:-

"14. Tied up cases.-- (1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench."

Rule 7 of Chapter VI of the said Rules provides as follows:-

"7. Part-heard cases.-- A case, which remains part-heard at the end of the day shall, unless otherwise ordered by the Judge or Judges concerned, be taken up first after miscellaneous cases, if any, in the Cause List for the day on which such Judge or Judges next sit. Every part-heard case entered in the list may, unless the Bench orders otherwise, be proceeded with whether any Advocate appearing in the case is present or not:

Provided that if any part-heard case cannot be heard for more than two months

on account of the absence of any Judge or Judges constituting the Bench, the Chief Justice may order such part-heard case to be laid before any other Judge or Judges to be heard afresh."

9. These Rules have been interpreted by a Full Bench of this Court in Sanjay Kumar Srivastava Vs. Acting Chief Justice & Ors.2. The Full Bench has emphasized that Rule 14 (1) makes it clear that a case does not become part-heard merely by passing an interim order or by issuance of a notice to the opposite party. Hence, the Full Bench held that a Bench which has merely passed an ex parte order or directed the notice to be issued locates it as a part-heard case or passes an order that it will come up before that Bench for further hearing or as a part-heard or as a tied-up case, the order would be in violation of the Rules of the Court and, therefore, a nullity. Such an order would be without jurisdiction and would not confer any jurisdiction on the Bench concerned to proceed with that case, unless it is listed before the Bench under the orders of the Chief Justice. The judgment of the Full Bench has been followed in a judgment of a Division Bench of this Court in Awadh Naresh Sharma Vs. State of U.P. & Ors.3, where the Division Bench held as follows:-

"14. Thus, the Full Bench of this Court has clearly laid down that if a Bench has issued only notice to the opposite party and passed an order that the matter will come up before that Bench for further hearing or as a part-heard or as a tied-up case, the order would be in violation of the Rules of Court and, therefore, a nullity. Such an order would be without jurisdiction and would not confer any jurisdiction on the Bench concerned to proceed with that case, unless the case is listed before that Bench under the orders of the Chief Justice.

15. In paragraphs 34 and 35 the Full Bench went into the question about the matters which are being heard finally and are part-heard. After referring Rule 14 of Chapter V of the Rules of the Court the Full Bench held in paragraph 34 that the provision of Sub-rule (1) would indicate that even a case which is partly heard by a Division Bench is not necessarily to be laid before that Bench. The use of word "ordinarily" itself indicates that there can be a departure from the normal practice of listing a part-heard case before the same Bench."

The Division Bench has finally concluded thus:-

"19. The law laid down in these judgments clearly established that the learned Single Judge could not have directed the Registry to continue the matter to be placed before him as the roster had been changed. Even if he was to say that the matter was part heard, in view of the law laid down by the Full Bench which is affirmed by the Apex Court: such a direction or order would be in violation of the Rules of Court and, therefore, nullity. Any case at pre-admission stage cannot be treated as part heard or tied up and such a direction contrary to the roster is not within the competence of any Single or Division Bench of the High Court as has also been held in the case of Jasbir Singh (supra)."

10. In this view of the matter, the law on the subject is settled beyond a shadow of doubt. The Rules of this Court contemplate that even the issuance of a notice or the passing of an ex parte order does not ipso facto result in a case being

treated as a case partly heard by a Bench. Consequently, if a court issues a direction treating a petition as a part-heard or as a tied-up case merely because a notice has been issued or an ex parte order has been passed, such an order would be a nullity and without jurisdiction. The Rules of the Court have, in the present case, been crafted with care and for a purpose. It is necessary, in order to maintain judicial discipline and to promote transparency in the functioning of the Court, that a Judge of the Court should not even remotely give an impression of holding on to a case despite a change in the assignment. When the roster changes, cases which have not been disposed of by a particular Court, necessarily, must pass on to the regular Bench to which the new roster of work has been assigned by the orders of the Chief Justice. An excessive outflow of part-heard or tied-up cases disrupts the orderly functioning of the court. Besides, it would promote a sense of confidence of the litigating public in the working of the court if Judges were not to treat cases as part-heard or tied-up unless, in a given case, the matter has been heard extensively, in which case the administration of justice requires that the case should be heard and disposed of by the same Bench. This is always subject to the overarching administrative discretion of the Chief Justice. Before a case can be taken up as a part heard or tied up case after a change in the roster, the prior administrative directions of the Chief Justice must be obtained. It is also well settled in view of the judgment of the Supreme Court in State of Rajasthan Vs. Prakash Chand4, that the Chief Justice has the authority and jurisdiction to refer even a part-heard case to another Bench for its disposal in accordance with the regular roster of work.

11. In the present case, as is evident from the order sheet, notice was issued, for the first time, on 10 July 2013 by which time the roster of work had changed. Even the issuance of a notice, however, is not sufficient for a case to be treated as tied-up or part-heard. It is evident that the direction for filing of the counter affidavit came to be issued on 10 July 2013. Consequently, there would be no occasion to treat the case as tied-up or part-heard by the time the roster of work had changed after the conclusion of the summer recess in the first week of July 2013. In this view of the matter, we find merit in the contention which has been urged on behalf of the appellant that the assumption of jurisdiction by the learned Single Judge and the impugned order dated 25 November 2013 must be regarded as a nullity. The learned Single Judge had, in our respectful view, no jurisdiction to hear the case on 25 November 2013.

12. In Prof. Y.C. Simhadri (supra), it has been held by the Division Bench that the contempt jurisdiction is an independent jurisdiction of an original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India. Consequently, it has been held that where the assumption of jurisdiction by the learned Single Judge is contrary to the Rules of the Court, the order would be appealable under Clause 10 of the Letters Patent as continued by Clause 15 of the United Provinces High Courts (Amalgamation) Order, 1948 and Rule 5 of Chapter VIII of the Allahabad High Court Rules, 1952. Such an order involving the exercise of jurisdiction not vested in the learned Single Judge has been held to fall within the definition of the expression 'judgment' since it decides a matter of moment or affects the vital and valuable rights of the parties, thereby working serious injustice as explained in the judgment of the Supreme Court in Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.5.

13. For all the aforesaid reasons, we allow this appeal and set aside the impugned judgment and order of the learned Single Judge dated 25 November 2013. In consequence, we direct that Writ - C No. 5825 of 2012 shall now be placed before the learned Single Judge in accordance with the roster of work.

14. We clarify that since we have held that the learned Single Judge had no jurisdiction to entertain the petition and to pass the impugned order dated 25 November 2013, it would not be necessary for us to express any view on the merits of the allegation of a breach of the judgment of this Court of 1997.

15. We also clarify that when the writ petition is placed before the learned Single Judge in pursuance of the present judgment and order, all the rights and contentions of the parties are kept open to be urged before and decided by the learned Single Judge on all issues which may arise for consideration.

16. The appeal is accordingly allowed. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2013

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE SANJAY MISRA, J.

Special Appeal No. 1964 of 2013

Chandra Pal Singh .Appellant
Versus
State of U.P. and Ors... .Respondents

Counsel for the Appellant:
Sri Shesh Kumar

Counsel for the Respondents:
C.S.C.

U.P. Civil Services Regulations-Regulation 351-A-Withholding 10% pension-in disciplinary proceeding appellant found guilty of charges-punishment of withholding 10% from pension-learned Single Judge-declined to interfere-argument that in absence of pecuniary loss-no power to withhold pension-hence-considering amended provision of Regulation 351-A w.e.f. 01.01.61-penalty of withholding 10% pension-can not be regarded as unconceivable-no interference call for-appeal dismissed.

Held: Para-6
After the amendment, the provision has now been modified so as to allow the exercise of power under regulation 351-A of the Regulations even in a situation where an employee is found to have been guilty of grave misconduct in departmental or judicial proceeding. Hence, both the legislative history as well as the plain and literal meaning of regulation 351-A of the Regulations do not support the submission which has been urged on behalf of the appellant. In the circumstances, the extent of penalty which has been imposed in the present case cannot be regarded as unconscionable. No case for interference is made out.

Case Law discussed:
A.Savariar Vs. The Secretary, Tamil Nadu Public Service Commission and another.

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

1. The special appeal arises from a judgment of the learned Single Judge dated 7 November 2013. By the judgment, which is impugned, the learned Single Judge dismissed a petition filed by the appellant seeking to question several orders, the substance of which is that 10% of the pension which is payable to the appellant has been withheld under

Regulation 351-A of the Civil Service Regulations (hereinafter referred to as 'the Regulations').

2. The charge against the appellant which has been held to be proved in pursuance of an enquiry in which the appellant participated is that when the appellant was working on the post of Naib Tehsildar in 1990-91 he had issued a false certificate to one Rama Kant S/o Babu Ram to the effect that he had rendered service in the Government between February 1981 to June 1982. The learned Single Judge has held that the enquiry was conducted in accordance with the principles of natural justice and was fair and proper. Following a decision of the Supreme Court in A. Savariar Vs. The Secretary, Tamil Nadu Public Service Commission and another 1, the learned Single Judge has held that once there was tangible evidence to support the charge of misconduct, no case for interference under Article 226 of the Constitution is made out.

3. The submission which has been urged on behalf of the appellant is that no pecuniary loss is found to have been sustained by the Government and hence, no deduction from the pension could have been ordered under regulation 351-A of the Regulations. Regulation 351-A of the Regulations reads as follows:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused Government, if the pensioner is found in departmental or Judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement."

4. Regulation 351-A of the Regulations falls for analysis. Under the regulation, the Government reserves to itself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension in certain stipulated circumstances. In other words, firstly, the Government can withhold or withdraw a pension or any part of it. Secondly, in addition it is open to the Government to order recovery from a pension. There are two components in regulation 351-A of the Regulations each of which operates independently. The first is where a pecuniary loss is caused to the Government, while the second is where the pensioner is found to have been guilty of grave misconduct. If the pensioner is found to be guilty in departmental or judicial proceeding of grave misconduct, it is open to the Government to withhold or withdraw the pension or any part of it. Alternatively, the power under regulation 351-A of the Regulations can be exercised also if the pensioner is found to have caused pecuniary loss to the Government by misconduct or negligence during his service or during re-employment. In that case, the Government can reimburse itself in regard to the loss or, as the case may be, a part of the pecuniary loss caused. In other words, it would not be a correct reading of regulation 351-A of the Regulations to hold that the power to withhold or withdraw a pension cannot be exercised despite a finding in the departmental or judicial proceeding of grave misconduct on the part of the employee merely on the ground that no pecuniary loss

has been sustained by the Government. The power to pass an order under regulation 351-A of the Regulations, in the event of a pecuniary loss being found to have been sustained by the Government, is independent of the power which can be exercised under the regulation where the employee is guilty of grave misconduct as established in the departmental or judicial proceeding.

5. At this stage, it may also be noted that before its amendment on 6 January 1961, regulation 351-A reserved to the Provincial Government the right to order recovery from the pension 'of any amount on account of loss found in judicial or departmental proceeding to have been caused to Government by the negligence or fraud of such officer during his service'.The earlier provision insofar as is material reads as follows:-

"351-A. The Provincial Government reserve to themselves the right to order the recovery from the pension of an officer who entered service on or after 7th August, 1940 of any amount on account of losses found in judicial or departmental proceeding to have been caused to Government by the negligence or fraud of such officer during his service."

6. After the amendment, the provision has now been modified so as to allow the exercise of power under regulation 351-A of the Regulations even in a situation where an employee is found to have been guilty of grave misconduct in departmental or judicial proceeding. Hence, both the legislative history as well as the plain and literal meaning of regulation 351-A of the Regulations do not support the submission which has been urged on behalf of the appellant. In the circumstances, the extent of penalty which has been imposed in the present case cannot be regarded as unconscionable. No case for interference is made out.

7. The special appeal is dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 11.11.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No.1993 of 2013

Sharad Chandra Tiwari & Ors.
Petitioners
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioners:
Sri A.P. Singh

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

Constitution of India, Art.-226-Service Law-Retirement age-logging officer-working in forest department-retired in the year 2012 on 58 years age-although Board of director already by its resolution dated 12.2011-decided to enhanced the age as 60 years-state government-granted approval only by G.O. dated 08.03.2013 having no retrospective effect-held-retirement on 58 years-in the years 2012-as per law prevailing at that time-proper-warrant no interference.

Held: Para-6
In view of above and looking to the facts and circumstances of the case, in my view, retirement of petitioners in 2012, on attaining the age of superannuation of 58 years, according to the then existing provision, cannot be said to be bad and it does not warrant interference. The change in age of retirement in

respect to employees of U.P. Forest Corporation, pursuant to State Government's order dated 8.3.2013, would be prospective, and, shall be applicable to the employees who would be retiring thereafter.

Case Law discussed:
AIR 1963 SC 395; 2008(3) ADJ 21 (DB); 1998(4) SCC 65; 1998 (4) SCC 114; 2005(8) SCC 394; 2006(3) SCC 620; 2000(10) SCC 153; 2001(5) SCC 482; 2005(5) SCC 598; 2008(1) ADJ 209.

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

1. This case has been taken on the mention made by learned counsel for petitioners.

2. Heard Sri A.P. Singh, learned counsel for petitioners and learned Standing Counsel for respondents.

3. Petitioners are working on different posts like Accountant, Logging Assistants, Deputy Logging Officers in U.P. Forest Corporation. The age of retirement in U.P. Forest Corporation was 58 years. All these petitioners attained the age of 58 years on various dates in the year 2012 and retired accordingly. The case set up by petitioners is that the Board of Directors of U.P. Forest Corporation passed a resolution and communicated it to Principal Secretary, Forest vide Managing Director's letter dated 23.12.2011 about enhancement of age of retirement of employees from 58 years to 60 years. It sought approval of the State Government for change of age of retirement which has now been granted by order dated 8.3.2013 (Annexure 1 to the writ petition). It is not the case of petitioners that the Corporation itself possess absolute power with regard to change of conditions of service of its employees and there was no requirement of approval of the State Government. That being so, the approval having been granted by order dated 8.3.2013, it cannot be said that it will have a retrospective effect. The employees who have already retired on attaining the age of 58 years cannot claim to have a right to continue till the age of 60 years, since decision has partaken shape of an order only after issuance of Government Order dated 8.3.2013. It is well settled that a mere decision by itself is not executable unless it partakes the status of an order, i.e., by communication or publication so as to make it known to all concerned. In the present case, the Board of Directors passed a resolution and thereafter sought approval of the State Government. It is not the case of petitioners that before issuance of order dated 8.3.2013 by State Government, at any point of time, the decision of Board of Directors became an order by its publication so as to get implemented having the effect of changing the earlier existing provision.

4. In Bachhittar Singh Vs. State of Punjab AIR 1963 SC 395, the Court held that a decision on file does not confer any right unless it partakes the nature of an order by communication to the person concerned. Similarly, a proposed or draft regulation is not to have effect of changing existing provision unless the procedure followed earlier is observed.

5. A similar question up for consideration before a Division Bench in Daya Shankar Singh Vs. State of U.P. and others 2008 (3) ADJ 21 (DB) wherein, in somewhat similar circumstances, it was held as under:

"A draft Regulation cannot be acted upon when the statutory Regulations made in accordance with the Act are already operative and holding the field. In

Abraham Jacob Vs. Union of India 1998 (4) SCC 65 and Vimal Kumari Vs. State of Haryana 1998 (4) SCC 114, it was held that draft rules may be acted upon to meet urgent situations when no rule is operative.

In Union of India & another Vs. V. Ramakrishnan & others 2005 (8) SCC 394, the Apex Court considering almost a similar situation held :

"A rule validly made even if it has become unworkable unless repealed or replaced by another rule of amended, continues to be in force."

In Mahabir Vegetable Oils (P) Ltd. & another Vs. State of Haryana & others 2006 (3) SCC 620, the Apex Court in para-37 of the judgment observed :

"It is now well-settled principle of law that the draft rules can be invoked only when no rule is operative in the field."

The logical inference is that if a valid rule is already operative, a draft rule would have no application at all.

An interesting situation occurred in Alphonse Cazilingarayar & others Vs. Inspector General of Police & others 2000 (10) SCC 153 where the Central Administrative Tribunal (Madras Bench) declared Draft Recruitment Rules pertaining to the post of Radio Supervisor (Operations) Grade-I illegal and unconstitutional. In appeal, the Apex Court held that the judgment of the Tribunal setting aside Draft Rules as unconstitutional was totally uncalled for being premature since the Draft Rules were not approved by the State and remained only draft rules. It was open to the Government/Appropriate Authority to consider either to approve draft rules or not or to frame fresh rules and, therefore, there was no cause of action available to anyone to challenge the draft rules. The same could not have the effect of affecting any right of the employees. Till the rules are amended as per the procedure prescribed, any order or decision taken by the authorities for amending or changing Regulations is only an administrative/executive order, which would not confer any right upon either of the parties contrary to the statutory provisions.

In Rajinder Singh Vs. State of Punjab 2001 (5) SCC 482 dealing with a similar situation, the Court held :

"The settled position of law is that no government order, notification or circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence."

In Ashok Lanka & another Vs. Rishi Dixit & others 2005 (5) SCC 598 the Court held :

"We are not oblivious of the fact that framing of rules is not an executive act but a legislative act; but there cannot be any doubt whatsoever that such subordinate legislation must be framed strictly in consonance with the legislative intent as reflected in the rule-making power contained in Section 62 of the Act. (para- 57)

Very recently, a similar controversy with respect to the appointment of Heads of Department in State University came up for consideration before a Division Bench in which one of us (Hon'ble Sudhir Agarwal, J.) was also a member in Prof. Kalawati Shukla (Smt.) & others Vs. State of U.P. & others 2008 (1) ADJ 209. There

statute 2.20 of Gorakhpur University framed in exercise of power under Section 50 of U.P. State Universities Act, 1973 provided that the senior most teacher in each department in the University shall be the Head of Department. State Government issued a G.O. dated 24.7.2007 providing that the Head of Departments in the University shall be by rotation and for the said purpose required Universities to take steps for amendment of the concerned Statutes. The statute, in fact, were not amended. The University acting as per the decision of the Government contained in the G.O. dated 24.7.2007 issued orders appointing Head of Departments by roaster instead of senior most teacher. This Court, following an earlier Division Bench decision in Ankur Yadav Vs. State of U.P. & others 2007 (10) ADJ 10 held that unless the statute is amended, no action could have been taken according to the Government Order dated 24.7.2007. The Court quoted the following observation of the Division Bench in Ankur Yadav (supra) :

".....the Statutes of the University framed under the Act would govern the field and so long as the Statutes are not amended, no person can be appointed in the University governed by the act and the Statutes framed thereunder by ignoring the qualification prescribed thereunder. No amount of proposal, acceptance, waiver, acquiescence etc. either by the University or the State Government would have the effect of amending the Statutes unless the Statute as such is amended in accordance with the procedure prescribed under Section 50 of the Act.....

It is not disputed that the First Statute of the University was not amended in the manner provided under Section 50 of the Act till the date the petitioner was appointed and thus principle of estoppel, waiver or acquiescence would not apply against law ....."

If the contention of the learned Counsel for the petitioner is accepted that once the resolution has been passed by the Board of Directors, UPSWC for making amendment in the Regulations, the petitioners are entitled for the benefit as per the said resolution irrespective of the fact whether the said resolution is sanctioned by the State Government for the purpose of making amendment in the Regulations as it would amount to making the procedure prescribed under Section 42 redundant."

6. In view of above and looking to the facts and circumstances of the case, in my view, retirement of petitioners in 2012, on attaining the age of superannuation of 58 years, according to the then existing provision, cannot be said to be bad and it does not warrant interference. The change in age of retirement in respect to employees of U.P. Forest Corporation, pursuant to State Government's order dated 8.3.2013, would be prospective, and, shall be applicable to the employees who would be retiring thereafter.

7. In view above, the writ petition is devoid of merit and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.12.2013

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 2707(M/S) of 2006

Muntazim Ali... Petitioner

Versus

Zonal Manager, LIC of India & Ors.

....Respondents

Counsel for the Petitioner:

Sri Ghanshyam Pathak, Sri Vishnu Srivastava

Counsel for the Respondents:

Sri P.K. Khare

Constitution of India, Art. 226-Service law-termination of agency of L.I.C. whether amenable under writ jurisdiction?-held-'No' in absence of relationship of master and servant service-benefits to a government servant-not available to LIC agent-being appointed on commission basis.

Held: Para-18

Thus, on the proposition laid down by Hon'ble the Supreme Court as well as of this Court, as above, it is settled that the relation of respondent-Corporation as well as the petitioner was of the Master and Agent. The respondent- corporation created an agency in favour of the petitioner and the petitioner was engaged to work as an agent of the Corporation. The terms of agency are governed under the Life Insurance Corporation of India (Agents) Rules, 1972, The rules speak that the Agents are appointed on commission basis. The nature of the engagement of the petitioner (Agent) does not lead to prove an appointment alike to Government servant. Therefore, I am of the view that the petitioner being an Agent could not claim the benefit of service like Civil Servants, unless it is provided under the Rules. The rules do not provide so.

Case Law discussed:

2011 AIR SCW 894; (2010) 11 Supreme Court Cases 186; (1986) 1 SCC 264; AIR 2002 Karnataka 113; AIR 1991 SC 1734; W.P. No. 911 (M.B) of 1994.

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr Vishnu Srivastava, learned counsel for the petitioner as well as Mr P.K. Khare, learned counsel for the respondents.

2. The petitioner has assailed the order dated 3rd August, 2004, passed by the Senior Divisional Manager, Life Insurance Corporation of India, Lucknow as also the order dated 18 th November, 2004, passed by the Zonal Manager/ Appellate Authority of the Life Insurance Corporation of India.

3. By means of order dated 3rd August, 2004 the Senior Divisional Manager of Life Insurance Corporation of India (In short Corporation) terminated the petitioner's agency in exercise of power provided under Section 16 (1)(a)(b)(d) which has been upheld by the appellate authority. The petitioner claims to be an agent of the Corporation having agency code no.359393 and was attached with the branch office of Corporation at Akbarpur district Ambedkarnagar. According to him, he is working as such since 1989 to the satisfaction of the customers as well as Corporation itself without any complaint. It is further stated that he insured one Hazi Nizamuddin on policy no.213537196 for a sum of Rupee one lakh in the month of August, 2002 after having full satisfaction about his health as well as after getting him medically examined by the duly approved Medical Officer but unfortunately the policy holder succumbed to death on 12.2.2002 on account of decease' "Acute Myocardial Infraction'.

4. Mr Hazi Nizamuddin earlier had two policies of the Corporation bearing nos. 75781137 and 210618164. The petitioner submits that policy holder was

known to him for a period of two months. During this period he was looking healthy and cheerful by appearance and he did not mention any kind of suffering from diseases on the proposal form/ self declaration.

5. After the death of policy holder, the petitioner was issued a show cause notice by the Corporation on 9.1.2004 to give explanation within fifteen days to show cause why the policy was issued to Hazi Nizamuddin by the petitioner by concealing the material facts.

6. The petitioner submitted reply on 23 rd December, 2002. He was also issued another show cause notice on 2.6.2003 on the same subject which was replied by him on 29.1.2004.

7. In reply he denied charges and submitted that there is no lapse on his part nor concealment of facts rather his policy is based on the medical examination report declaring Mr Hazi Niamuddin fit for holding policy. After considering the petitioner's explanation the authority concerned passed the order impugned terminating petitioner's agency. Aggrieved petitioner filed an appeal against the order of termination of agency before opposite party no.2, who also rejected the same on 18.11.2004. The petitioner also claims that he was not given opportunity to cross-examine the Medical Officer, who examined the policy holder's physical status and thus also complains the order impugned being in violation of principles of natural justice.

8. The petitioner further claims the order impugned being in violation of Rule 8 of the L.I.C. Agents Rules, 1972.

9. Per contra, learned counsel for the respondent-Corporation submitted that the engagement and termination of agency is governed under the Life Insurance Corporation of India (Agents) Rules 1972. Agents are engaged on payment of Commission). Thus, their engagements are purely contractual in nature. He further contends that the termination of agency is not amenable to judicial review of this Court under Article 226 of the Constitution of India. He further submits that the petitioner deliberately suppressed material facts by playing fraud to the Corporation and did not disclose the serious type of illness suffered by the Policy-holders, who had already 2, 3 times heart attack . It came out through deep and confidential inquiry that the policy-holder was at the verge of death on the date of commencement of policy. It is further stated that the authority of the Corporation has taken a decision to terminate the petitioner's agency on being satisfied with the facts stated above. Therefore, there was no occasion to provide any opportunity to the petitioner to cross-examine the Medical Officer nor is it provided under Rules.

10. In order to understand the controversy, I feel it appropriate to extract the provisions of Rules 8 and 16 of the Rules as under;

Rule 8-Functions of Agents:

(1)Every agent shall solicit and procure new life insurance business which shall not be less than the minimum prescribed in these rules and shall endeavour to conserve the business already secured.

(2) In procuring new life insurance business, an agent shall :

(a) take into consideration the needs of the proposers for life insurance and their capacity to pay premiums;

(b) make all reasonable inquiries in regard to the lives to be insured before recommending proposals for acceptance, and bring to the notice of the corporation any circumstances which may adversely affect the risk to be underwritten;

(C) take all reasonable steps to ensure that the age of the life assured is admitted at the commencement of the policy; and

(d) not interfere with any proposal introduced by any other agent.

(3)Every agent shall, with a view to conserving the business already secured, maintain contact with all persons who have become policy-holders of the Corporation through him and shall:

(a) advise every policy-holder to effect nomination or assignment in respect of his policy and offer necessary assistance in this behalf;

(b) endeavour to ensure that every instalment of premium is remitted by the policy-holder to the Corporation within the period of grace;

(C) endeavour to prevent the lapsing of a policy or its conversion into a paid-up policy; and

(d)render all reasonable assistance to the claimants in filling claim forms and generally in complying with the requirements laid down in relation to settlement of claims.

(4) Nothing contained in these rule shall be deemed to confer any authority on an Agent to collect any moneys or to accept any risk for or on behalf of the Corporation or to bind the Corporation in any manner whatsoever.

11. Provided that an agent may be authorized by the Corporation to collect and remit renewal premiums under policies on such conditions as may be specified.

Rule 16-Termination of agency for certain lapses.

(1)The competent authority may, by order, determine the appointment of an agent.

(a) if he has failed to discharge his functions as set out in rule 8, to the satisfaction of the competent authority;

(b) if he acts in a manner prejudicial to the interests of the Corporation or to the interests of its policy holders;

(C) if evidence comes to its knowledge to show that he has been allowing or offering to allow rebate of the whole or any part of the commission payable to him;

(d)if it is found that any averment contained in his agency application or in any report furnished by him as an agent in respect of any proposal is not true;

(e) if he becomes physically or mentally incapacitated for carrying out his functions as an agent;

(f) if he being an absorbed agent, on being called upon to do so, fails to undergo the specified training or to pass the specified tests, within three years from the date on which he is so called upon;

12. Provided that the agent shall be given a reasonable opportunity to show cause against such termination.

(2)Every order of termination made under sub-rule (1) shall be in writing and communicated to the agent concerned.

(3)Where the competent authority proposes to take action under sub-rule (1) it may direct the agent not to solicit or procure new life insurance business until he is permitted by the competent authority to do so.

13. Learned counsel for the parties also laid before this Court some decisions on the point which are discussed hereunder;

Gondavari Sugar Mills Ltd. V. State of Maharastra and others reported in 2011 AIR SCW 894 in support of his submission on the maintainability of the writ petition. Clauses (ii), (iii) and (iv) of paragraph 6 are extracted below:-

(ii)if a right has been infringed- whether a fundamental right or a statutory right- and the aggrieved party comes to the court for enforcement of the right, it will not be giving complete relief if the court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realised by the Government without the authority of law (vide State of Madhya Pradesh v. Bhailal Bhai AIR 1964 SC 1006).

(iii)A petition for issuance of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the civil or for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of the power conferred under Article 226 for payment of money. (vide Suganmal Vs. State of Madhya Pradesh AIR 1965 SC 1740.)

(iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of a writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the taxes collected was without authority of law and, therefore, the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition (vide Salonah Tea Co. Ltd. Superintendent of Taxes, Nangaon (1968) 1 SCC 401) : AIR 1990 SC 772).

14. The next judgment is of of Hon'ble Supreme Court of the case of Zonal Manager, Central Bank of India Vs. Devi Ispat Limited and others (2010) 11 Supreme Court Cases 186.

15. In the aforesaid judgment Hon'ble Supreme Court referred the judgment of LIC Vs. Escorts Ltd. (1986) 1 SCC 264. Relevant paragraph 13 is reproduced hereunder;

"We do not thing this Court in the above case has, in any manner, departed from the view expressed in the earlier

judgments in the case cited herein above. This Court in LIC(Supra) proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words" Court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in State of U.P. Vs. Bridge and Roof Co.(India Ltd. (1996) 6 SCC 22."

16. On the other hand, learned counsel for the respondent placed reliance on the following decisions:-

B.K. Vadiraja and another Vs. Managing Director L.I.C. of India and others, reported in AIR 2002 Karnataka 113. Relevant paragraphs 9 and 13 are reproduced hereunder,

"9. The Life Insurance Corporation of India has framed Regulations defining the method of recruitment of agents of the Life Insurance Corporation of India and the terms and conditions of their appointment and work in exercise of their powers under Section 49 of the Life Insurance Corporation Act, 1956. In the dictionary clause of the Regulations, the meaning of the expression " agent' is defined. It means, a person, who has been appointed under Regulation 4 of the Regulations and includes an absorbed agent. The appointment of an agent is made by the Corporation for the purpose of soliciting or procuring life insurance business for the Corporation. Regulation 16 of the Regulations provides for termination of agency for certain lapses. Regulation 17 of the Regulations provides for termination of agency by notice."

"13. The Apex Court in the case of Life Insurance Corporation of India Vs. Smt. Lalithadevi, AIR 1991 SC 1734 was pleased to state:

"The respondent was an absorbed agent in the Life Insurance Corporation of India. Since, her husband was in service of the appellant, the respondent's agency was rightly terminated in accordance with Regn. 17 (1) of the Agent's Regulations 1972. Before terminating the respondent's agency, the appellant had taken care to serve notice on her. We are of the opinion that the order of termination of respondent's agency did not suffer from any legal infirmity and the High Court committed error in quashing the same. We accordingly, allow the appeal and set aside the order of the High Court."

17. In the case of Jai Narain Verma Vs. Life Insurance Corporation of India and another W.P.No.911 (M.B) of 1994 a Division Bench of this Court held that the relationship between Corporation and its agent was of the Principal and agent and the petitioner, who was agent of the corporation was not an employee of the Corporation. The terms and conditions of agency are regulated by statutory regulations framed by the Corporation, known as Life Insurance corporation of India (Agents Regulation 1972 which are framed under Section 49 of the L.I.C. Act 1956."

18. Thus, on the proposition laid down by Hon'ble the Supreme Court as well as of this Court, as above, it is settled

that the relation of respondent-Corporation as well as the petitioner was of the Master and Agent. The respondent-corporation created an agency in favour of the petitioner and the petitioner was engaged to work as an agent of the Corporation. The terms of agency are governed under the Life Insurance Corporation of India (Agents) Rules, 1972, The rules speak that the Agents are appointed on commission basis. The nature of the engagement of the petitioner (Agent) does not lead to prove an appointment alike to Government servant. Therefore, I am of the view that the petitioner being an Agent could not claim the benefit of service like Civil Servants, unless it is provided under the Rules. The rules do not provide so.

19. Upon perusal of the record, I find that the conditions for termination of agency were followed. The proviso of the Rule 16 (1) of the Rules provides that the Agent shall be given reasonable opportunity to show against such termination. He was provided so. Therefore, the order impugned cannot be held to be suffered from error.

20. In the result, the writ petition stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE, J.

Writ Petition No.2965 (S/S) of 1993

Dr. A.P. Bajpai... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri S.M.K. Chaudhary, Sri Vikas Singh

Counsel for the Respondents:
C.S.C.

(A)Constitution of India, Art.-226 read with U.P. Recruitment benefits Rule 1961-Rule-7-Family pension-entitlement-petitioner being grand son of deceased employee put claim after the death of widow and son of the employee-admittedly when deceased government employee-died-the father of petitioner already crossed age of 25 years-held-not entitled for family pension.

Held: Para-14

Learned counsel for the petitioner has also filed Government Order No. lk&3&115@nl&3@82 dated 24.2.1998 (Annexure No. 5 to the amended petition), which provides for maximum age limit for entitlement of family pension and this maximum age limit was enhanced from 21 years to 25 years in case of sons. In case of daughter, it was enhanced from 24 years to 25 years. Meaning thereby after attaining age of 25 years the son of a government servant shall not be entitled for the payment of family pension provided he remain unemployed till attaining the age of 25 years. Even if the son of the deceased petitioner Dr. A.P. Bajpai would have survived even then he was not entitled for the family pension because he has crossed the maximum age limit of 25 years much earlier. The sons of Sameer Bajpai could not inherit better right then his own father. Therefore, in the facts of this case, in our considered opinion, family pension is not payable to the present petitioners. Order dated 22.12.2010 rejecting the representation of the petitioner for grant of family pension need not to be interfered with.

(B)Constitution of India, Art.-226-Payment of interest-at rate of 12%-for period payment delayed claim based upon G.O. 06.12.94-entitled for interest @ 12%.

Held: Para-11 and 12-

11-In view of the aforesaid case laws, it is clear that payment of pension is a right and that too has to be paid at the earliest stage. It is the right of the government servant. In the facts of this case, the State had utterly failed to make payment of the pension of Dr. A.P. Bajpai within time. There is no specific averment in the counter affidavit that interest on the delayed payment has also been paid.

12-Learned counsel for the petitioner has brought to the notice to the Court a Government Order No. lk&3&2102@nl&971@80 dated 6.12.1994 whereby order for payment of interest on delayed payments was modified and provision was made for payment of 12% interest per annum on delayed payment of pension, which is payable on delayed payment of provident fund. Therefore, the petitioners were entitled for interest at the rate of 12% per annum on the delayed payment of gratuity and family pension.

Case Law discussed:

(1989) 4 SCC 397; (1985) 3 SCC 345; 1997 A.W.C.(Supp.) 204.

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

1. Heard learned counsel for the petitioner, learned Standing Counsel for the State of U.P. and perused the material available on record.

2. The instant writ petition was initially filed by Dr. A.P. Bajpai (since deceased) with the following prayer:-

"(i) issue a writ, order or direction in the nature of mandamus directing the opposite parties to pay the pension of the petitioner regularly as well as pay the arrears of pension with effect from 1.6.1988 and further be pleased to issue direction to the opposite parties to pay the provisional pension with immediate effect.

(ii) grant any other relief that this Hon'ble Court may deem fit, proper and just under the circumstances."

3. The case of the petitioner is that he joined the Provincial Medical Service U.P. in March, 1961. After serving on different post, he attained the age of superannuation on 31.5.1988 from the post of Deputy Director Medical Health & Family Welfare. He submitted his pension papers but till the date of filing of the instant petition, no pension was paid to him. Representations were made by him in the month of March, 1991 and reminder was sent on 2.9.1992 but that too paid no dividend. Gratuity was also not paid, which was Rs. 61876/-. In the pension papers, as family members of the petitioner names of his wife Suman Bajpai and son Sameer Bajpai were mentioned. After filing of the instant petition, pension payment order was issued on 27.4.1994 wherein wrong date of his attaining the age of superannuation was mentioned, however, the same was subsequently rectified. During the pendency of the instant petition on 11.4.2004 the only son of the petitioner Sameer Bajpai expired and in the same year on 18.8.2004 wife of the petitioner Smt. Suman Bajpai also expired. The petitioner himself expired on 23.7.2007 and thereafter the present petitioners, who happens to be wife and minor son of Sameer Bajpai were substituted as petitioners and they have also amended the prayer and have made the following prayer:-

"(i) issue a writ, order or direction in the nature of mandamus directing the opposite parties to pay the pension of the petitioner regularly as well as pay the arrears of pension with effect from 01.06.1988 and further be pleased to issue

direction to the opposite parties to pay the provisional pension with immediate effect "and further direct the opposite parties to pay 12% interest to the petitioner on the post retirement dues including the payment of monthly pension till the post retirement dues are settled or finally paid to the petitioner and submit a statement of account in respect of payment of post retirement dues such as gratuity, Provident Fund, leave encashment, commuted value of pension and monthly pension particularly the date of amount.

(i-a) to direct the opposite parties to pay monthly pension to the grandson of the deceased petitioner as provided under rule 7 read with rule 3 (ix) of the U.P. Retirement Benefit Rules, 1961 forthwith.

(i-b) issue a writ of certiorari or a writ, order or direction in the nature of certiorari to quash the letter dated 22.12.2010 (contained in Annexure -14 to the writ petition) by means of which the claim of the petitioners to grant family pension to the grandson of the deceased petitioner was rejected."

4. Learned counsel for the petitioner has submitted that to grant the family pension in favour of the minor sons of pre-deceased son of Dr. A.P. Bajpai, a representation was moved before the competent authority but the same was rejected by means of letter dated 22.12.2010. Further submission of learned counsel for the petitioner is that family members of Dr. A.P. Bajpai are entitled to get the interest on the outstanding dues and on delayed payment of retiral benefits and sons of predeceased son also entitled for the family pension. He has drawn the attention of the Court towards the provisions of The Uttar Pradesh Retirement Benefits Rules, 1961, Rule 3 defines the family, which reads as under:-

(3) "Family" means the following relative of an officer;

(i) wife, in the case of any male officer,
(ii) husband, in the case of a female officer,
(iii) sons (including such step-children and adopted children)
(iv) unmarried and widowed daughters (Including such step-children and adopted children)
(v) Brothers below the age of 18 years and unmarried and widowed sisters (including step-brothers and step-sisters),
(vi) father,
(vii) mother
(viii) married daughters (including step-daughters), and
(ix) children of a predeceased son;

7. Family Pension.-(1) A family pension not exceeding the amount specified in sub-rule (2) below may be granted for a period of ten years to the family of an officer who dies, whether after retirement or while still in service after completion of not less than 20 years' qualifying service:

Provided that the period of payment of family pension shall in no case extend beyond a period of five years from the date on which the deceased officer reached or would have reached the age of compulsory retirement.

Notes.-(1) Government may,. It exceptional circumstances, consider at their discretion the award of family pension of the family of an officer who may die before completing 20 year's

qualifying service but after completing not less than 20 years' qualifying services.

(2) In cases where the qualifying service is less than the prescribed minimum the deficiency should not be condoned by invoking the provisions of Article 423 (1) of the Civil Service Regulations.

(2). The amount of family pension will be-

(a) in the event of death while in service, one-half of the superannuation pension which would have been admissible to the officer has been retired on the date following the date of his death, and

(b) In the event of death after retirement, one-half of the pension sanctioned to him at the time of retirement:

Provided that the amount of family pension will be subject to a maximum of Rs. 150 per mensem and a minimum of Rs. 30 per mensem:

Provided further that the minimum pension will not in any case, exceed the full amount of the pension sanctioned to the deceased officer at the time of his retirement or in case he dies while in service, the pension that would have been admissible to him if he had retired on a superannuation pension on the date following the date of his death.

Note.- The amount of family pension will be reduced by the amount of pension commuted, if any, by the pensioner before his death. For example, if the ordinary pension was Rs. 90 per mensem and an amount of Rs. 30 out of this had been commuted, the amount of family pension will be Rs. 90/2-30= Rs. 15 per mensem.

(3) No pension shall be payable under this Part-

(a) to a person mentioned in clause (b) of sub-rule (4) below, unless the pension sanctioning authority is satisfied that such person was dependent on the deceased officer for support;

(b) to an unmarried female member of the family, in the event of her remarriage;

(c) to widowed female member of the family, in the event of her remarriage;

(d) to a brother of the deceased officer on his attaining the age of 18 years; and

(e) to a person who is not a member of the deceased officer's family.

(4) Except as may be provided by a nomination under sub-rule (5) below:

(a) a pension sanctioned under this Part shall be granted-

(i) to the eldest surviving widow, if the deceased was a female officer;

(ii) failing the widow or husband, as the case maybe to the eldest surviving son;

(iii) failing (i) and (ii) above, to the eldest surviving unmarried daughter,

(iv) these failing, to the eldest widowed daughter and

(b) in the event of the pension not becoming payable under clause (a) the pension may be granted-

(i) to the father;

(ii) failing the father, to the mother;

(iii) failing the father and mother both, to the eldest surviving brother below the age of 18;

(iv) these failing, to the eldest surviving unmarried sister;

(v) these failing (i) to (iv) above, to the children of a predeceased son in the order it is payable to the children of the deceased officer under clause (a) (ii), (iii) and (iv), above.

Note.- The expression "eldesta surviving widow" occurring in clause (a) (i) above, should be construed with reference to the seniority according to the date of marriage with the officer and not with reference to the age of surviving Widows.

(5) A Government Servant shall immediately after his confirmation, make a nomination in Form "E" indicating the order in which a pension sanctioned under his Part should be payable to the members of his family, and to the extent it is valid the pension will be payable in accordance with such nomination provided the nominee concerned is not ineligible, on the date on which the pension may become payable to him or her to receive the pension under the provisions of sub-rule (3), In case the nominee concerned is or has become ineligible to receive the pension under the said sub-rule, the pension shall be granted to the person next lower in the order in such nomination. The provisions of sub-rules (5) (b), (7) and (8) of rule 6 shall apply in respect of nomination under this sub-rule

(6) (a) A pension awarded under this Part shall not be payable to more than one member of the deceased officer's family at the same time.

(b) If a pension awarded under this Part ceases to be payable before the expiry of the period mentioned in the proviso to sub-rule (1) on account of death or marriage of the recipient or any other cause, it will be re-granted to the person next lower in the order mentioned in sub-rule (4) or to the person next lower in the order shown in the nomination under sub-rule (5), as the case may be, who satisfied the other provisions of this Part.

(7) A pension sanctioned under this Part will be tenable in addition to any extraordinary pension, gratuity or compensation that may be granted to the members or an officer's family under the existing rules or Acts.

(8) Future good conduct of the recipient is an implied condition of every grant of pension under this part. Government reserve to themselves the right of withholding or withdrawing such pension or any part thereof, if the recipient be convicted of serious crime or be guilty of grave misconduct. Decision of the Government in such matters shall be final.

5. In the counter affidavit dated 30.10.2012, it has been stated that the petitioner retired from service on 31.5.1988 after attaining the age of superannuation and he has been paid all his post retiral dues in his lifetime. It is further stated that the deceased had died on 23.7.2007 and after his death, on 8.12.2008, a Government Order was issued pursuant to recommendations of the Pay Commission with respect to payment of pension/gratuity/family pension and encashment. By virtue of the aforesaid government order dated 8.12.2008 the same has been made applicable on the government servants, who retired or had died on 1.1.2006 and thereafter. Since the petitioner had died subsequent to the said cut off date,

therefore the aforesaid government order would be applicable in the instant case. As per the provisions of the aforesaid government order for the purpose of admissibility of pension, family has been classified in two parts;

Class-(1) A widow/widower, till life time or till remarriage whichever is earlier by son/daughter (including widow daughter) till marriage/remarriage.

Class-(2) (c)
Unmarried/widow/divorced daughter who is not covered by Class-1 till marriage or remarriage or from the date of employment or till death whichever is earlier.

(d) Such mother and father who were dependent upon the government servant in his life time and the government servant had not left behind any widow/widower or children.

6. Submission is that family pension is a right of government servant, which accrued on the ground of his long length of service. It is not a bounty or gifts of the department. Therefore, the department is liable to make the payment of pension within time. If there is any unreasonable or undue delay in the payment of the same then the interest shall be payable on him. Learned counsel for the petitioners has placed reliance on some case laws, which shall be considered at the relevant part of the judgment.

7. The prayer of the petitioners by means of amended petition is now two folds; first is with regard to the interest on the delayed payment of pension and the second is regarding family pension in favour of the minor sons of the predeceased son.

8. So far as the first submission is concerned, it is clear from the averments made in the petition and also in the counter affidavit that pension was paid after a considerable delay. The petitioner stood retired on 31.5.1988 and the PPO was issued for the first time on 27.4.1994 i.e. after about six years of his attaining the age of superannuation.

9. However, it has been pleaded on behalf of the respondents that entire payment has been made but the details of the said payment have not been specified in the counter affidavit. It is not clear from the perusal of the counter affidavit whether any interest on the delayed payment has been paid or not. It has nowhere specifically been pleaded in the counter affidavit that any interest has been paid on the delayed payment.

10. For payment of pension, learned counsel for the petitioner has place reliance upon the pronouncement of Hon'ble the Apex Court in the case of Smt. Bhagwanti Vs. Union of India reported in (1989) 4 SCC 397 has held in paragraph no. 9 as under:-

"9. Pension is payable, as pointed out in several judgments of this Court, on the consideration of past service rendered by the government servant. Payability of the family pension is basically on the selfsame consideration. Since pension is linked with past service and the avowed purpose of the Pension Rules is to provide sustenance in old age, distinction between marriage during service and marriage after retirement appears to be indeed arbitrary....."

Reliance has also been placed on the pronouncement of Hon'ble the Apex Court in the case of Smt. Poonamal and

others Vs. Union of India and others reported in (1985) 3 SCC 345 wherein the Hon'ble Court has held in paragraph no. 7 as under:-

"7. It is not necessary to examine the concept of pension. As already held by this Court in numerous judgments pension is a right not a bounty or gratuitous payment. The payment of pension does not depend upon the discretion of the Government but is governed by the relevant rules and anyone entitled to the pension under the rules can claim it as a matter of right. (Deoki Nandan Prasad v. State of Bihar 1971 Supp SWCR 634; D.S. Nakara v. Union of India (1976) 3 SCR 360). Where the Government servant rendered service to compensate which a family pension scheme is devised, the widow and the dependent minors would equally be entitled to family pension as a matter of right. In fact we look upon pension not merely as a statutory right but as a fulfillment of a constitutional promise inasmuch as it partakes the character of public assistance in cases of unemployment, old-age, disablement or similar other cases of undeserved want. Relevant rules merely make effective the constitutional mandate. ....."

Reliance has also been placed on the pronouncement of Division Bench of this Court in the case of C.M. Wahal (Decd.), through L.Rs. Vs. Divisional Manager, L.I.C. Of India, Varanasi and another reported in 1997 A.W.C. (Supp.) 204 has held in paragraph no. 5 as under:-

"5. In the instant case, there is culpable delay in making the payment of outstanding dues to the petitioner. In paragraphs 8 and 9 of the counter-affidavit filed on behalf of the respondents, it has been stated that since certain enquiries were pending against the petitioner, therefore, the payment of his outstanding dues was withheld. But neither the nature of such enquiry has been disclosed, nor is there anything on the record to establish the pendency of the enquiry against the petitioner. Only vague allegations have been made about it. It is admitted that no disciplinary enquiry was initiated against the petitioner either before or after his retirement and no such enquiry was pending at the time of his retirement. Therefore, there was no justification to withhold the payment of the outstanding dues of the petitioner for a period of about four years. The respondents did did not take any effective step for payment of the dues to the petitioner inspite of his repeated representations and reminders to various functionaries of the L.I.C. The petitioner ultimately had to file the writ petition and in view of the order of this Court directing, the L.I.C. To decide the representations regarding non-payment of the dues, the payment was made in 1989. under law, the respondents were bound to make the payment to the petitioner his all outstanding dues at the time of retirement or in any case immediately thereafter. But they have failed to discharge their legal obligation. Therefore, they have to pay the interest to compensate the petitioner for retention of the amount belonging to him."

11. In view of the aforesaid case laws, it is clear that payment of pension is a right and that too has to be paid at the earliest stage. It is the right of the government servant. In the facts of this case, the State had utterly failed to make payment of the pension of Dr. A.P. Bajpai within time. There is no specific averment

in the counter affidavit that interest on the delayed payment has also been paid.

12. Learned counsel for the petitioner has brought to the notice to the Court a Government Order No. lk&3&2102@nl&971@80 dated 6.12.1994 whereby order for payment of interest on delayed payments was modified and provision was made for payment of 12% interest per annum on delayed payment of pension, which is payable on delayed payment of provident fund. Therefore, the petitioners were entitled for interest at the rate of 12% per annum on the delayed payment of gratuity and family pension.

13. Now the next point is to be considered whether petitioner no. 1/2 and 1/3 being the son of the predeceased son are entitled for family pension or not. The date of birth of the predeceased son Sameer Bajpai was mentioned in the pension papers as 15.4.1961. Sameer Bajpai expired on 11.4.2004, which means that on the date of his death, he was about 43 years old. Dr. A.P. Bajpai expired on 23.7.2007. Dr. A.P. Bajpai died after coming into force of government order of 2008 dated 8.12.2008.

14. Learned counsel for the petitioner has also filed Government Order No. lk&3&115@nl&3@82 dated 24.2.1998 (Annexure No. 5 to the amended petition), which provides for maximum age limit for entitlement of family pension and this maximum age limit was enhanced from 21 years to 25 years in case of sons. In case of daughter, it was enhanced from 24 years to 25 years. Meaning thereby after attaining age of 25 years the son of a government servant shall not be entitled for the payment of family pension provided he remain unemployed till attaining the age of 25 years. Even if the son of the deceased petitioner Dr. A.P. Bajpai would have survived even then he was not entitled for the family pension because he has crossed the maximum age limit of 25 years much earlier. The sons of Sameer Bajpai could not inherit better right then his own father. Therefore, in the facts of this case, in our considered opinion, family pension is not payable to the present petitioners. Order dated 22.12.2010 rejecting the representation of the petitioner for grant of family pension need not to be interfered with.

15. In view of the discussion made above, this writ petition deserves to be partly allowed and is hereby partly allowed. The petitioners shall be entitled for interest as provided under the relevant government orders at the rate, which is admissible under the government orders on delayed payment of pension and if the same has not already been paid then the same shall be paid within a period of three months from the date a certified copy of the judgment is produced before the concerned authority. To this extent the writ petition is allowed. The second prayer for grant of family pension in favour of the son of the predeceased son is hereby declined.

16. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2013

BEFORE
THE HON'BLE MUSHAFFEY AHMAD, J.

Criminal Revision No. 3381 of 2013

and Criminal Revision No. 3410 of 2013

Smt. Premwati .Revisionist

Versus

State of U.P..... Respondent

Counsel for the Revisionist:
Sri A.K. Kashyap, Sri A.S. Kashyap

Counsel for the Respondents:
A.G.A.

Cr.P.C. 397(2)- Criminal Revision-against order passed by Magistrate under section 156(3)-whether such order can be termed interlocutory one and revision barred by section 397(2)?-as per full bench Father Thomas case-question referred to constitute larger bench.

Held: Para-19
The Hon'ble Apex Court had not discussed or considered the scope of application under section 156(3) or the impact of the order passed under Section 156 (3) Cr.P.C. on the aggrieved complainant on the rejection of the application. Similarly in the case of Sakhiri Vasu (Supra), the Hon'ble Court did not forbid the maintainability of revision against the order passed under section 156(3) Cr.P.C. The court simply observed that if the first information report was not registered, the aggrieved might, instead of rushing to the High Court to file writ petition or a petition under Section 482 Cr.P.C., utilize the remedy under Sections 36, 154(3) and 156(3) Cr.P.C. or by filing a criminal complaint under Section 200 Cr.P.C. Thus, it appears the Hon'ble Apex Court never meant to shut the door for the aggrieved to agitate the order of rejection under Section 156 (3) Cr.P.C. in a revision. Therefore, the conclusion of the Full Bench on question-B that an order made under Section 156(3) Cr.P.C. is an interlocutory order, remedy of revision against such an order is barred by sub section (2) and Section 397 Cr.P.C. requests further consideration by a Larger Bench.

Case Law discussed:

(2011)1 U.P.L.B.E.C. 1; 2000(41) A.C.C. 425(D.B.); A.I.R. 2007 S.C.(Suppl.) 684; AIR 2008 S.C. 907.

(Delivered by Hon'ble Mushaffey Ahmad, J.)

1. These two criminal revisions have been preferred against the orders passed by the Magistrates on the applications moved under Section 156 (3) Cr.P.C. Since a common question is involved in both the revisions, they are taken up together.

2. In the first case, the Judicial Magistrate, Mainpuri by order dated 3.11.2013 treated the application of the applicant as complaint, where the complainant had alleged against Opp. Party offences of criminal house trespass, mishandling and committing rape on her under threat. In the second case, complainant Radhika Devi alleged against the Opp. Party the offences of cheating and forging of documents in respect of agricultural land, but The Chief Judicial Magistrate, Mainpuri by order dated 20.9.2013 rejected the application.

3. Learned A.G.A. makes preliminary objection to the maintainability of the revision against these orders on the strength of this Court's Full Bench decision rendered in the case of Father Thomas Vs. State of U.P. and others, reported in (2011) 1 U.P. L.B.E.C. 1.

4. Learned counsel for the revisionists, on the other hand, press for admission of and full fledged hearing on the revisions.

5. Thus, we are called upon to see if the revisions arising from the orders under Section 156 (3) Cr.P.C. are barred in the light of father Thomas Case (Supra).

6. The Full Bench was constituted to consider and decide three questions referred to by Hon'ble J.C. Gupta J, as His Lordship then was, and those three questions were;

(A) Whether the order of the Magistrate made in exercise of power under Section 156 (3) Cr.P.C. directing the police to register and investigate it is open to revision at the instance of a person against whom neither cognizance has been taken nor any process has been issued?

(B) Whether an order made under Section 156 (3) Cr.P.C. is an interlocutory order and remedy of revision against such an order is barred under sub section (2) of section 397 Cr.P.C., 1973?

(C) Whether the view expressed by a Division Bench of this Court in the case of Ajai Malviya Vs. State of U.P. and others, reported in 2000 (41) A.C.C. 435 (D.B.) that an order made under section 156 (3) Cr.P.C. is amenable to revision, no writ petition for quashing of first information report registered on the basis of the order will be maintainable, is correct?

7. The applications under Section 156 (3) Cr.P.C. are either allowed and police concerned is directed to register and investigate the case as alleged in the applications, or they are rejected.

8. The Full Bench of this Hon'ble Court in the case of Father Thomas (Supra) discussed a catena of case laws based on the question whether prospective accused can be heard at the time of disposal of the application under Section 156 (3) Cr.P.C. and held that such a person is not entitled to any hearing before or at the time of disposal of application under Section 156 (3) Cr.P.C. and, therefore, the Full Bench held that no revision lay against such an order. The decision to this effect has been based upon the premise that the order passed under Section 156 (3) Cr.P.C. directing the police concerned to register a case and investigate it does not affect the rights of the accused, and therefore it is purely an interlocutory in nature. The conclusions of the Court have been based upon a number of case laws discussed.

9. The cases such as one in Revision No. 3381 of 2013, where a woman of a weaker section has alleged the offence of rape on her more than once against persons not on convenient terms with her husband, as the Magistrate has mentioned it in the order, with incessant deterioration in the social and moral set up, shall strain the concept that the rights of perspective accused are not affected by order passed under Section 156(3) Cr.P.C.

10. But there is another situation, and that is when an application disclosing a cognizable offence is rejected, a valuable right of the aggrieved to get justice by bringing the accused to book through agency of the State is infringed. This aspect of the matter, though directly agitated before the Full Bench, seems to have not received concentrated attention. On the rights of the aggrieved complainant to have justice through machinery of the State, the Hon'ble Court in para-40 of the judgment observed as follows:-

"An order under section 156(3) Cr.P.C. passed by the Magistrate directing the police officer to investigate a

cognizable case on the other hand is no such order of moment, which impinges on any valuable rights of the party. Were any objection to the issuance of such a direction to be accepted (though it is difficult to visualize any objection which could result in the quashing of a simple direction for investigation), the proceedings would still not come to an end, as it would be open to the complainant informant to move an application under section 154(3) before the Superintendent of Police (S.P.) or a superior officer under section 36 of the Code. He could also file a complaint under section 190 read with section 200 of the Code. This is the basic difference from the situations mentioned in Madhu Limaye and in Amar Nath's cases, where acceptance of the objections could result in the said accused being discharged or the summons set aside, and the proceedings terminated. Also the direction for investigation by the Magistrate is but an incidental step in aid of investigation and trial. It is thus similar to orders summoning witnesses, adjourning cases, orders granting bail, calling for reports and such other steps in aid of pending proceedings which have been described as purely interlocutory in nature in Amar Nath (supra)".

11. In para-42 of the judgment, the Hon'ble Court has compared powers under Section 156 (3) Cr.P.C. to be of the same nature as the powers under Section 156 (1) Cr.P.C. i.e. where the police officer incharge of a police station refuses to register a case, the aggrieved have further opportunity of approaching the Superintendent of police concerned under section 154(3) Cr.P.C. for a direction for investigation, such powers may also be exercised by any officer superior in rank to officer incharge of a police station under Section 36 of the Code. The Hon'ble Full Bench has further observed in the same para that it would be illogical to suggest that the Courts have no jurisdiction to interfere in the criminal revision or other judicial proceedings with the decision of the police officer incharge of the police station to lodge the first information report under Section 154 (1) Cr.P.C. by superior officer under Section 154(3) or the actual investigation conducted by the police under the aforesaid provision.

12. The order directing investigation may be an incidental step in aid of investigation and trial and may be compared to orders summoning witnesses, adjourning case, granting bail, calling for report, etc. But once the application for direction to register and investigate the case is rejected, a poor and resourceless aggrieved complainant loses last hope to get justice when remedy of revision is denied to him. It is termed the last hope because he moves the application with an affidavit or copies of application showing the police had not responded to his request. It is the last hope because even the writ petition does not lie against the refusal of direction for investigation as it has been observed in para-58 of the Full Bench judgement, 'Even where the informant's plea for a direction for investigation under section 156(3) Cr.P.C is refused by the Magistrate, as held by the three judge bench of the Supreme Court in Aleque Padamsee v. Union of India, AIR 2007 SC (Supp) 684, the remedy for the informant lies not in filing a writ petition, but in filing a complaint under section 190 (1)(b) read with section 200 of the Code. The legal position after review of

the authorities as noted in Aleque Padamsee in paragraph 7 was as follows: "The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that a cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code'.

13. It is the last hope because the order under Section 156 (3) has been declared interlocutory as a whole, as the Bench answers the question-B, the petition under Section 482 Cr.P.C. would not lie to circumvent the express ban under Section 397(2) Cr.P.C.

14. No doubt, a person aggrieved by the rejection of his application under Section 156 (3) Cr.P.C. may file a complaint and undertake to fee the counsel, and bear the burden of collecting and producing evidence at his own expenses.

15. The State has the first constitutional mandate to secure justice and that too with a directive to provide justice ensuring that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Art. 39-A of the Constitution of India).

16. To elucidate the point: where a son of a maid servant, who had gone to demand his wages from doctors in a nursing home on the occasion of those doctors' daughter's marriage is found drowned in a pond and the body discovered had the blood oozing from the mouth and nostrils and the Magistrate on the application under Section 156(3) Cr.P.C. refuses to order registration and investigation of the case, Can the maid servant be expected to get justice by lodging a private complaint and collecting evidence against the influential doctors. Similarly, where in an open assault, the husband of the complainant is felled and killed at the spot, the victim being the near relation of the accused, say brother of the accused, the widow having been first withheld from going to police station to lodge a report and when after some time she reaches the police station, the police turning her away and not registering a case and when the women resorts to her parental house and then moves an application alongwith post mortem report under Section 156 (3) Cr.P.C. and the Magistrate treats the same as complaint, Can the lady be expected to collect evidence from village where she is not residing, against the persons who are powerful and resourceful (both the illustrations cited happen to be the real cases which came to my notice while working as District and Sessions Judge).

17. The provision for revision having been barred by the case law, which is the handy remedy with the locals, the magistracy is testing absolutism, and some times not without complaint.

18. We, therefore, hold that the rejecting of the application in such many similar cases not only affects the legal right of the aggrieved to get justice but the rejection order amounts to denial of justice to them. The provision of revision would not add to but could stem the rising numbr of writ petitions and petitions under Section 482 Cr.P.C., as discountenanced by the Hon'ble Apex Court in the cases in the case of Aleque Pademsee Vs. Union of India , A.I.R. 2007 S.C. (Suppl.) 684 and Sakhiri Vasu Vs. State of U.P. and others, A.I.R. 2008 S.C. ,907. It appears that the Hon. Full Bench ruled out the right to revision against the order under Section 156 (3) Cr.P.C. on a partial

reading of Hon. Apex Court decision in the case of Aleque Pademsee (Supra). The Hon'ble Apex Court observed in that case that where the first information report is not registered by the police, the complainant has remedy under Section 190(1) (a) read with Section 200 of the Code. The Hon'ble Full Bench has instead read in ,' 'Even where the informant's plea for a direction for investigation under section 156(3) Cr.P.C is refused by the Magistrate, as held by the three judge bench of the Supreme Court in Aleque Padamsee (Supra)'.

19. The Hon'ble Apex Court had not discussed or considered the scope of application under section 156(3) or the impact of the order passed under Section 156 (3) Cr.P.C. on the aggrieved complainant on the rejection of the application. Similarly in the case of Sakhiri Vasu (Supra), the Hon'ble Court did not forbid the maintainability of revision against the order passed under section 156(3) Cr.P.C. The court simply observed that if the first information report was not registered, the aggrieved might, instead of rushing to the High Court to file writ petition or a petition under Section 482 Cr.P.C., utilize the remedy under Sections 36, 154(3) and 156(3) Cr.P.C. or by filing a criminal complaint under Section 200 Cr.P.C. Thus, it appears the Hon'ble Apex Court never meant to shut the door for the aggrieved to agitate the order of rejection under Section 156 (3) Cr.P.C. in a revision. Therefore, the conclusion of the Full Bench on question-B that an order made under Section 156(3) Cr.P.C. is an interlocutory order, remedy of revision against such an order is barred by sub section (2) and Section 397 Cr.P.C. requests further consideration by a Larger Bench.

20. Record of this case be placed before Hon'ble the Chief Justice with the request that if it is found proper and expedient the matter be referred to a Larger Bench for consideration of the question,

" Whether an order made under Section 156 (3) Cr.P.C. is an interlocutory order and remedy of revision against such an order is barred under sub Section (2) of Section 379 Cr.P.C."

21. The maintainability of the revisions filed shall abide by the judgment of the Court after reference.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2013

BEFORE
THE HON'BLE KALIMULLAH KHAN, J.

Habeas Corpus Writ Petition No. 4583 of 2013

Smt. Gudiya and Anr.... Petitioners
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioners:
Sri Deepak Tripathi

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

Constitution of India, Art.-226-Habeas Corpus petition-by husband petitioner-being employee of Government press-allegation against corpus found false-rather the petitioner himself guilty of maltreatment to his wife and two minor children-petition disposed of with cost of Rs. 50,000/- apart from Rs. 25000/- towards expenses-keeping in view pendancy of suit of restitution of conjugal rights-petition disposed of with further direction to govt press(the employer) to deduct Rs. 5000/- from salary of petitioner and send to the corpus through many order on monthly basis.

Held: Para-6 & 7-

6-Petitioner Rajendra Kumar Saroj has stated that he has already filed a petition for restitution of his conjugal right and he is ready and willing to keep his wife and her children with him.

7-In the totality of facts and circumstances of the case, it appears essential in the interest of justice to direct petitioner Rajendra Kumar Saroj to pay monthly allowance of Rs. 5,000/- to his wife Smt. Neeta Bhartiya for her maintenance and also for the maintenance of her two minor children till any other competent court of law awards any maintenance to them.

(Delivered by Hon'ble Kalimullah Khan, J.)

1. Heard learned counsel for the parties and perused the record.

2. Learned A.G.A. Sri Ashutosh Kumar Tripathi has filed affidavit sworn by Nand Prakash Maurya Tehsildar Sadar, District- Allahabad. In para 6 of the said affidavit, it has been contended that the order dated 5.4.2013 and 10.5.2013 passed by this Court has already been complied with.

3. Learned counsel for the respondent No. 4 does not dispute the aforesaid fact.

4. Before parting with this writ petition, it appears essential in the interest of justice to point out something relevant in this matter and pass suitable orders in the ends of justice. Petitioner Rajendra Kumar Saroj has filed this writ petition of habeas corpus on false grounds only to harass his wife Smt. Neeta Bhartiya and two minor children below three years of age born out of this wedlock. The corpus Smt. Neeta Bhartiya along with two minor children and her old father (respondent No. 4) appeared in the Court and stated that her father had not illegally detained her and her two minor children rather on being tortured continuously by her husband petitioner Rajendra Kumar Saroj who used to practice cruelty on one pretext or the other upon her and took shelter at her Maika in the house of her father and her husband did not pay even a single penny towards their maintenance. He is Government employee and is presently posted as a clerk in Government Press at Allahabad as he himself deposed this fact in his affidavit sworn by him and filed on 23.1.2013 in this writ petition. Her father (respondent No.4) is a poor old man and he has no sufficient means to maintain the corpus Smt. Neeta Bhartiya and her children. At present more than one year has elapsed but her husband is not taking care for them in the matter of their maintenance.

5. The corpus Smt. Neeta Bhartiya and her both minor children have already been set at liberty and petitioner Rajendra Kumar Saroj has already been imposed cost Rs. 50,000/- for filing the petition on false grounds apart from Rs. 15,000/- as expenses incurred by his wife along with children and respondent No.4, her father in attending the court.

6. Petitioner Rajendra Kumar Saroj has stated that he has already filed a petition for restitution of his conjugal right and he is ready and willing to keep his wife and her children with him.

7. In the totality of facts and circumstances of the case, it appears essential in the interest of justice to direct petitioner Rajendra Kumar Saroj to pay monthly allowance of Rs. 5,000/- to his wife Smt. Neeta Bhartiya for her maintenance and also for the maintenance

of her two minor children till any other competent court of law awards any maintenance to them.

8. Accordingly, this petition of habeas corpus stands disposed of with the direction that the petitioner Rajendra Kumar Saroj shall pay Rs. 5,000/- per month to his wife Smt. Neeta Bharatiya for her and her children's maintenance till they are awarded maintenance by any other competent court of law.

9. D.D.O. Government Press Allahabad is directed to deduct Rs. 5,000/- per month plus money order charges from the salary of petitioner Rajendra Kumar Saroj S/o late Sunder Lal R/o 84 Nayapura Stanly Road, P.S.- Shivkuti, District- Allahabad and send it through money orders to Smt. Neeta Bhartiya D/o Ram Prasad Bharatiya R/o 1563 Kidwai Nagar Allapur, Police Station- George Town, Allahabad month to month.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2013

BEFORE
THE HON'BLE RAM SURAT RAM (MAURYA), J.

Civil Misc. Writ Petition No. 6549 of 1990

Bhuley & Others... Petitioners
Versus
Assistant Director of Consolidation & Ors... Respondents

Counsel for the Petitioners:
Dr. V.K. Rai, Sri Vijay Kumar Rai
Sri Prabho Kant, Sri A.K. Jaiswal
Sri M.D. Singh, Sri Sankatha Rai

Counsel for the Respondents:
S.C., Sri K.R. Sirohi, Sri Yogesh Kumar Singh, Sri G.N. Verma, Sri Dr. Madhu Tandon, Sri S.M. Nazar Bokhari, Sri Nazaruddin, Sri Sanjay Kr. Singh, Sri Sharfuddin Ahmad, Sri Nazar Bokhari.

U.P. Consolidation of holdings Act 1953-Section 5(i)(c)(ii)-Sale deed executed on 4.9.82-notification in the unit under section 4(2)(b)-published on 24.09.82-whether such transaction hit by section 5(i)(c)(ii) in absence of permission to sale the part of holdings?-held-'no' consolidation operation come into existence only after publication notification-order passed by consolidation authorities-illegal quashed-consequential direction given.

Held: Para-12

Section 5 (1) (c) (ii) of the Act imposes a restriction on transfer by way of sale, gift or exchange of the holding or any part of it in the consolidation area, except with prior permission of Settlement Officer Consolidation. The consolidation area has been defined as "the area in respect of which a notification under Section 4 has been issued". Mode of issuing notification under Section 4 has been provided under Section 4 (2) (b) by publishing the notification in the official Gazette and in each unit in the said area. Under Section 2 (8) of the Act, publication in the unit has to be made by reading out, the document in the unit on a date of which prior notice shall be given by beat of drum, and proclamation by beat of drum, or, in any other customary mode, in the unit of the fact that the document is open to public inspection at an appointed place and time. Thus so long as notification is not published in the unit the restrictions imposed upon Section 5 (1) (c) (ii) of the Act will not apply. Use of different words under Section Section 5 (1) and 5 (2) of the Act are nothing to do with the restriction for transfer, which has been imposed in the consolidation area, which has a definite meaning under the Act. In the cases relied upon by the counsel for the petitioners, this Court has rightly held that so long as notification under Section 4 (2) (b) of the Act is not made in the unit, the restrictions under Section 5 (1) (c) (ii) will not apply. I do not find any reason to take a different view. Admittedly notification

under Section 4 (2) (b) of the Act, in the unit was made on 24.09.1982 and sale deeds were executed on 04.09.1982 as such these sale deeds are not invalid under Section 45-A (2) of the Act. The consolidation authorities have illegally ignored the sale deeds of the petitioners, in spite of the fact that its due execution was found to be proved.

Case Law discussed:
1997(1) AWC 29; 1997(88) RD 348; 2001(92) RD 531; 2004(96) RD 8; (1990) 3 SCC 682; (1990) 3 SCC 682; (2012) 9 SCC 552.

(Delivered by Hon'ble Ram Surat Ram (Maurya), J.)

1. Heard Sri Vijay Kumar Rai, for the petitioners and Sri K.R. Sirohi, Senior Advocate, assisted by Sri Yogesh Kumar Singh, for the contesting respondents.

2. The writ petition has been filed against the orders of Consolidation Officer dated 25.04.1986, Settlement Officer Consolidation dated 17.07.1989 and Assistant Director of Consolidation dated 08.03.1990, passed in title proceedings, under U.P. Consolidation of Holdings Act, 1953 (hereinafter after referred to as the Act).

3. The dispute relates to land of basic consolidation year khata 88 [consisting plots 45 (area 9-3-0 bigha), 69 (area 3-1-0 bigha), 278 (area 1-14-0 bigha), 307 (area 3-04-0 bigha), 315 (area 2-16-0 bigha) and 422 (area 22-2-0 bigha)], which was recorded in the name of Ram Ratan son of Man Singh and khata 93 [consisting plots 96 (area 8-13-0 bigha) and 103/1 (area 3-2-0 bigha), which was recorded in the names of Ram Ratan son of Man Singh and Desh Raj son of Ram Chandra, of village Jhatta, pargana Dankaur, district Buland Shahar. Ram Ratan executed three sale deeds dated 04.09.1982, by which he transferred entire land of khata 88 and his 1/2 share of khata 99, in favour of the petitioners .

4. Village Jhatta, pargana Dankaur, district Buland Shahar was placed under consolidation operation by Notification No. 2426/G-33-81, dated May 26, 1982 published in U.P. Gazette Part 1-Ka, dated 10th July, 1982 and notification in the Unit took place on 24.09.1982, according to the provisions of Section 4 (2) (b) of the Act. The village was notified under Section 9 of the Act, in October, 1985. In CH Form 5, relating to khatas in dispute, the possession of the petitioners were noted and name of Smt. Angoori (respondent-4) was noted as an heir of Ram Ratan. The petitioners filed their objections under Section 9 of the Act, for recording their names over the land in dispute, on the basis of the sale deeds dated 04.09.1982, executed by Ram Ratan in their favour. Smt. Angoori contested the objections on the ground that sale deeds were obtained without prior permission of Settlement Officer Consolidation and are void documents. The sale deeds were procured by committing fraud without payment of consideration. The sale deeds were canceled by the decree of Civil Court dated 24.05.1983, passed in Civil Suit No. 296 of 1982. She claimed to be daughter of Ram Ratan and his only heir.

5. The objections of the petitioners were registered as Case No. 376 to 379 and consolidated and tried together. Apart from documentary evidence, the petitioners examined Ratan Lal and Smt. Premwati alias Ramwati, the marginal witnesses of the sale deeds and the respondent examined Prem Singh, Deshraj and Bhagwat Singh.

The Consolidation Officer, by his order dated 25.04.1986 held that the name of Smt. Angoori was mutated as an heir of Ram Ratan by the order of Assistant Consolidation Officer dated 05.11.1985. Although due execution of the sale deeds dated 04.09.1982 by Ram Ratan in favour of the petitioners has been proved but as the sale deeds have already been canceled by decree of Civil Court dated 24.05.1983 as such it cannot be given effect to in consolidation records. The requisite permission of Settlement Officer Consolidation was not obtained under Section 5 (1) (c) of the Act as such the sale deeds are void. On these findings objections of the petitioners were dismissed by order dated 25.04.1986.

6. The petitioners filed appeals (registered as Appeal Nos. 1079, 1080, 1081 and 1082) from the aforesaid order. In the meantime exparte decree dated 24.05.1983 was set aside and O.S. No. 196 of 1982 was abated under Section 5 (2) of the Act. The appeals were consolidated and heard by Settlement Officer Consolidation, who by order dated 17.07.1989 held that as notification under Section 4 (2) was published in Government Gazette on 10.07.1982 and the sale deeds were executed on 04.09.1982 without prior permission of Settlement Officer Consolidation as such the sale deeds are void and the names of the petitioners cannot be mutated on its basis. The petitioners filed revisions (registered as Revision Nos. 1980/550, 1981/551 and 1982/552) from the aforesaid orders. The revisions were consolidated and heard by Assistant Director of Consolidation (respondent-1) who by order dated 08.03.1990 upheld the findings of Settlement Officer Consolidation and dismissed the revisions. Hence, this writ petition has been filed.

7. The counsel for the petitioners submitted that Section 4 (2) (a) of the Act (as amended by U.P. Act No. VIII of 1963) provides that when the State Government decides to start consolidation operations, either in an area covered by a declaration issued under sub-section (1) or in any other area, it may issue a notification to this effect. The mode of issuing notification has been provided under Section 4 (2) (b) of the Act, which provides that every such notification shall be published in the official gazette and in each unit in the said area. Thus so long as notification according to the provisions of Section 4 (2) (b) of the Act is not published, the village is not brought under consolidation operation. Notification in Government Gazette was published on 10.07.1982 and in the Unit was published on 24.09.1982 as such prior to 24.09.1982, the consolidation operation in the village was not started and the sale deeds dated 04.09.1982 were not hit by the provisions of Section 5 (1) (C) of the Act. The Consolidation Officer found due execution of the sale deeds by Ram Ratan was proved as such the names of the petitioners were liable to be recorded over the land in dispute on the basis of the sale deeds executed by Ram Ratan in their favour. The orders of consolidation authorities are illegal and is liable to be set aside. He placed reliance on the judgments of this Court in Nagina and another Vs. DDC and others, 1997 (1) AWC 29, Raj Singh Vs. DDC and others, 1997 (88) RD 348, Ram Chandra Vs. DDC and others, 2001 (92) RD 531 and Madan Lal Vs. DDC and others, 2004 (96) RD 8, in which it has been held that consolidation operation in the village

commences from the date of publication of the notification in the Unit. The counsel for the petitioners also relied upon several other case law in which the word publication as mentioned in Land Acquisition Act, 1894 and Railways Act, were interpreted.

8. In reply to the aforesaid arguments, the counsel for the respondent submitted that in the case law relied upon by the counsel for the petitioners, different words under Section Section 5 (1) and 5 (2) of the Act have not been noticed. Under Section 5 (1) the words "Upon the publication of the notification under sub-section (2) of Section 4 in the Official Gazette" have been used, while under Section 5 (2) the words "Upon the publication of the notification under sub-section (2) of Section 4" have been used. This was the cautious act of the legislature. The consequences of sub-section (1) of Section 5 follow from the date of the notification under sub-section (2) of Section 4 in the Official Gazette. Admittedly notification under Section 4 (2) in the Government Gazette was published on 10.07.1982 as such sale deeds executed on 04.09.1982 without prior permission of Settlement Officer Consolidation were void. The consolidation authorities have rightly ignored the sale deeds. He submits that the Court only interprets the provision of law and has no jurisdiction to add any thing omitted in the law as held by Constitutional Benches of Supreme Court in S.P. Gupta Vs. Union of India and others, AIR 1982 SC 149 and Punjab Land Development Reclamation Corporation Ltd. Labour Court, (1990) 3 SCC 682. The writ petition is liable to be dismissed.

9. I have considered the arguments of counsel for the parties and examined the record. So far as the arguments of the counsel for the respondent is concerned it is well settled that the Court only interprets the provision of law and has no jurisdiction to add any thing in it. Constitutional Bench of Supreme Court in Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court, (1990) 3 SCC 682, held that the court has to interpret a statute and apply it to the facts. Hans Kelsen in his Pure Theory of Law (p. 355) makes a distinction between interpretation by the science of law or jurisprudence on the one hand and interpretation by a law-applying organ (especially the court) on the other. According to him "jurisprudential interpretation is purely cognitive ascertainment of the meaning of legal norms. In contradistinction to the interpretation by legal organs, jurisprudential interpretation does not create law". "The purely cognitive interpretation by jurisprudence is therefore unable to fill alleged gaps in the law. The filling of a so-called gap in the law is a law-creating function that can only be performed by a law-applying organ; and the function of creating law is not performed by jurisprudence interpreting law. Jurisprudential interpretation can do no more than exhibit all possible meanings of a legal norm. Jurisprudence as cognition of law cannot decide between the possibilities exhibited by it, but must leave the decision to the legal organ who, according to the legal order, is authorised to apply the law". According to the author if law is to be applied by a legal organ, he must determine the meaning of the norms to be applied: he must "interpret' those norms (p. 348). Interpretation therefore is an intellectual activity which accompanies the process of law application in its advance from a higher level to a lower level. According to him, the law to be applied is a frame. "There are cases of intended or unintended indefiniteness at the lower level and several possibilities are

open to the application of law". The traditional theory believes that the statute, applied to a concrete case, can always supply only one correct decision and that the positive-legal "correctness' of this decision is based on the statute itself. This theory describes the interpretive procedure as if it consisted merely in an intellectual act of clarifying or understanding; as if the law-applying organ had to use only his reason but not his will, and as if by a purely intellectual activity, among the various existing possibilities only one correct choice could be made in accordance with positive law. According to the author: "The legal act applying a legal norm may be performed in such a way that it conforms (a) with the one or the other of the different meanings of the legal norm, (b) with the will of the norm creating authority that is to be determined somehow, (c) with the expression which the norm-creating authority has chosen, (d) with the one or the other of the contradictory norms; or (e) the concrete case to which the two contradictory norms refer may be decided under the assumption that the two contradictory norms annul each other. In all these cases, the law to be applied constitutes only a frame within which several applications are possible, whereby every act is legal that stays within the frame". Again in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552, held that it is not the function of the court to supply the supposed omission, which can only be done by Parliament. In our opinion, legislative surgery is not a judicial option, nor a compulsion, whilst interpreting an Act or a provision in the Act.

10. Now the relevant provisions of the Act are required to be examined. By U.P. Act No. XXXVIII of 1958, the Act was amended. The relevant provisions are quoted below:-

Section 2 (2-A)- 'Consolidation area' means the area, in respect of which a notification under Section 4 has been issued, except such provisions thereof to which the provisions of the U.P. Zamindari Abolition and Land Reforms Act, 1950 do not apply.

(8) 'Publication in the unit' or 'publish in the unit' with reference to any document means reading out of the document in the unit on a date of which prior notice shall be given by beat of drum, and proclamation by beat of drum, or, in any other customary mode, in the unit of the fact that the document is open to public inspection at an appointed place and time.

"5. Effect of declarations.- (1) Upon the publication of the notification under sub-section (2) of Section 4 in the Official Gazette, the consequences, as hereinafter set forth, shall subject to the provisions of this Act, from the date specified thereunder till the publication of notification under Section 52 or sub-section (1) of Section 6, as the case may be, ensue in the area to which the notification under Section 4 (2) relates, namely-

(a) .....

(b).....

(c) Notwithstanding anything contained in the U.P. Zamindari Abolition and Land Reforms Act, 1950, no tenure holder, except with the permission in writing of the Settlement Officer Consolidation previously obtained shall-

(i) .....

(ii) transfer by way of sale, gift or exchange his holding or any part of it in the consolidation area.

45-A. Penalty for contravening provisions of Section 5.- (1).....

(2) A transfer made in contravention of the provisions of Section 5 (1) (c) (ii)

shall not be valid or recognized; anything contained in any other law for the time being in force to the contrary notwithstanding."

11. The relevant portion of the provisions of Section 4, as it was in 1982 is quoted below:-

4. Declaration and notification regarding consolidation.- (1)

(2) (a) When the State Government decides to start consolidation operations, either in an area covered by a declaration issued under sub-section (1) or in any other area, it may issue a notification to that effect.

(b) Every such notification shall be published in the official Gazette and in each unit in the said area.

12. Section 5 (1) (c) (ii) of the Act imposes a restriction on transfer by way of sale, gift or exchange of the holding or any part of it in the consolidation area, except with prior permission of Settlement Officer Consolidation. The consolidation area has been defined as "the area in respect of which a notification under Section 4 has been issued". Mode of issuing notification under Section 4 has been provided under Section 4 (2) (b) by publishing the notification in the official Gazette and in each unit in the said area. Under Section 2 (8) of the Act, publication in the unit has to be made by reading out, the document in the unit on a date of which prior notice shall be given by beat of drum, and proclamation by beat of drum, or, in any other customary mode, in the unit of the fact that the document is open to public inspection at an appointed place and time. Thus so long as notification is not published in the unit the restrictions imposed upon Section 5 (1) (c) (ii) of the Act will not apply. Use of different words under Section 5 (1) and 5 (2) of the Act are nothing to do with the restriction for transfer, which has been imposed in the consolidation area, which has a definite meaning under the Act. In the cases relied upon by the counsel for the petitioners, this Court has rightly held that so long as notification under Section 4 (2) (b) of the Act is not made in the unit, the restrictions under Section 5 (1) (c) (ii) will not apply. I do not find any reason to take a different view. Admittedly notification under Section 4 (2) (b) of the Act, in the unit was made on 24.09.1982 and sale deeds were executed on 04.09.1982 as such these sale deeds are not invalid under Section 45-A (2) of the Act. The consolidation authorities have illegally ignored the sale deeds of the petitioners, in spite of the fact that its due execution was found to be proved.

9. In view of the aforesaid discussions, the writ petition succeeds and is allowed. The orders of Consolidation Officer dated 25.04.1986, Settlement Officer Consolidation dated 17.07.1989 and Assistant Director of Consolidation dated 08.03.1990 are set aside. The Consolidation Officer shall give effect to the sale deeds dated 04.09.1982 executed by Ram Ratan in favour of the petitioners, in the consolidation records.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2013

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No. 7672 of 2013

Ram Kishun Singh @ Ram Krishna Singh... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Sudhakar Pandey

Counsel for the Respondents:
C.S.C., Sri K.N. Mishra

U.P.Z.A. & L.R. Act-Section-9- Vesting of land-petitioner seeking direction permitting to execute the sale-on ground his father was recorded as Bhumidhar-after his death petitioner became owner-plot in question recorded as Abad over which since 1906 Bank is running consolidation authorities-no power to record the name of heir as bhumidhar-on his background plea of bank-about settlement under section 9 of the Act-proper-no mandamus can be issued.

Held: Para-13&14
13-It is also admitted case between the parties that after abolition of the Zamindari, no proceedings was ever initiated by the father of the petitioner and even after the death of the father of the petitioner in 1980, the petitioner did not initiate any proceeding. The silence on the part of the petitioner as well as his father for the more than of 50 years cannot be raised and adjudicated in a writ jurisdiction under article 226.

14- The Court is of the view that property on which the Bank stands was deemed to have been settled in favour of the Bank by the State under section 9 of U.P.Z.A & L.R Act.

(Delivered by Hon'ble V.K. Shukla, J.)

1. Petitioner by means of this writ petition seeks a direction in the nature of mandamus directing the authorities concerned to permit the petitioner to transfer his land by registered sale deed in favour of any person and further a direction is being sought against the authorities not to interfere from transferring the title of the property in question in favour of any person.

2. The brief facts of the case is that Arazi Nos.296, 297 and 869 Ka (Mi) measuring 0.0216 and 0.684 Hectares respectively was recorded in the name of the ancestors of the petitioner in the revenue records. After the death of the Tikori Singh, father of the petitioner, the name of the petitioner has been recorded as successor in the revenue records.

3. Petitioner claims that he wants to transfer the said property to third parties, however, the said sale deed was objected to by the Sub Registrar (Registration) Kasia District Kushinagar by his order dated 18.1.2013 stating therein that District Cooperative Bank stands on the said property and further the property has been grossly under valued and there is a specific direction of the District Magistrate as well as Assistant Inspector General (Registration) stating that sale in respect of the property in question need not be registered.

4. Counter affidavit has been filed on behalf of the State wherein it has been stated that Deoria Kasia Zila Sahkari Bank Ltd. Branch Kasia was established in the year 1906 on the property in question and the Bank is running on the plots recorded in the name of Tikori Singh, father of the petitioner. On 1.11.1951, the Bank constructed the building on the said property. Tikori Singh who died in 1980 had never objected to the said construction during his life time and since 1980, the petitioner has also not raised any objection. It is also stated that after the death of Tikori Singh, the petitioner managed to get his name recorded in the revenue record during the consolidation proceedings, although the plots in dispute were recorded as abadi land in the revenue records and therefore were outside the consolidation proceedings. Since the petitioner was not in possession of the land in question prior to the enforcement of U.P.Z.A

& L.R Act 1950, hence the property stood settled with the Bank under section 9 of the aforesaid mentioned Act.

5. Shri K.N.Mishra, Advocate has put in appearance on behalf of respondent Bank and it has been stated that the Bank was established in 1906 and since then the Bank is in possession of the said premises. The premises also comprises of the houses and quarters of the Bank officials. Extracts of Khasra (field register) has also been filed showing that on the said plot Cooperative Bank is established. During consolidation proceedings also the said property is recorded as abadi. The petitioner fraudulently managed to get the property recorded as Bhumidari and since then the petitioner claims to have title on the said property.

6. We have heard the counsel for the parties.

7. The contention of the petitioner that he has having title on the said property cannot be accepted as the petitioner has failed to demonstrate as to how he got himself recorded as Bhumidar on the land which is admittedly abadi. The Bank was established in the year 1906 is admitted between the parties. After abolition of the Zamindari and publication of notification under the Act, property in question vested with the Bank in pursuance of Section 9 of the U.P Z.A & L.R Act. Section 9 is reproduced below:

"9. Private wells, trees in abadi and buildings to be settled with the existing owners or occupiers thereof - All wells, trees in abadi and all buildings situate within the limits of an estate belonging to or held by an intermediary or tenant or other person whether residing in the village or not, shall continue to belong to or be held by such intermediary tenant or person, as the case may be,and the site of the wells or the buildings within the area appurtenant thereto shall be deemed to be settled with him by the State Government on such terms and conditions as may be prescribed."

8. It is not the case of the petitioner that his father has ever raised any objection or adjudicated the matter before any forum to challenge the vesting of the property in favour of the Bank. The father of the petitioner died in the year 1980 and then, the petitioner also did not raise any objection or approached any forum to claim title to the said property. It is during consolidation proceedings, the petitioner fraudulently managed to get his name entered as Bhumidar of the said property. The said entry is absolutely on the basis of fraud and mis representation as Abadi land are not included within consolidation proceedings and are excluded from the said proceedings. The Consolidation Officer themselves have recorded the said property as abadi which is recorded in Form CH 41. For more than 50 years after abolition of Zamindari, the Bank is functioning on the said property and also have constructed the premises. The petitioner till date have not raised any objection nor his father ever raised any objection knowing very well that the property vested with the Bank under section 9 of the Act. It is also not the case of the petitioner that the Bank is a tenant and his father ever received any rent or the petitioner has been receiving any rent since 1980. Nothing has also been brought on the record to show that the building in question was constructed by the father of the petitioner.

9. Section 4 of U.P.Z.A & L.R Act deals with vesting of an estate in the State whereas Section 6 deals with

consequences of the vesting of an estate in the State. Now reading the two sections together three things emerges on coming into the force of the Act. By virtue of Section 4 the right, title and interest of all intermediaries in every estate, including Hats, Bazars and Melas, stood terminated. Secondly, this whole bundle of interests came to be vested in the State, free from all encumbrances, the quality of the vesting being absolute. Thirdly, one and only one species of property in Hats, Bazars and Melas was expressly excluded from the total vesting of estates in the State, viz. such as had been held on lands to which Section 18(1)(a) to (c) applied. Section 9 at this stage needs to be examined as it provides for settlement under the State, of some kinds of landed interests in existing owners or occupiers.

10. Ordinarily property is held by a person to whom it belongs i.e Owner. Such person alone is entitled to the deeming concept of settlement under Section 9 and not any person holding on inferior right or by imperfect adverse possession.

11. In Hari Shanker versus Narendra Pratap Bahadur Singh and others AIR 1973 Allahabad 561 where Zamindar-plaintiff's permitted the defendants to construct building exclusively in their ownerships on Zamindar's land. The rent from the said property was being shared. After abolition of the Zamindari, the owner of the building started realising rents from the shops by not paying the share to the Zamindar. The Zamindar filed suit for recovery of half of the share on the ground that ownership of the site on which the shop stood belonged to him. This Court repelled the said argument on the ground that the building belonged to the person who constructed it and after abolition of the Zamindari since the site vested with the State, it could not be said that the Zamindar held the said buildings. The Court further stated that the word 'held' used in section 9 would mean building belonging to a person lawfully and it would not mean a tenant who has an inferior right. The tenant hold it on behalf of the owner and not on his own right. Secondly a trespasser will also have no right under section 9 as the trespasser cannot be the owner vide Budhan Singh versus Nabi Bux AIR 1962 Alld 43 which was affirmed by the Supreme Court in Budhan Singh versus Nabi Bux AIR 1970 SC 1880. In Budhan Singh (Supra) it was held that a house built as Riyaya on the land of Zamindar of the Village, with his permission, belonged to the said person and not to the Zamindar. Even in case the person had left the premises for some time and on his return the building was taken possession by the Zamindar, it was held that Zamindar being the trespasser would not have a right under section 9 and the building would not be deemed to be settled with the Zamindar because 'held' in section 9 means lawfully held and not gained wrongful possession.

12. In the facts of the present case, it is not the case of the petitioner that the Bank was ever a tenant of his father or ancestors. It is a specific case of the Bank that they had constructed the building of the Bank and the premises around the Bank and the banking activity is being carried on since 1906. Therefore, after abolition of the Zamindari, in view of section 9, the building standing on the site belonging to the father of the petitioner shall be deemed to have been settled in favour of the Bank.

13. It is also admitted case between the parties that after abolition of the

Zamindari, no proceedings was ever initiated by the father of the petitioner and even after the death of the father of the petitioner in 1980, the petitioner did not initiate any proceeding. The silence on the part of the petitioner as well as his father for the more than of 50 years cannot be raised and adjudicated in a writ jurisdiction under article 226.

14. The Court is of the view that property on which the Bank stands was deemed to have been settled in favour of the Bank by the State under section 9 of U.P.Z.A & L.R Act.

15. For the reasons stated herein above, this Court is not inclined to interfere under Article 226 of the Constitution of India. The relief claimed for seeking mandamus to enable the petitioner to transfer the property to 3rd party cannot be accorded as the petitioner has failed to demonstrate before this Court that he has any title to the said property.

16. The petition is devoid of merits and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Misc. Singhle No. 7739 of 2013

Chandra Shekhar Tripathi... Petitioner
Versus
State of U.P. and Ors.... Respondents

Counsel for the Petitioner:
Sri Amrendra Nath Tripathi

Counsel for the Respondents:
C.S.C., Sri Yogendra Nath Yadav

Constitution of India, Art.-226- Opportunity of hearing-person claiming violation of principle of Natural Justice- to come forward and show if opportunity given-what would be plausible explanation-entry in revenue recored by playing fraud-FIR already lodged against erring revenue officers-claim of petitioner to re-enter his name by deleting name of Gaon sabha in pursuance of order passed by DDC 15 years ago-by exercising power of review in view of full bench decision-consolidation authorities have no power of review-held-claim rightly rejected-petition dismissed.

Held: Para-9&10

9. As it was stark forgery and manipulation, hence impugned orders cannot be set aside on the ground of denial of opportunity of hearing. In any case in the writ petition petitioner has thoroughly been heard and original records have also been shown to his learned counsel as well as to the court.

10. The argument that in respect of abadi land, petitioner should not be evicted is also not acceptable as from the original records of 1359 Fasli, it is evident that over the said land also name of the petitioner's father was inserted much later fraudulently.

Case Law discussed:
2005(98)RD 244; 2009(108) RD 321; 2010(15) SCC 218; AIR 2000 SC 2783; 2007(4) SCC 54; 1997(15) LCD 921.

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. Heard Sri A.N. Tripatahi, learned counsel for petitioner and Sri Y.M.S. Yadav, learned standing counsel for respondents.

2. Through this writ petition order dated 03.08.2010 passed by Deputy D.M., Patti Pratapgarh in Case No.40 under

Section 33/39 of U.P. Land Revenue Act, Shatrughan Tiwari and others Vs. Chandrashekhar and order dated 23.09.2013 passed by Additional Commissioner (II), Allahabad Division, Allahabad dismissing the Revision No.32 filed by the petitioner against the order dated 03.08.2010 have been challenged. Through the impugned orders, it has been directed that name of the petitioner recorded over the land in dispute should be cancelled and the land in dispute should be re-entered as Gaon Sabha land. Land was directed to be entered as naveen parti, jungle, pond, abadi. It was held that forgery had been committed and manipulation had been made in the revenue records. FIR was also lodged against the officials, who had made manipulation in the records.

3. However, the Deputy D.M. committed a blunder by not hearing the petitioner.

4. It is repeatedly directed by this Court that such type of orders shall not be passed without hearing the persons likely to be affected therefrom, however the Deputy Collectors are not paying any heed. In this regard reference may be made to the authority of Chaturgan Vs. State 2005 (98) RD 244 and Dina Nath Vs. State, 2009 (108) RD 321, which has been approved by Supreme Court in Dina Nath Vs. State, 2010 (15) SCC 218 (para-4). In future the court may consider to direct recording of adverse entry against the revenue officers, who pass such type of orders without hearing the persons concerned. However the Supreme Court in A.M.U. Aligarh Vs. M.A. Khan, AIR 2000 SC 2783 and Ashok Kumar Sonekar Vs. Union of India, 2007 (4) SCC 54 has held that if in a writ petition an order is challenged on the ground that opportunity of hearing was not provided then in the writ petition it must be shown that in case opportunity of hearing had been provided, what plausible cause the petitioner would have shown.

5. Petitioner's case is that D.D.C. Pratapgarh had passed an order in his favour on 24.03.1972 in Revision No.2138, Chandrashekhar Vs. Gaon Sabha, copy of which is Annexure-4 to the writ petition. In the said order, it is mentioned that earlier the revision had been dismissed on 24.01.1972, however review petition had been filed, which was allowed through order dated 24.03.1972. It is further mentioned in the said order that from the perusal of the record it was clear that the land in dispute was entered in the name of petitioner's father as bag bila lagan bhoomidhari and without any order, the said land was subsequently entered in the name of the Gaon Sabha. Annexure-3 to the writ petition is photostat copy of the revenue records of 1359 Fasli onward. On 26.11.2013, learned standing counsel was directed to produce original records. Accordingly, the records were produced on 28.11.2013 and shown to the learned counsel for petitioner also and photostat copies of relevant records were placed on record of this writ petition after providing one set to the learned counsel for petitioner also as recorded in the order dated 28.11.2013. It was more than apparent even to the naked eye that manipulation by addition of the name of Sataya Narain father of the petitioner had been made in the records. They were clearly in different ink and handwriting.

6. The most glaring aspect of the matter is that the order of the D.D.C. dated 24.03.1972 was not mutated for 15 years. Application for mutation was filed under

Rule 109 of U.P. Consolidation of Holdings Rules and order was passed on 09.01.1989. Thereafter, petitioner's name was mutated. In case petitioner's review had been allowed then there was absolutely no question as to why petitioner would have remained silent. Even in the report of Consolidator, copy of which is Annexure-7, it has categorically been stated that mutation of the alleged order of March 1972 was not there in C.H. Form-45 available in Tehsil. In case order dated 24.03.1972 had in fact been passed there was no reason that why it was not included and mentioned in C.H. Form-45. In any case if due to inadvertence it had not been in fact so incorporated, it is impossible that petitioner would have remained silent for 15 years.

7. It is experience of the court that in consolidation people are rather liberally manufacturing forged orders and seeking their implementation after several years. Accordingly, no such order can be presumed to have been passed unless application for its mutation is promptly filed. Records of the revision have been weeded out.

8. Last but not least a Full Bench of this court reported in Smt. Anar Kali Vs. D.D.C., 1997 (15) LCD 921 has held that D.D.C. has got no power to review.

9. As it was stark forgery and manipulation, hence impugned orders cannot be set aside on the ground of denial of opportunity of hearing. In any case in the writ petition petitioner has thoroughly been heard and original records have also been shown to his learned counsel as well as to the court.

10. The argument that in respect of abadi land, petitioner should not be evicted is also not acceptable as from the original records of 1359 Fasli, it is evident that over the said land also name of the petitioner's father was inserted much later fraudulently.

11. Accordingly, writ petition is dismissed. Petitioner shall be evicted forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2013

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 8125 of 1998

Kanpur Electricity Supply Co. Ltd..
..Petitioner
Versus
Deepak Sikroria & Anr..... Respondents

Counsel for the Petitioner:
Sri Arvind Kumar, Sri Nripendra Mishra

Counsel for the Respondents:
C.S.C., Sri S.N. Dubey

U.P. Industrial Dispute Act 1947-Section 33(c)(2)-Application for execution of realization of amount of award-already got finally by apex court-inspite of direction of court-in the term of award not complied-with letter and spirit-contention that computation of arrear of salary-amounts to adjudication of claim-not permissible under mode of execution-held-misconceived-direction for compliance of award with 9% interest-given.

Held: Para-21
The grievance of the workman was that even after 10 years, the award of the Labour Court and the order of the Supreme Court were not complied with in true letter and spirit but were complied with partly, therefore, he moved an application under Section 33C (2) of the Act, 1947 in respect of a claim,

which was already adjudicated upon by the Labour Court in Adjudication Case No. 105 of 1980. In view of the law laid down by the Supreme Court, it cannot be said that the present application filed by the workman under Section 33C(2) of the Act, 1947 was not based on existing right. In fact, his right has already been adjudicated upon by the Labour Court and the application moved by the workman under Section 33C(2) of the Act, 1947 was in respect of a claim, which has already been adjudicated by the Labour Court and upheld by the Supreme Court. Therefore, in my view, the submission of learned Counsel for the petitioner that the application under Section 33C(2) of the Act, 1947 was not maintainable as it was not in respect of the existing right, is not acceptable and the application of the workman was maintainable and it was in respect of an existing right

Case Law discussed:
(1964) 3 SCR 140; (2005) 8 SCC 58.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. This writ petition was initially filed by the Uttar Pradesh State Electricity Board through Kanpur Electricity Supply Administration. However, during pendency of the writ petition, there was reorganisation of the Electricity Board, therefore, with the permission of the Court, Kanpur Electricity Supply Company Limited through its General Manager has been substituted as the writ petitioner.

2. The writ petition is directed against the order and award of the Labour Court (I), U.P., Kanpur dated 15th December, 1997 passed in Misc. Case No. 115 of 1997, in proceedings under Section 33C(2) of the Industrial Disputes Act, 1947, whereby the respondent no. 1 has been awarded an amount of Rs.1,38,251/- as arrears of difference of pay in the pay scale of Stenographer Selection Grade with effect from 01st April, 1984 to 30th April, 1997.

3. The essential facts, as averred by the petitioner, are that the respondent no. 1-workman was initially appointed as Stenographer in the establishment of the petitioner on 16th November, 1976. In the year 1980, he raised an industrial dispute, being Adjudication Case No. 105 of 1980, claiming pay scale and designation of the Stenographer Selection Grade. The Labour Court allowed his claim. Aggrieved by the said order, the petitioner preferred Special Leave to Appeal (Civil) No. 6468 of 1981, which was dismissed by the Supreme Court and the award of the Labour Court was upheld. It is stated that in compliance of the order of the Supreme Court and the Labour Court, the petitioner vide order dated 31st October, 1985 implemented the award of the Labour Court and the respondent no. 1 was given the pay scale of Rs. 610-955, as revised from time to time. A copy of the order dated 31st October, 1985 has been brought on record as Annexure-1 to the writ petition. It is further stated that the respondent no. 1 was also given benefit of the Board's order dated 28th August, 1995, whereby pay scale of Rs.610-955 was revised to Rs.1650-2690. It is also stated that the respondent no. 1 was given all his dues in terms of the award of the Labour Court passed in Adjudication Case No. 105 of 1980.

4. The respondent no. 1, however, was not satisfied with the said order of the Board and he claimed that he was entitled for the grade/ pay scale of Rs.1850-2930 with effect from 01st April, 1984. It is

averred that on 21st September, 1989 the salary of the respondent no. 1 was re-fixed in the revised grade and the pay scale of Rs.1850-2930 was not admissible to him as it was given to the Stenographers attached to the Chief Engineer, Grade-I.

5. When the demand of respondent no. 1 for the pay scale of Rs.1850-2930 was not accepted, he moved an application under Section 33C(2) of the Industrial Disputes Act, 1947 (for short, the "Act, 1947") on 29th May, 1996, which was registered as Misc. Case No. 123 of 1996, before the Labour Court (I), U.P. at Kanpur. By means of said application, the respondent no. 1 claimed that he was entitled to the pay scale of Rs.1850-2930 with effect from 01st April, 1984 and Rs.2225-3500 with effect from 16th November, 1992 and thus, the amount due to him was Rs.84,795.50. A true copy of the application of the petitioner filed under Section 33C(2) of the Act, 1947 is on the record as annexure-6 to the writ petition. Subsequently, the respondent no. 1 moved a fresh application under Section 33C(2) of the Act, 1947 claiming a sum of Rs.1,38,251/-, on the basis of fresh calculation, along with 18% interest. This application was registered as Misc. Case No. 115 of 1997. A copy of the said application has been brought on record as annexure-7 to the writ petition. Against the application so moved by the workman, the petitioner filed its objection. Before the Labour Court, the petitioner got examined one Sri Ramesh Babu Sharma. A copy of his statement is annexure-10 to the writ petition. The Labour Court by the impugned order dated 15th December, 1997 has found that the claim of the respondent no. 1 is justified and accordingly, allowed the application of the petitioner, being Misc. Case No. 115 of 1997, and the petitioner has been directed to pay the respondent no. 1 a sum of Rs. 1,38,251/- within two months.

6. Dissatisfied with the aforesaid order of the Labour Court, the petitioner preferred this writ petition.

7. On 16th March, 1998, when this writ petition was entertained, an interim order was passed by this Court staying the operation of the impugned award subject to deposit of 25% of the awarded amount.

8. Respondent no. 1 has filed a counter affidavit, wherein it is stated that for grant of pay scale of Stenographer Selection Grade he had raised an industrial dispute, which was registered as Adjudication Case No. 105 of 1980, in the Labour Court (IV), U.P., Kanpur wherein award was made in favour of respondent no. 1 and it was held that he was entitled for the Stenographer Selection Grade.

9. It is noteworthy that at that point of time the pay scale admissible to the Stenographer Selection Grade was Rs.250-500 with effect from 01st April, 1969 and on the recommendation of the Anomaly Committee with effect from 01st April, 1969 it was revised to Rs.300-655, which was further revised to Rs.665-1130 with effect from 01st April, 1979 and not the pay scale of Rs.610-955. Pay scale of Rs.610-955 was the pay scale of Stenographer (Ordinary Grade) and not the Stenographer Selection Grade.

10. It is further stated in the counter affidavit that as a result of revision of the pay scale, the pay scale of Rs.665-1130

has been revised to Rs.1850-2930 with effect from 01st April, 1984. Thus, the respondent no. 1 was entitled for the pay scale of Rs.1850-2930 with effect from 01st April, 1984 and after completion of 9 years' service, he was entitled to first time-scale of Rs. 1800-3150 and after 16 years' service second time-scale of Rs.2225-3600 with effect from 16th November, 1992. It is also stated that the respondent no. 1, who is the senior-most, was attached to Sri K.K. Singh, Chief Engineer (G&D), Sri S.C. Chawla, Chief Engineer (Commercial), and Sri A.K. Mitra, Chief Engineer (Commercial)/C.B.S.C.. He has brought on record various orders in support of the said contention.

11. A supplementary counter affidavit has been filed by the respondent no. 1, wherein it is stated that when in spite of the order of the Supreme Court dated 30th September, 1985 the petitioner did not pay his dues in terms of the award passed by the Labour Court in Adjudication Case No. 105 of 1980, the respondent no. 1 approached the Supreme Court by filing Civil Misc. Petition No. 42952 of 1985 (Deepak Sikeria v. Area Manager, Kanpur Electricity Supply Admn. & anr.), which was disposed of on 15th September, 1987 on the statement of learned Counsel for the petitioner that payment shall be made within four weeks. It is further stated that when even after the order of the Supreme Court dated 15th September, 1987 the petitioner did not make the payment in terms of the award of the Labour Court, the respondent no. 1 had no other option but to move an application under Section 33C(2) of the Act, 1947 before the Labour Court (I). In fact, the order of the Supreme Court has been partly implemented and that too after nearly 10 years of passing of order by the Supreme Court. The Labour Court by the impugned order has rightly computed the benefits due to the workman in terms of the award and orders of the Supreme Court and allowed the application of the respondent no. 1-workman under Section 33C(2) of the Act, 1947 thereby directing the petitioner to make the payment of a sum of Rs.1,38,251/- to the respondent no. 1.

12. I have heard Sri Arvind Kumar, learned Counsel for the petitioner, and Sri S.N. Dubey, learned Counsel for the respondent no. 1-workman.

13. Learned Counsel for the petitioner submits that the application under Section 33C(2) of the Act, 1947 for grant of grade of Rs. 1850-2930 was not in respect of the existing claim and, as such, his application under Section 33C (2) was not maintainable.

14. Learned Counsel for the respondent no. 1 Sri Dubey submits that the respondent-workman was entitled for the designation of Stenographer Selection Grade with effect from 20th December, 1980, which was given to him by the Labour Court by means of the award passed in Adjudication Case No. 105 of 1980, which award was upheld by the Supreme Court. Though the pay scale of the Stenographer Selection Grade was revised from time to time, but the workman was not given benefit of the same in spite of being entitled. It has been further submitted that during the pendency of the present writ petition, the petitioner itself vide order dated 19th June, 2007 accepted the claim of the petitioner, as directed by the Supreme

Court, and by a subsequent order dated 23rd June, 2008 salary of the respondent no. 1 has been fixed in the pay scale of Rs.1850-2930 from 01st April, 1984. However, an illegal rider has been put in the order that no arrears will be paid. He further urged that the dispute is now confined for the period from 01st April, 1984 to 1997.

15. I have considered the respective submissions advanced by the learned Counsel appearing for the parties and perused the record. .

16. I find it helpful to extract Section 33C(2) of the Act, 1947, which reads as under:

"33C. Recovery of money due from an employer.--(1) **** ****

(2) Where any workman is entitled to receive from the employer any money or any benefit which is capable of being computed in terms of money and if any question arises as to the amount of money due or as to the amount at which such benefit should be computed, then the question may, subject to any rules that may be made under this Act, be decided by such Labour Court as may be specified in this behalf by the appropriate Government within a period not exceeding three months:

Provided that where the presiding officer of a Labour Court considers it necessary or expedient so to do, he may, for reasons to be recorded in writing, extend such period by such further period as he may think fit."

17. Scope of Section 33C(2) of the Act, 1947 is no more res integra as the Supreme Court in the long course of the judgements has settled the scope of said section. The Supreme Court in the case of The Central Bank of India Ltd. v. P.S. Rajagopalan etc., (1964) 3 SCR 140, has held as under:

"16. Let us then revert to the words used in s. 33C(2) in order to decide what would be its true scope and effect on a fair and reasonable construction. When sub-s. (2) refers to any workman entitled to receive from the employer any benefit there specified, does it mean that he must be a workman whose right to receive the said benefit is not disputed by the employer? According to the appellant, the scope of sub-s. (2) is similar to that of sub-s. (1) and it is pointed out that just as under sub-s. (1) any disputed question about the workmen's right to receive the money due under an award cannot be adjudicated upon by the appropriate Government, so under sub-s. (2) if a dispute is raised about the workmen's right to receive the benefit in question, that cannot be determined by the Labour Court. The only point which the Labour Court can determine is one in relation to the computation of the benefit in terms of money. We are not impressed by this argument. In our opinion, on a fair and reasonable construction of sub-s. (2) it is clear that if a workman's right to receive the benefit is disputed, that may have to be determined by the Labour Court. Before proceeding to compute the benefit in term of money the Labour Court inevitably has to deal with the question as to whether the workman has a right to receive that benefit. If the said right is not disputed, nothing more needs to be done and the Labour Court can proceed to compute the value of the benefit in terms of money; but if the said right is disputed, the Labour Court must deal with that

question and decide whether the workman has the right to receive the benefit as alleged by him and it is only if the Labour Court answers this point in favour of the workman that the next question of making necessary computation can arise. It seems to us that the opening clause of sub-s. (2) does not admit of the construction for which the appellant contends unless we add some words in that clause. The Clause "Where any workman is entitled to receive from the employer any benefit" does not mean "where such workman is admittedly, or admitted to be, entitled to receive such benefit." The appellant's construction would necessarily introduce the addition of the words "admittedly, or admitted to be" in that clause, and that clearly is not permissible. Besides, it seems to us that if the appellant's construction is accepted, it would necessarily mean that it would be at the option of the employer to allow the workman to avail himself of the remedy provided by sub-s. (2), because he has merely to raise an objection on the ground that the right claimed by the workman is not admitted to oust the jurisdiction of the Labour Court to entertain the workman's application. The claim under s. 33C(2) clearly postulates that the determination of the question about computing the benefit in terms of money may, in some cases, have to be preceded by an enquiry into the existence of the right and such an enquiry must be held to be incidental to the main determination which has been assigned to the Labour Court by sub-s. (2). As Maxwell has observed "where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution(1)." We must accordingly hold that s.33C(2) takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by their employers. Incidentally, it may be relevant to add that it would be somewhat odd that under sub-s.(3), the Labour Court should have been authorised to delegate the work of computing the money value of the benefit to the Commissioner if the determination of the said question was the only task assigned to the Labour Court under sub-s. (2). On the other hand, sub-s. 3 becomes intelligible if it is held that what can be assigned to the Commissioner includes only a part of the assignment of the Labour Court under sub-s. (2)."

18. In State of U.P. and another v. Brijpal Singh, (2005) 8 SCC 58, the Supreme Court has held as follows:

"10. It is well settled that the workman can proceed under Section 33-C(2) only after the Tribunal has adjudicated on a complaint under Section 33-A or on a reference under Section 10 that the order of discharge or dismissal was not justified and has set aside that order and reinstated the workman. This Court in the case of Punjab Beverages (P) Ltd. v. Suresh Chand2 held that a proceeding under Section 33-C(2) is a proceeding in the nature of execution proceeding in which the Labour Court calculates the amount of money due to a workman from the employer, or, if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. Proceeding further, this Court held that the right to the money which is sought to be calculated or to the

benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the industrial workman, and his employer. This Court further held as follows: (SCC p. 150, para 4)

"It is not competent to the Labour Court exercising jurisdiction under Section 33-C(2) to arrogate to itself the functions of an Industrial Tribunal and entertain a claim which is not based on an existing right but which may appropriately be made the subject-matter of an industrial dispute in a reference under Section 10 of the Act.""

19. Principles of law, which emanate from the above judgements, are that the proceedings under Section 33C(2) of the Act, 1947 are like execution proceedings. Right to money which is claimed by workman must be existing one. Therefore, there is no need to adjudicate the claim, only calculation is required to be done. In other words, Labour Court can only compute the money in terms of earlier adjudication.

20. In the case in hand, the workman had raised a dispute with regard to the pay scale of Stenographer Selection Grade. His claim was adjudicated upon in Adjudication Case No. 105 of 1980 by the Labour Court. The Labour Court in its award found that the workman, respondent no. 1 herein, was entitled for the pay scale of Stenographer Selection Grade. Aggrieved by the said award of the Labour Court, the petitioner preferred a Special Leave to Appeal (Civil) No. 6468 of 1981, wherein the award of the Labour Court was upheld. However, when despite that the petitioner did not comply with the order of the Supreme Court and award of the Labour Court, the respondent no. 1 approached the Supreme Court by filing Civil Misc. Petition No. 42952 of 1985, wherein, after hearing both the parties, on 15th September, 1987 the Supreme Court passed the following order:

"Shri Markandeya, learned counsel for U.P. State Electricity Board makes a statement at the Bar that the Board shall in compliance with this Court's order dated September 30, 1983, pay to the petitioner whatever is due on account of the salary and allowances payable to him as a Stenographer, Selection Grade, with effect from October 7, 1983. The payment shall be made within 4 weeks from today. C.M.P. is disposed of accordingly."

21. The grievance of the workman was that even after 10 years, the award of the Labour Court and the order of the Supreme Court were not complied with in true letter and spirit but were complied with partly, therefore, he moved an application under Section 33C (2) of the Act, 1947 in respect of a claim, which was already adjudicated upon by the Labour Court in Adjudication Case No. 105 of 1980. In view of the law laid down by the Supreme Court, it cannot be said that the present application filed by the workman under Section 33C(2) of the Act, 1947 was not based on existing right. In fact, his right has already been adjudicated upon by the Labour Court and the application moved by the workman under Section 33C(2) of the Act, 1947 was in respect of a claim, which has already been adjudicated by the Labour Court and upheld by the Supreme Court. Therefore, in my view, the submission of learned Counsel for the petitioner that the application under Section 33C(2) of the Act, 1947 was not maintainable as it was not in

respect of the existing right, is not acceptable and the application of the workman was maintainable and it was in respect of an existing right.

22. Relevant it would be to mention that before the Labour Court the respondent no. 1 had moved an application dated 25th September, 1997 to summon certain orders of the petitioner. But in spite of the order having been passed when the documents were not produced, the respondent no. 1 had filed photocopies of the said orders before the Labour Court. The Labour Court after perusal of the order of the petitioner dated 10th January, 1977 found that the pay scale of the Stenographer Selection Grade was Rs.300-655 with effect from 01st April, 1969, which was revised to Rs.540-900 with effect from 01st April, 1974. Again it was revised to Rs.656-1121 and thereafter Rs.665-1130 with effect from 01st April, 1979. Thereafter, vide Board's order dated 28th August, 1995 it was revised to Rs.1850-2930. The Labour Court has recorded that the employer/petitioner did not file any documentary evidence to establish its claim that the pay scale of the Stenographer Selection Grade was Rs.485-755. It has also recorded the statement of the only witness produced by the employer, namely, Sri Ramesh Babu Sharma, who deposed that he did not know any fact with regard to previous award of the Labour Court and the order of the Supreme Court. He also could not satisfy the Labour Court that why the papers summoned by the Court on the application of the respondent no. 1-workman were not produced. There is a recital in the impugned order that said witness of the employer admitted in his deposition that the pay scale of Rs.665-1130 was revised to Rs.1850-2930. The Labour Court has, thus, on the basis of documents and oral evidence, recorded a finding of fact about the revision of pay scale of the Stenographer Selection Grade to Rs.1850-2930.

23. Learned Counsel for the petitioner failed to point out any infirmity in the findings recorded by the Labour Court.

24. In view of the aforesaid facts and circumstances of the case, I am of the view that there is no error in the impugned order and award of the Labour Court to warrant any interference under Article 226 of the Constitution of India. Accordingly, the award of the Labour Court is upheld. The petitioner is directed to make the payment in terms of the award passed by the Labour Court within three months from the date of communication of this order. The respondent no. 1 shall be entitled for interest @ 9% from the date of award till the payment is actually made to him. Needless to say that the amount received by the respondent no. 1 in compliance with the interim order of this Court dated 16th March, 1998 shall be adjusted.

25. Thus, the writ petition fails and is hereby dismissed.

26. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2013

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ASHOK PAL SINGH

Misc. Bench No. 10533 of 2013
and Misc. Bench No. 10529 of 2013.

Dr. Kailash Singh & Ors.... Petitioners
Versus
State of U.P. and Ors. ..Respondents

Counsel for the Petitioners:
Sri Anurag Kumar Singh

Counsel for the Respondents:
C.S.C., Sri Gaurav Mehrotra, Sri Sanjay Bhasin

Constitution of India, Art.-226-Interference by anti social elements-petitioner being allottee from L.D.A.-restrained by anti-social elements-from raising construction-allotment not disputed-suggestion of intervener regarding plots to be covered by water reservoir-denial by Development Authority-held-development authority and housing board-bound to provide protection by appointing Nodel officers-further consequential guidelines given.

Held: Para-14
Considering the problems with regard to interference by the anti social elements or alike persons with the property of lawful allotttess to secure the public interest, it is necessary to issue directions so that it may not be necessary for a citizen to approach this court again and again for an incident that he/she is stopped with the construction work by a person or group of persons over his/her land.

Case Law discussed:
AIR 2001 SC 3215; 2013 LCD 2048.

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

1. Affidavits have been exchanged between the parties.

2. Heard learned counsel for the parties and perused the record.

3. These two writ petitions have been preferred under Article 226 of the Constitution with the common reliefs, hence, with the consent of learned counsel for the parties, they are being decided by this common Judgment and order at admission stage.

4. Admittedly, the petitioners have been allotted plots/land by the Lucknow Development Authority and U.P. Housing Board, Lucknow. After allotment of the plots/land, the petitioners have applied for sanction of maps. The Lucknow Development Authority and the U.P. Housing Board Board, Lucknow have sanctioned the maps of the petitioners in accordance to rules and thereafter, the petitioners visited their sites for starting construction work. They were stopped to raise constructions by certain persons including the Members of Kissan Union and some villagers of the vicinity. Feeling aggrieved, the petitioners have approached this court under Article 226 of the Constitution of India by filing the instant writ petitions.

5. Learned counsel for the Development Authorities(Lucknow Development Authority as well as U.P. Housing Board, Lucknow) do not dispute that the petitioners are the lawful allottees of the plots and their maps have been sanctioned for construction of permanent structure over the land allotted to them.

6. In pursuance of the order passed by this court, Sri J. Ravindir Goud, Senior Superintendent of Police, Lucknow, has filed an affidavit and has brought on record that seven persons have submitted the complaints with the grievance that they have been stopped to raise constructions by the Members of Bhartiya Kissan Union. These seven persons are namely, Sri Susheel Kumar, Sri Janki Prasad, Sri Mahesh Pal, Sri Ajay Kumar Saxena, Sri Jamal Ahmad, Sri Himanshu Gupta and again Sri Himanshu Gupta.

7. The Senior Superintendent of Police, Lucknow has pointed out that Members of the Bhartiya Kissan Union have stopped the lawful allottees to raise constructions over their plots. In some of

the cases, matter has been settled, but, in other cases, the dispute is still under discussion.

8. Sri Anurag Yadav, District Magistrate, Lucknow has also filed an affidavit pointing out similar problems where the allottees have been prevented to raise constructions over their land which have been allotted to them by the Development Authorities or the Housing Board.

9. On the other hand, Mohd. Abid Ali, learned counsel appearing as an intervenor in Writ Petition No. 10533 (M/B) of 2013 submits that the plots allotted to the petitioners are water body, reservoirs or pond and they should be maintained in the same capacity as they exist, by the development authorities in view of law laid down by the Apex Court in the case reported in AIR 2001 SC 3215, Hinch Lal Tewari Vs Kamla Devi and Others.

10. So far as the argument advanced by Sri Abid Ali, learned counsel for the intervenor that the development authorities cannot allot the plots while preparing the lay out plans of the area which is a water body reservoir or a pond in terms of revenue record in view of law laid down by the Apex Court in the case of Hinch Lal Tewari(Supra) is concerned, seems to be correct. It is the duty of the developments authorities to maintain them in the same form as a part of public recreation centres or picnic spot.

11. Lucknow Development Authority, Lucknow while filing the Counter Affidavit has denied that the plots allotted to the petitioners of the writ petition no. 10533(M/B) of 2013 are water reservoir or ponds which has been refuted by Sri Abid Ali, learned counsel for the intervenor by filing an affidavit. Whether the plots allotted to the petitioners are water reservoirs or ponds, is a disputed question of fact which requires thorough probe.

12. Now, coming to first limb of argument of learned counsel for the the petitioners that lawful allottees have been prevented by Members of a certain union/association or person to raise constructions over the land allotted to them is concerned, is a matter of deep concern for this court. In case, the lawful allottees are prevented by some persons by use of muscle power or mobism, then, it shall be antithesis of the rules of law.

13. The report sent by the Senior Superintendent of Police, Lucknow also reveals that at different places, Members of Bhartiya Kissan Union have tried to prevent the construction of lawful allottees. Identical writ petitions have also been filed in this court from time to time, where the lawful allottees have been prevented to raise constructions on the basis of sanctioned plan by a group of persons or by some anti-social elements or by politically associated persons. Right to peaceful enjoyment of property is a fundamental right conferred to a citizen subject to statutory and constitutional limitation as held by the Division Bench of this court in the case reported in 2013 LCD 2048, Shree Narayan Singh Versus State of U.P. & Others. Accordingly, once a plot or land is allotted by Development Authority to a citizen and he/she wants to raise constructions over it in pursuance of the sanctioned plan and statutory limitation, then no person has right to interfere with such construction. It appears that in the district of Lucknow, it is a routine feature where the

constructions are stopped by a group of private persons or associations/union interfering with the rights to enjoyment of the property of lawful allottees. The government must deal strictly with such anti social elements. The Senior Superintendent of Police, Lucknow must ensure that the lawful allottees are permitted to raise constructions in pursuance of the sanctioned plan and appropriate task force must be constituted by the district administration to deal with such situation for ensuring that the citizens may enjoy their properties which have been allotted to them in accordance to law.

14. Considering the problems with regard to interference by the anti social elements or alike persons with the property of lawful allotttess to secure the public interest, it is necessary to issue directions so that it may not be necessary for a citizen to approach this court again and again for an incident that he/she is stopped with the construction work by a person or group of persons over his/her land.

15. We have been informed by learned Standing Counsel that nodal officers have been appointed to look into such matters, but, we feel that the nodal officers have failed to discharge their obligations except indulging into negotiations with the persons who interfere with the constructions of the houses of the lawful allotttees and keep the matter pending for an indefinite period. Accordingly, we dispose of both the writ petitions finally with the following directions :-

1. The District Magistrate/Senior Superintendent of Police, Lucknow shall constitute a Task Force containing sufficient number of persons of Arm Forces like P.A.C. headed by the Sub. Divisional Magistrate and a Deputy Superintendent of Police to deal with such complaints where any person/ association or union interferes with the construction work raised by lawful allottee in the city or district of Lucknow. More than one Task Force may be established to meet out the requirement in the district. The Senior Superintendent of Police, Lucknow shall appoint a police officer not below the rank of Additional Superintendent of Police to monitor the functioning of the Task Force so constituted. District Magistrate Lucknow shall nominate an Additional District Magistrate to provide necessary assistance.

2. Whenever, a complaint is received that Lucknow Development Authority or U.P. Housing Board has allotted a plot which is a water reservoir or is a pond, then respective Development Authority or Housing Board, shall look into such complaint and in case, in the revenue record, it is found that the said plot is a water reservoir or a pond, then alternative accommodation shall be provided to such allottee immediately say within a period of two months after recording the finding with due communication to the complainant. The Development Authority or the Housing Board, Lucknow shall appoint an officer to look into such complaints to decide whether the plot allotted to an allottee is a water reservoir or a pond in the revenue record or not. Opportunity of hearing shall be provided to the complainant.

3. Right of a citizen to protest against unlawful action of development authority is a fundamental right, but, that protest may be made at appropriate place (not at the allottted plot or vicinity) without

disturbing the peace and tranquility of the society and also without interfering with the right of a peaceful enjoyment of the property by a lawful allottee.

4. Whenever, a complaint is received that the lawful allottee intending to raise construction over the premises in pursuance of the sanctioned plan is being prevented by anti-social elements or person or a group of persons or by an association, the Task Force so constituted shall ensure to remove such hurdle and shall further ensure that lawful allottee is permitted to raise construction over the plot in pursuance of the sanction plan and requisite number of police force shall be deployed for the security of the allottee during the construction work, if necessary. It shall be open to police to register F.I.R. & proceed in accordance to law against disturbing elements.

16. Let Lucknow Development Authority as well as U.P. Housing Board Lucknow appoint a nodal officer to receive complaints to adjudicate the controversy in terms of the directions issued hereinabove with regard to ponds and water reservoirs within a period of one month and also issue appropriate directions or circulars accordingly.

17. The District Magistrate/Senior Superintendent of Police, Lucknow shall also pass appropriate directions/circulars for constituting the Task Force in terms of the directions issued hereinabove within a period of one month.

18. Let a compliance report be submitted to this court immediately after one month.

19. With the consent of learned counsel for the parties and directions issued hereinabove, both the writ petitions are decided finally.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2013

BEFORE
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE SUNEET KUMAR, J.

Civil Misc. Writ Petition No.18432 of 2010 alongwith W.P. No. 64382 of 2010, W.P. No. 21802 of 2010, W.P. No. 21928 of 2010,W.P. No. 27009 of 2010, W.P. No. 27010 of 2010; W.P. No. 28407 of 2010.

Shanti Dham School & Anr... .Petitioners
Versus
State of U.P. and Ors. ..Respondents

Counsel for the Petitioners:
Sri Bajrang Bahadur Singh

Counsel for the Respondents:
C.S.C.

Motor Vehicle Act-1988-Section 68(1)-Power of State Transport Authority-fixation of age limit-of transport vehicle-used for transportation of students-held-proper-in absence of allegation for violation of Art. 14-can not be interfered-keeping the security of passengers and to control pollution.

Held: Para-30
Here in the present case also as far as this Court is concerned it will not at all come to the rescue or reprieve of the petitioner by directing the Respondents not to fix age of vehicle at the point of time of issuance of permit/continuance of permit, as condition of permit, as challenge made is unsustainable for the reasons already mentioned above, the same being in the realm of policy decision for securing safety of passenger and control pollution.

Case Law discussed:
AIR 1980 SC 800; 1995 AWC 890; AIR 1995 Kar 264; 2002(2) ACC 293(Cal); W.P. No. 46190 of 2003; W.P. No. 19461 of 2010; W.P. No. 58181 of 2010; W.P. No. 19461 of 2010; W.P. No. 46190 of 2003; W.P. No. 26114 of 2011; W.P. No. 9950 of 2013.

(Delivered by Hon'ble V.K. Shukla, J.)

1. In this bunch of writ petitions, petitioners have come up with the following relief:

"(i) Issue a writ, order or direction in the nature of certiorari quashing the impugned circular no. 433-STA/2010-58STA/2007 dated 5.3.2010 issued by respondent no. 2 and order/direction dated 19.03.2010 issued by respondent no. 3 contained as (Annexure no 1 & 2 respectively) to the writ petition.

(ii) Issue a writ, order or direction in the nature of mandamus directing the respondent no. 4 to not interfere in the peaceful operation of the school buses of the petitioners which are being plying to carry the children.

(iii) Issues any other writ, order or direction which this Hon'ble Court may deem fit and proper under circumstances of the case."

2. Writ No. 18432 of 2010 is being treated as leading writ petition.

3. Petitioners of the leading writ petition have come up with case that the purposes of providing easy and fair transportation facilities to the students of the institution the petitioners have obtained permits for operation of their vehicle No. MP-17A-2964 Model 1994, U.P. 95-6979, Model 1991, MP-16-A-7475 Model 1998), DL-1P-2778 Model 1992, MP-36-P-0120 Model 1998, MP-16-A-0711 model 1992, U.P. 75-7886 Model 1992, U.P. 07-B-6754 Model 1992 & HR 26-A-1148 model 1992, U.P. 78-B-6327 Model 1992, U.P. 78-B-6551 Model 1992, M.P.16-A-1163 Model 1992, DL-1P-3900 Model 1992. Petitioners have proceeded to mention that meeting of the State Transport Authority had been held on 23.02.2010 for fixation of age of transport vehicles State Transport Authority took decision for fixation of age limit of the transport vehicles in question in the backdrop of road saftey, pollution free transport facility, passenger facility. Thereafter minutes of the meeting dated 23.02.2010 has been circulated by secretary, State Transport Authority in respect of fixation of age of vehicle in question vide circular notice dated 05.03.2010, addressed to each Regional Transport Authority provided therein respective age of vehicles, in respective regions and respective cities in exercise of authority conferred under Sub-Section (4) of Section 68.

4. Petitioners at this juncture are before this Court and their submission is that fixation of age of vehicles in question is totally arbitrary and without any foundation and basis.

5. Courter affidavit has been filed and therein stand has been taken that Motor Vehicle Act, 1939 has been amended by Act No. 59 of 1988 and the said Act in question came in force with effect from 1st April 1989 replacing the Motor Vehicle Act, 1939 and the amendment in the aforesaid Act has been made to reduce the vehicle pollution and in order to ensure safety of the road user. Earlier to amendment of Act, 27 of 2000 requirement of obtaining Permits for educational institution buses was not mandatory but after enforcement of

amendment Act, 27 of 2000, same has become mandatory. It has also been stated that re-scheduling of the age of motor vehicle has been introduced with the aim and object to maintain the environmental condition and in public interest. State Transport Authority has fixed the said condition for the purpose of grant of permit for use of particular vehicle for a particular period, in the interest of road safety, benefit and security of passengers and students as well as the pollution free transportation system, and accordingly there is no infirmity in the action taken.

6. Rejoinder affidavit has also been filed appending therein copy of the judgment and order of State Transport Authority in Revision No. 20 of 2010 with connected revisions.

7. After pleadings mentioned above have been exchanged present writ petition in question has been taken up for final hearing and disposal.

8. Learned counsel for the petitioners submitted with vehemence that petitioners are running school buses and State Transport Authority has acted with material illegality in fixing different age of the vehicle without considering road worthiness of the vehicle in question and fixation of age of vehicle has no nexus with the object sought to be achieved accordingly the order in question be quashed and petitioner be permitted to ply their buses upto the age of 20 years.

9. Countering the said submission, learned Standing counsel on the other hand contended that petitioners cannot be permitted to ply their vehicles beyond the prescribed age as described in the policy decision that has been taken by the State Transport authority and specially when its a conscious decision based on road safety, safety of students, pollution free traffic and as larger interest is being served, this Court should not at all interfere as same is virtually in the realm of policy decision.

10. First issue is to be answered by this Court is as to whether State Transport Authority has transgressed and overstepped its authority in issuing Circular dated 05.03.2010 at the point of time when it proceeds to fixed age of buses run by the institution concerned.

11. The first enactment relating to motor vehicles in India was the Indian Motor Vehicles Act, 1914. Said Act has subsequently been replaced by Motor Vehicle Act, 1939. The Act of 1939 had been amended several times. In spite of several amendment, it was felt necessary to bring out comprehensive legislation keeping in view the change in transport technology, pattern of passenger and freight movement, development of road network in the country and particularly the improved techniques in the motor vehicles management. In this direction lot of homework was done by Ministry of Transport, by discussing the matter with the Transport Minister of all States and Union Territories, and then Bill had been introduced in the Parliament, with the view to provide an Act to consolidate and amend law relating to motor vehicles, known as Motor Vehicle Act, 1988. After the said Act in question has been enforced, on various occasions amendments have been introduced namely Motor Vehicles (Amendment) Act, 1994; Motor Vehicles (Amendment) Act, 2001.

12. For the purposes of the case in hand, this Court takes note that under the definition Clause, sub-section (ii) of Section 2 defines "educational institution bus" means

an omnibus, which is owned by a college, school or other educational system and used solely for the purpose of transporting student or staff of educational institution in connection with any of its activities. Chapter v deals with control of transport vehicle and Section 66 (1) restricts use of vehicle as transport vehicle in any public place without the permit and if permit is there, then strictly as per the terms and condition of permit. Earlier for school buses, there was no requirement of permit, but by means of amendment introduced by Act No. 27 of 2000, even school bus is required to have a permit. Power to grant permit is conferred in transport authority. Under Section 68 (1) State Government is empowered to constitute for the State, State Transport Authority to exercise and discharge, the powers and functions specified in sub-section (3) and in like manner constitute Regional Transport Authorises. Section 68(3) obligates State Transport Authority and every Regional Transport to effect to any directions issued under section 67, alongwith various other functions. For the purposes of exercising and discharging the power and functions under sub-Section (3), State Transport Authority, may issue directives to "Regional Transport Authority and he is obliged to ensure its compliance.

13. In order to consider the question as to whether the Regional Transport Authority, while granting permits can impose condition for grant of permit i.e. can he fix the age of the vehicle in question. Section 68 (3) and (4) of the Act, 1988 being relevant for the present case are being extracted below:

"68.Transport Authorities-
(1).....
(2).....

(3) The State Transport Authority and every Regional Transport Authority shall give effect to any directions issued under section 67 and the State Transport Authority shall, subject to such directions and save as otherwise provided by or under this Act, exercise and discharge throughout the State the following powers and functions, namely :-

(a) to co-ordinate and regulate the activities and policies of the Regional

Transport Authorities, if any, of the State ;

(b) to perform the duties of a Regional Transport Authority where there is no such Authority and, if it thinks fit or if so required by a Regional Transport Authority, to perform those duties in respect of any route common to two or more regions;

(c) to settle all disputes and decide all matters on which differences of opinion arise between Regional Transport Authorities;

[(ca) Government to formulate routes for plying stage carriages; and]

(d) to discharge such other functions as may be prescribed.

(4) For the purpose of exercising and discharging the powers and functions specified in sub-section (3), a State Transport Authority may, subject to such conditions as may be prescribed, issue directions to any Regional Transport Authority, and the Regional Transport Authority shall, in the discharge of its functions under this Act, give effect to and be guided by such directions."

14. Under Section 68 (3) of the Act, 1988, as noted and quoted above State

Transport Authority subject to the directions issued by the State Government under Section 67 shall exercise and discharge throughout the State the functions and powers as enumerated in sub-section (3) and one of the major functions provided for in sub-section (3) is to co-ordinate and regulate the activities and policies of the Regional Transport Authorities of the State.

15. Apex Court in the case Subhash Chandra & Ors. Vs. State of U.P. & Ors, reported in AIR 1980 SC 800 in alike circumstances had occasion to consider a condition in Section 51(2) (x) of the Motor Vehicles Act, 1939 to the effect that vehicle should not be more than seven years of age from the date of registration during the validity of permit. The above provision was challenged. The Apex Court upheld the said condition by taking following view:

"4. Section 51(2) (x) authorises the imposition of any condition, of course, having a nexus with the statutory purpose. It is undeniable that human safety is one such purpose. The State's neglect in this area of policing public transport is deplorable but when it does act by prescribing a condition the court cannot be persuaded into little legalism and harmful negativism. The short question is whether the prescription that the bus shall be at a seven-year old model one is relevant to the condition of the vehicle and its passengers' comparative safety and comfort on our chaotic highways. Obviously, it is. The older the model, the less the chances of the latest safety measures being built into the vehicle. Every new model incorporates new devices to reduce danger and promote comfort. Every new model assures its age to be young, fresh and strong, less likely to suffer sudden failures and breakages, less susceptible to wear and tear and mental fatigue leading to unexpected collapse. When we buy a car or any other machine why do we look for the latest model? Vintage vehicles are good for centenarian display of curios and cannot but be mobile menaces on our notoriously neglected highways. We have no hesitation to hold, from the point of view of the human rights of road users, that the condition regarding the model of the permitted bus is within jurisdiction, and not to prescribe such safety clauses is abdication of statutory duty."

16. Thereafter before the Division Bench judgment of this Court in the case of Radhey Shyam Sharma Vs. Regional Transport Authority, Kathgodam, Nainital, reported in AIR 1991 Alld 158, Rule 88 of Central Motor Vehicles Rules, 1989 which provided that motor vehicle covered under permit should not be more than 9 years old with regard to national permit came up for consideration. The model condition of the aforesaid rule was challenged and the Division Bench of this Court upheld the vires of the rules and also the condition. Relevant extract of the said judgement is as follows:

"22. In view of the reports mentioned above and for the reasons given in the counter-affidavit, Government was fully justified in fixing the age/model condition of nine years of vehicles for use under national permit and it cannot be said that there was no reasons or material with the Government for framing the impugned rules. In fact from the perusal of the aforesaid reports and the reasons given in the counter-affidavit of the Government, we are satisfied that the Government was

fully justified in fixing the age limit of nine years of a vehicle for operation under national permit."

The copy of the circular dated 05/3/2010, issued by the STA on the basis of the resolution dated 23/2/2010, issued in exercise of power under Section 68(4) of the Act, 1988 has been brought on record as Annexure SCA-1

17. Thereafter yet another Division Bench of this Court in the case of Smt. Munni Devi Vs. Regional Transport Authority, Meerut & Ors reported in 1995 AWC 890,. wherein, the R.T.A., Meerut while granting permit has put a condition that not more than 10 years old vehicles be provided. The said condition was assailed by stage carriage permit holders. This Court took the view that the STA can issue direction regarding fixation of age of vehicles. Even grant of permit by the R.T.A of the vehicle owners having 10 years old vehicles was upheld. Relevant extract of the said judgement is as follows:

"6.State Transport Authority, Lucknow (hereinafter referred to as S.T.A.) has fixed the model condition of twenty years for vehicles to be placed under stage carriage permits with the result that an operator is entitled to ply a vehicle which is not more than twenty years old. S.T.A. has also, in this connection, issued direction on 9.3.1993 under sub-section (4) of Section 68, to all the R.T.A.s. in this State requiring them to impose only twenty years model condition for plain routes and ten years model condition for hill routes. These directions have been issued by the S.T.A. in view of the difference of opinion on the question of model condition between the R.T.As. in this State. There is no dispute that S.T.A. can issue such a direction. Direction issued by S.T.A. under the above provisions is binding on the R.T.A. which is to "give effect to and be guided by such directions". R.T.A. while granting permits by the impugned resolution has referred to the aforesaid directions of S.T.A. and was conscious of the fact of fixation twenty years model condition by it and, therefore, it has not fixed any model condition contrary to that fixed by S.T.A. What it has done is that it has granted permits to persons holding vehicles of not more than ten years old. Fixing the model condition and granting permits to better models are two different things. By model condition, the maximum period upto which a vehicle can be used as a stage carriage under a permit is fixed. Without transgressing the model condition, it is always open to the transport authorities to grant permits to those applicants who have vehicles of better model. Such a condition is in the interest of travelling public. The order of the R.T.A. thus is not contrary to the direction issued by the S.T.A."

18. Even the other High Courts, faced with such a situation has been taking the same view, that such condition of prescribing age for vehicle, can be imposed while granting stage carriage permit. Karnataka High Court in the case of Bharat Kumar Vs. Karnataka State Transport Appellate Tribunal, AIR 1995 Kar 264, took the view that even in the absence of rules, conditions could be prescribed in the permit and such conditions are reasonable and such power to impose condition is traceable to the provision of Act itself. The expression "Specified description" used in Section 72 (2) of 1988 Act is similar to expression used

in Section 48 (3) of 1939 Act. Specified description of stage carriage is not confined to its class or make but same includes the year of manufacture also. Calcutta High Court also in the case of Prasanna Kumar Dua Vs. State of West Bengal 2002 (2) ACC 293 (Cal) has taken the view that Transport Authorities are well within their authority to impose condition not to grant stage carriage permit to vehicles which are more than three years old from the date of initial registration for security safety of passengers and to control pollution.

19. State Transport Authority under the scheme of things provided for has ample authority to fix age of vehicles to be placed under "stage carriage" permits, and issue necessary directive in the said direction to Regional Transport Authorities, who are duty bound to give effect to and be guided by such directions. In view of this Regional Transport Authority being bound by the directive of State Transport Authority, at the point of time, when he proceeds to issue permit, as one of the conditions of permit, can provide for the age of vehicle in question. Such power to impose condition is traceable and referable to the provisions and the scheme of Act itself, and it cannot be said that such power is exercised by the authority beyond its competence or beyond its jurisdiction.

20. In the present case, this much is clear that Circular dated 05.03.2010 has been issued by the Secretary State Transport Authority on the basis of resolution dated 23.02.2010 issued in exercise of the authority vested under Section 68 (4) of the Act. The circular in question clearly reflects that same deals with specially in respect of school bus by mentioning that for school bus, the security measures and passengers facilities has to be better as compared to other passenger vehicle. As to what should be age fixed for school bus in question, the same has been distinctly dealt with qua the other category passenger bus, and resolve has accordingly been taken. In rural are a age of school bus without CNG has been fixed as 12 years and in urban area without CNG has been fixed as 10 years. Similarly in urban area, age of school bus with CNG has been fixed 12 years and in rural area with CNG has been fixed as 15 yeas. Once no disparity is there, and there is total uniformity, in the matter of fixation of age of bus, in the entire state qua rural area and urban area then said action cannot be faulted. State Transport Authority has neither transgressed nor over stepped its jurisdiction in fixing age of school bus to be placed under stage "carriage permits" for securing safety of students and to control pollution.

21. This Court would be failing in its duty by not taking note of the order passed in Civil Misc. Writ Petition No. 46190 of 2003 (Ram Prakash and others Vs. State of U.P.) wherein this Court had issued following direction.

" The Secretary, Regional Transport Authority shall issue permit to the petitioner after verifying the fact that the petitioner has a vehicle which is roadworthy and fit in condition. He will ensure that the vehicle which is owned by petitioner is of the model which is within period of 20 years"

22. This Court finds, that the order that had been passed in the year 2003, on 15.10.2003 is being followed bereft of the order of State Transport Authority dated 05.03.2010, impugned in the present writ

petition. The said order has been followed in the following writ petitions. Civil Misc. Writ Petition No. 19461 of 2010, Sri Guru Ram Rai Public School Vs.State of U.P. decided on 09.04.2010 wherein following orders have been passed:

Hon'ble Askok Bhushan,J.
Hon'ble Virendra Singh, J

After hearing the learned counsel for the petitioner and the learned standing counsel, we dispose of this petition in terms of the judgement and order of this Court dated 15.10.2003 passed in Civil Misc. Writ Petition No. 46190 of 2003 (Ram Prakash and another Vs. State of U.P. and others) wherein this Court had issued the following direction:-

"The Secretary, Regional Transport Authority, respondent No.3 shall issue permit to the petitioner after verifying the fact that the petitioner has a vehicle which is roadworthy and fit in condition. He will also ensure that the vehicle which is owned by the petitioner is of the model which is within the period of 20 years."

Order Date: 9.4.2010

23. This Court in Civil Misc. Writ Petition No. 29567 of 2010 decided on 21.05.2010 passed following orders:

Hon'ble Vineet Saran, J
Hon'ble Ran Vijai Singh,J

After hearing the learned counsel for the petitioner and the learned standing counsel, we dispose of this petition in terms of the judgement and order of this Court dated 15.10.2003 passed in Civil Misc. Writ Petition No. 46190 of 2003 (Ram Prakash and another Vs. State of U.P. and others) wherein this Court had issued the following direction:-

"The Secretary, Regional Transport Authority, respondent No.3 shall issue permit to the petitioner after verifying the fact that the petitioner has a vehicle which is roadworthy and fit in condition. He will also ensure that the vehicle which is owned by the petitioner is of the model which is within the period of 20 years."

Dt. 21.5.2010

24. This Court in Civil Misc. Writ Petition No. 58181 of 2010 (Vikash Modern School Vs. State of U.P. and others) decided on 21.09.2010 passed following orders;

Hon'ble Amitava Lala, J
Hon'ble Askok Srivastava,J

After hearing the learned counsel for the petitioner and the learned standing counsel, we dispose of this petition in terms of the judgement and order of this Court dated 15.10.2003 passed in Civil Misc. Writ Petition No. 46190 of 2003 (Ram Prakash and another Vs. State of U.P. and others) wherein this Court had issued the following direction:-

"The Secretary, Regional Transport Authority, respondent No.3 shall issue permit to the petitioner after verifying the fact that the petitioner has a vehicle which is roadworthy and fit in condition. He will also ensure that the vehicle which is owned by the petitioner is of the model which is within the period of 20 years.

No order is passed as to cost

Order dated 21.09.2010

25. Based on various order passed by this Court, and the said order being impugned before the Tribunal, State Transport Authority proceeded to place the impugned resolution of the present writ petition in abeyance on 14.06.2010 for period of one year or till the matter is decided by the Court, whichever is earlier. The travesty of justice is also fully reflected from the circumstances and the fact, that the Tribunal in stead of deciding the matter on merits, in its order dated 08.10.2010, has proceeded to mention that judgment of this Court in Writ Petition No. 19461 of 2010 Sri Guru Ram Rai Public School Vs. State of U.P. has been produced before him wherein judgment in writ petition no. 46190 of 2003 Ram Prakash Vs. State of U.P. has been relied upon and the above mentioned order of High Court is applicable to Revisions therefore, Revisions before him and are allowed. The fact of the matter is that validly of resolution on its merit has not at all been gone into.

26. Revision before the State Transport Appellate Tribunal U.P. at Lucknow alongwith bunch of Revision has been decided on 08.10.2010 by proceeding to make following observations:

"Revisions are allowed. Impugned orders are set aside. It is hereby directed that the age limit for the stage carriage plying on various routes:single storied vehicles shall be 20 years and for non-C.N.G. city bus shall be 15 years and for C.N.G. city bus shall be 12 years as existed before 23.2.2010. However, the age limit for C.N.G. vehicles in Ghaziabad shall be 15 years.

Record received from the lower authorities be sent back to their offices.

A copy of this judgment be kept on the record of each of Revisions Nos.21/2010 to 41/2010, 43/2010 to 64/2010, 69/2010, 99/2010, 100/2010, 104/2010,107/2010 to 158/2010,175/2010 to 177/2010 & 199/2010 and the original judgment be retained on the record of Revision No.20/2010.

Sd/-illegible

8.102010

(Suresh Kumar Srivastava) Chairman".

27. Decision taken in the Revision by the State Transport Appellate Tribunal U.P. at Lucknow was confined only in reference of single storied vehicles, Non-C.N.G vehicles city buses, C.N.G vehicles city buses, and at no point of time before the State Transport Appellate Tribunal U.P. at Lucknow there has been an issue in respect of school buses and the net effect of the same is that as far as school buses are concerned there age has to be dealt with as per the criteria as has been provided therein.

28. In the case of Mahraj Uddin and others Vs. State of U.P. and others (Civil Misc. Writ Petition No. 26114 of 2011) decided on 26.05.2011, this Court has been dealing the incumbents who have been plying their three wheeler within the municipal limit, in such a situation this Court proceeded to pass following orders :

"In view of the foregoing discussions and conclusions, we dispose of this writ petition with the following directions:

1.The S.T.A. is fully justified to put model condition regarding age of vehicles (including three wheeler).

2.The decision of the STA dated 23/2/2010, which is the basis for putting model condition in the petitioners permit

that vehicles are to be changed after 5 years, having been set-aside, the period of 5 years in the model condition in the permits of the petitioners shall stand substituted by the period of 7 years which was prevalent prior to 23/2/2010.

3. The model condition in the petitioners vehicles (which are three wheelers) shall be read to the effect that the petitioners have to change their vehicles after 7 years, failing which their permits shall be treated to be automatically cancelled.

4.That the above directions shall continue till the STA takes any other decision fixing any other age of vehicles (three wheelers) in accordance with law.

The prayer of the petitioners that a direction be issued to the respondent no.2, Regional Transport Officer, Meerut to permit the petitioners to ply their three wheelers up to the age of 20 years, cannot be granted and is refused."

29. This Court once again in the case of Surise Public School Through Caretaker and others Vs. State of U.P. and others (Civil Misc. Writ Petition No. 9950 2013) decided on 22.02.2013 wherein similar prayer had been made for issuing direction in the nature of mandamus directing the respondents to issue permit and fitness certificate to the petitioners' vehicles fixing the age of vehicles upto 20 years old model has not been accepted and writ petition in question has been dismissed.

30. Here in the present case also as far as this Court is concerned it will not at all come to the rescue or reprieve of the petitioner by directing the Respondents not to fix age of vehicle at the point of time of issuance of permit/continuance of permit, as condition of permit, as challenge made is unsustainable for the reasons already mentioned above, the same being in the realm of policy decision for securing safety of passenger and control pollution.

31. In view of this there is no scope of interference and accordingly this bunch of writ petition are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2013

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.19937 of 2009

Prahlad Kumar Sahu... Petitioner
Versus
Shiv Prasad & Ors.... Respondents

Counsel for the Petitioner:
Sri Sanjay Agarwal,Sri Ashish Agarwal
Sri Prakash Gupta

Counsel for the Respondents:
Sri Prakash Gupta, Sri K.K. Tiwari

U.P. Urban Buildings(Regulation of Letting Rent & Eviction) Act-1972-Section 21(i)(a)- Bonafide need of of land lord-Prescribed authority found the need of land lord to settled his -unemployed son-bonafide no effort made for alternate accommodation by tenant-reversed by Appellate Court on pertext need of the son of landlord can not be considered-as well as son is playing three wheals can not be said unemployed held-order by Appellate Court not sustainable in eye of law.

Held: Para-11
Here in this case, the prescribed authority has held that as during the pendency of the release application, the tenant has not made an effort to search out any alternative accommodation, therefore the comparative hardship of the landlord would be greater. The appellate authority has not addressed

itself on the point for the reason that the need of the landlord was not found to be pressing and bonafide.

Case Law discussed:
2003(1) ARC 256; AIR 2003 SC 532; 2010(78) ALR 748; 2006(2) ARC 78; 2006(2) AWC 1542; 2007(1) ARC 512.

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

1. Heard Sri Ashish Gupta, learned counsel for the petitioner and learned counsel for the respondents. Counter and rejoinder affidavits have been exchanged and the writ petition is taken up for final disposal with the consent of learned counsel for the parties.

2. By means of this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the judgments and order dated 18.3.2009 passed by Additional District Judge, Court No. 1, Jhansi in Rent Control Appeal No. 03 of 2006 (Shiv Prasad and another Vs. Prahlad Kumar Sahu and others) by which appeal filed by respondents no. 1 and 2 has been allowed and order dated 6.2.2006 passed by the learned Prescribed Authority/Judge Small Causes Court in P.A.Case No. 51 of 2004 has been set aside.

3. The facts giving rise to this case are that the present petitioner (landlord) has filed an application under Section 21 (1) (a) of U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 seeking release of the shop in question for the bonafide need of his younger son Sri Pankaj Sahu on the ground that he is major and unemployed and wants to start his independent business. The release application was contested by the respondents on the ground that Sri Pankaj Sahu is having income by plying three seaters and the ladies of his house are also engaged in manufacturing of papper and are earning huge money from it, therefore the need is not bonafide and the application for release deserves to be rejected.

4. In support of the release applicaiton, Sri Pankaj Sahu has filed an affidavit no.18Ka and other affidavits 19Ka, 20Ka and 21 ka.

5. Sri Shiv Prasad (the respondent no. 1) has also filed an affidavit 33ka in rebuttal stating therein that his father was original tenant in the shop in dispute and after his death, the respondents are running tailoring shop. It has also been stated that the needs set up by landlord is not genuine as there is sufficient income of the family. The prescribed authority has framed three issues:-

(i) Whether there is a relation-ship of tenant and landlord in between the applicant and the opposite party.
(ii) Whether the need of the landlord is bonafide and genuine.
(iii) In case, the release application is allowed whose hardship shall be greater.

6. The prescribed authority has held that the need of the landlord is bonafide as his one major son, Sri Pankaj Sahu is jobless and is entitled to establish his independent business. So far as the comparative hardship is concerned, the prescribed authority has recorded that since during the pendency of release application, no effort has been made by the tenant to search out alternative accommodation for shifting his business, therefore the comparative hardship of the landlord would be greater than the tenant. After recording these findings, the learned prescribed authority has allowed the

release application vide judgment and order dated 6.2.2006 with the direction to the landlord to pay the rent of two years to the tenant within 15 days, with the further direction to the tenant to vacate the accommodation in dispute within a period of one month and in the event of failure of handing over the possession, the landlord was made entitled to take possession through court.

7. Aggrieved by the order of the prescribed authority, the respondent tenant has filed appeal, which has been allowed by the appellate court holding that the need of the son of the landlord is not bonafide as it cannot be believed that a man of thirty years can be unemployed. Further there is sufficient income of family, which is being earned through plying of three seaters and selling of papper by the house ladies.

8. After going through the impugned judgment passed by the appellate authority, I find that the appellate authority has erred in setting aside the finding recorded by the learned prescribed authority regarding bonafide need of the landlord taking very hypothetical view without there being any concrete material to observe that a man of thirty years cannot be believed to be unemployed, whereas the specific case of the landlord was that his son is major and is unemployed and wants to start his independent business. The appellate court has also erred in taking into account the meagre income coming from preparation and selling of papper by the house ladies as well as the income of the son of the landlord. The plying of three seaters by the son cannot be said to be an independent business of the son of the landlord. It is not the object of the act that if the release of accommodation is sought on the ground of establishing the major son, the son should sit idle. The bonafide need has to be tested in totality of circumstances and not by taking into consideration such type of pity involvement in earning something for livelihood. I am of the view that the major son of the landlord is entitled to establish his healthier independent business.

9. It is settled that in case, landlord's son is major and is unemployed and wants to start an independent business, his need has to be treated to be bonafide. Reference may be given to the judgment of the Apex Court in Smt. Sushila Vs. 2nd Additional District Judge, Banda and others 2003 (1) ARC 256, and Akhileshwar Kumar and others Vs. Mustaqim AIR 2003 SC 532 as well as of this Court in Devi Saran Vs. Additional District and Sessions Judge, Court No. 6, Bulandshahr and others (Writ Petition No. 36815 of 2001 decided on 26.9.2008) and Waqar Alam Vs. Additional District Judge & another 2010 (78) ALR 748.

10. So far as comparative hardship is concerned it is settled that if after filing of the release application, no effort has been made for searching out an alternative accommodation by the tenant, the question of hardship does not arise in favour of the tenant. Reference may be given in B.C.Bhutada Vs. G.R.Mundada AIR 2003 SC 2713 :2005 (2) ARC 899 and Ganga Devi Vs. District Judge Nainital 2008 (7) ADJ 501. This Court has reiterated the same view in Sri Krishna Bajpai Vs. Ist Additional District Judge (Shahjahanpur and others) 2006 (2) ARC 78, Hiralal (D) Through L.R.Vs. Vth A.D.J.and others 2006 (2) AWC 1542 and Kulwant Singh (Sardar) Vs. Vith A.D.J. Saharanpur and others (2007 (1) ARC 512.

11. Here in this case, the prescribed authority has held that as during the pendency of the release application, the tenant has not made an effort to search out any alternative accommodation, therefore the comparative hardship of the landlord would be greater. The appellate authority has not addressed itself on the point for the reason that the need of the landlord was not found to be pressing and bonafide.

12. After going through the entire judgment of the appellate authority and record, I find that the appellate authority has erred in holding that the need of the landlord is not bonafide. Therefore, the impugned judgment passed by the appellate authority cannot be sustained in the eye of law. The writ petition succeeds and is allowed. The impugned judgment and order dated 18.3.2009, passed by Additional District Judge, Court No. 1, Jhansi, is hereby quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.12.2013

BEFORE
THE HON'BLE KARUNA NAND BAJPAYEE, J.

Criminal Misc. Application No. 22554 of 2012

Rakesh Kumar & Ors.... Applicants
Versus
State of U.P. and Ors.... Opposite Parties

Counsel for the Applicants:
Sri Mahendra KUmar Sharma, Sri Pavan Kishore

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 482-Quashing of criminal proceeding-offence under Section 498-A, 323, 504, 506 I.P.C.-readwith 3/4 D.P. Act-before District Mediation Center-both decided to live together-considering matrimonial dispute-keeping in view of law laid down by Apex Court in B.S. Joshi, Nikhil Merchant, Manoj Sharma and Gian Singh cases-all criminal proceeding quashed.

Held: Para-8 & 9

8. In the aforesaid circumstances of the case at hand the court itself had referred the matter to the mediation which has fructified into positive result. A broken house has come back to life again, it shall be not only be abuse of the court's process but shall also be a travesty of justice, if even in such circumstances, where husband and wife started living together, this court cold shoulders them and forces them once again to join the issue and lock horns with each other.

9. The existence of Mediation Centre has found its full vindication and the parties have amicably settled the controversy tormenting their lives so far. If the proceedings of lower court are still allowed to go on, it is apparent that the same shall be a sheer abuse of the court's process. The dockets of the pending cases are already bursting on their seams and the lower Courts must be allowed to engage themselves in more fruitful judicial exercise and not be saddled with matters like the one at hand whose fate is already sealed.

Case Law discussed:
(2003)4 SCC 675; (2008) 9 SCC 677; (2008) 16 SCC 1; (2012) 10 SCC 303; 2013(83) ACC 2781.

(Delivered by Hon'ble Karuna Nand Bajpayee, J.)

1. This application u/s 482 Cr.P.C. has been filed by applicants Rakesh Kumar, Rajesh Kumar, Smt. Rinki, Ram Adhar and Smt. Shanti Devi with the prayer to quash the entire proceedings of Case No.5094 of 2009 (State Vs. Rakesh Kumar and others) u/s 498A, 323, 504, 506 I.P.C. & 3/4 Dowry Prohibition Act,

P.S.-Karchhana,District-Allahabad ending in the Court of A.C.J.M., Court No.4, Allahabad.

2. As the matter emanated from a matrimonial dispute the same was referred to the District Mediation Centre at Allahabad. The parties agreed to settle their dispute amicably and have decided to live together peaceably. A supplementary affidavit has also been filed on behalf of the applicants, which is on record. The perusal of same also reveals that the parties are living together happily as husband and wife and no dispute is pending any more.

3. On the former date the opposite party no.2 was summoned by the Court to appear in person who in compliance with the order dated 04.12.2013 has presented herself before the Court. It is an unfortunate fact that she is deaf and dumb both. Her father, who is opposite party no.3 and the complainant of this case, has accompanied her and the queries made by the Court have been conveyed and communicated to her through her father and she had given her positive responses. There is no ambiguity in her positive response. The Court itself has given sufficient time to make clear the queries made by itself and she in a very conspicuous manner answered them all by making such gestures which were more eloquent than speech. The Court is very well in a position to understand that she has no objection if the proceedings going on in the lower court are quashed as she is not only living along with her husband peaceably but has no grievance left any more.

4. Sri Mahendra Kumar Sharma, learned counsel for the applicants and Sri Mahendra Pratap Yadav, learned counsel for opp. party Nos.2 and 3 have been heard along with learned A.G.A.

5. Counsel for the applicants have placed reliance on the following cases:

1.B.S. Joshi and others Vs. State of Haryana and another (2003)4 SCC 675

2.Nikhil Merchant Vs. Central Bureau of Investigation[2008)9 SCC 677]

3.Manoj Sharma Vs. State and others (2008) 16 SCC 1,

4.Gian Singh Vs. State of Punjab (2012) 10 SCC 303

6. Reliance has also been placed on the decision given by this Court in Shaifullah and others Vs. State of U.P. And another [2013 (83) ACC 278] in which the law expounded by the Apex court in the aforesaid cases has been expatiated in detailed.

7. A perusal of the case law cited by the counsel makes it very clear that the Hon'ble Supreme Court has lent its judicial countenance to the exercise of inherent jurisdiction in such matters so that the abuse of the court's process may be averted. Even in the cases which involved non compoundable offences their quashing has been approved by the Apex Court if the nature of the offence is such which does not have grave and wider social ramifications and where the dispute is more or less confined between the litigating parties. A criminal litigation emanating from matrimonial dispute has been found to be the proceedings of the same class where the inherent jurisdiction of this court may be suitably exercised if the parties inter-se have mutually decided to bury the hatchet and settle the matter amicably in between them. There are many other litigations which may also fall in the same

class even though they do not arise out of matrimonial disputes. Several disputes which are quintessentially of civil nature and other criminal litigations which do not have grave and deleterious social fall-outs may also be settled between the parties. In such matters also when parties approached the court jointly with the prayer to put an end to the criminal litigations in which they had formerly locked their horns, the Court in the wider public interest may suitably exercise its power and terminate the pending proceedings. Such positive exercise of the inherent jurisdiction can also find its vindication in a more pragmatic reason. When the complainant of a case or the victim of the offence itself expresses its resolve not to give evidence against the accused in the back drop of the compromise between the parties inter-se, and they are still called upon to depose in the court, they in all probability, go back on their words and resile from their previous statements, the truthfulness of which is best known only to themselves. They are in such circumstances very likely to eat their words and purgure themselves. The solemn proceedings of the court often get reduced to a shame exercise and farce in such circumstances. The proceedings can hardly be taken to their logical culmination and in such circumstances, the prospect of the conviction gets lost. In all probability, the trial becomes a futile exercise in vain and the precious time of court is attended with nothing except a cruel wastage. Of course, there are crimes which are the offences against the State and the inter-se compromise between the litigants cannot be countenanced with and the court despite the rapprochement arrived at in between the parties, would still not like to terminate the prosecution of the culprits. There are crimes of very grave nature entailing far reaching deleterious ramifications against the society. In those matters, the courts do not encourage either mediation or a compromise through negotiation and even the Apex Court has carved out exceptions and did not approve the quashing of non-compoundable offences regardless of their gravity. The Courts have to be discreet and circumspect and must see whether the exercise of inherent jurisdiction is indeed serving the ends of justice or to the contrary defeating the same.

8. In the aforesaid circumstances of the case at hand the court itself had referred the matter to the mediation which has fructified into positive result. A broken house has come back to life again, it shall be not only be abuse of the court's process but shall also be a travesty of justice, if even in such circumstances, where husband and wife started living together, this court cold shoulders them and forces them once again to join the issue and lock horns with each other.

9. The existence of Mediation Centre has found its full vindication and the parties have amicably settled the controversy tormenting their lives so far. If the proceedings of lower court are still allowed to go on, it is apparent that the same shall be a sheer abuse of the court's process. The dockets of the pending cases are already bursting on their seams and the lower Courts must be allowed to engage themselves in more fruitful judicial exercise and not be saddled with matters like the one at hand whose fate is already sealed.

10. In the aforesaid circumstances of the case, it is deemed proper that the impugned proceedings of the aforesaid case be quashed forthwith. The same therefore, are hereby quashed.

11. The application stands allowed.

12. A copy of this order be certified to the lower court forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 23175 of 2012

Hira Lal. .Petitioner
Versus
State of U.P. and Ors... Respondents

Counsel for the Petitioner:
Sri Govind Krishna, Sri Abhishek Krishna
Sri Rajendra Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-promotional pay scale-entitlement-explained-petitioner got twice promotional order-but failed to avail on personal ground-held-not entitled for benefits of promotional pay-reasons discussed.

Held: Para-19
Even otherwise, coming on merits, it is evident that explanation 3, provided in G.O. Dated 12.5.1997, disentitle petitioner, benefit of time bound scale/promotional scale for the reason that he has forgone promotion and therefore, not a person, who has suffered on account of stagnation due to lack of promotional avenues. In my view, grievance of petitioner that he should be given higher scale ignoring his voluntarily forgoing promotion and that too twice, lacks substance and is not tenable either on equity or in law, otherwise. It is not a case where petitioner can be said to have suffered on account of any laxity on the part of respondents but looking to policy, object and purpose of grant of time bound scale/promotional scale i.e. to avoid stagnation and open higher avenues to the employees, who are not able to avail actual opportunity of promotion to higher post, to be compensated by giving higher pay scale. The petitioner having not suffered the same for his own volition, cannot be allowed to complain. Since it is for something he deserve to blame himself.

Case Law discussed:
2004(1) SCC 347; 2006(11) SCC 464; J.T. 2007 (4) SC 253; J.T. 1994(6) SC 71; 1995(5) 628; AIR 1961 SC 993; AIR 1976 SC 2617; 1976(3) SCC 579; AIR 2007 SC 1330; 2008(4) ESC 2423.

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

1. Heard Sri Govind Krishna, learned counsel for the petitioner at great length.

2. The writ petition is directed against orders dated 10.3.2003 and 28.11.2011 whereby petitioner has been denied benefit of promotional pay scale on the ground that since he was actually promoted on higher post but voluntarily forgo his promotion, therefore, in view of Government Order dated 12.5.1997, clarification no.3, promotional scale is not admissible to him.

3. Sri Govind Krishna, learned counsel for the petitioner submitted that petitioner forgo promotion only for the time being and that too for a certain period. It cannot be construed so as to disentitle him for promotional scale, for all times to come.

4. The facts in brief necessary for proper adjudication of this case are as under:

5. The petitioner was appointed as Junior Clerk on 23.7.1973 in the office of District Saving Officer, Ghazipur. In ordinary course of functioning, he became due for promotion to the post of Assistant Saving Officer. The competent authority, vide order dated 17.9.1992, promoted him on the post of Assistant Saving Officer and posted him at Basti. The petitioner, who was

working at Ghazipur, by letter dated 22.9.1992, informed respondents competent authority that due to his family circumstances, he is not inclined to go on promotion and therefore, is forgoing promotion for a period of three years. Thereafter, his promotion on the post of "Senior Clerk" was made by competent authority vide order dated 21.9.1994 but the petitioner, by letter dated 28.9.1994, again requested competent authority not to compel him to go on promotion and allow him to forgo the said promotion. Consequently promotion order dated 21.9.1994 was cancelled vide order dated 7.10.1994.

6. It is not in dispute that matter of forgoing promotion twice attained finality and the petitioner never felt aggrieved thereto.

7. The State Government issued Government Order (hereinafter referred to as "G.O.") dated 8.3.1995 for providing benefit of personal promotional scale and one additional increment to the employees satisfying certain conditions provided therein, read with earlier Government Order dated 3.6.1989. Some amendment was made by Government Order dated 5.2.1997. However, there appears to be some anomaly/difficulty in implementing the aforesaid Government Order and certain clarifications were required, which were so clarified by Government vide G.O. Dated 12.5.1997. The clarification no.3 thereof categorically provides that if a person is actually promoted on a higher post but declined to take over charge on the promoted post, such person would not be entitled for the benefit of promotional pay scale on the basis of length of service for the reason that personal promotional scale and increments have been made admissible vide G.O. dated 8.3.1995 and 5.2.1997, to give relief to employees suffering on account of stagnation and lessor promotional avenues but where such opportunity actually became available to an employee but he voluntarily declined to accept such promotion, it cannot be said that such an employee is suffering on account of stagnation.

8. Para 3 0f G.O. Dated 12.5.1997 reads as under:

त्रुटि

प्रोन्नति पद पर कार्य–भार ग्रहण करने से इनकार करने वाले कर्मचारियों को भी वैयक्तिक रूप से सेवा अवधि के
आधार पर प्रोन्नति वेतनमान की त्रुटिपूर्ण स्वीकृति।

स्पष्टीकरण 3– किसी कर्मचारी की वास्तविक प्रोन्नति उच्च पद पर होने की दशा में यदि वह प्रोन्नति के पद को ग्रहण नही करता है अथवा प्रोन्नति के पद पर जाने से इनकार करता है तो उस तिथि तथा उसके पश्चात् की तिथि से सेवा अवधि के आधार पर सेलेक्शन ग्रेड के लाभ के रूप में एक वेतन–वृद्धि अथवा वैयक्तिक प्रोन्नति/अगला वेतनमान का लाभ अनुमन्य नही होगा। इस संबंध में यह भी स्पष्ट किया जाता है कि सेलेक्शन ग्रेड/सेलेक्शन ग्रेड के लाभ के रूप में एक अतिरिक्त वेतन–वृद्धि तथा वैयक्तिक प्रोन्नति वेतनमान/अगले उच्च वेतन मान संबंधी लाभ कर्मचारियों को प्रोन्नति के अवसर के अभाव को दृष्टिगत रखते हुए प्रदान किये गये है, अतः वास्तविक प्रोन्नति से इनकार करने वाले कर्मचारियों के मामले में सेवा में वृद्धिरोध नही माना जा सकता।

9. It appears that ignoring G.O. Dated 12.5.1997, Additional Director, National Savings, U.P. Lucknow, passed an order on 18.10.2000 giving personal promotional scale of Rs.1200-2040 to petitioner w.e.f. 1.5.1990 and further extended benefit of one additional increment w.e.f. 1.5.1995. The petitioner's salary was fixed at the stage of Rs.1380 w.e.f. 1.5.1995. The aforesaid order was passed with specific reference to G.O.

dated 8.3.1995 and 5.2.1997, which clearly show that clarification provided by State Government vide G.O. dated 12.5.1997 stood omitted or ignored by Additional Director while passing order dated 18.10.2000.

10. The petitioner having availed one promotional pay scale and one additional annual increment, proceeded to request for second promotional scale which was admissible to an employee who has completed 24 years of satisfactory service, as provided by subsequent G.O. Dated 3.9.2001. This request was considered favourably by Assistant Director (Saving) Ghazipur. He recommended for second promotional scale vide letter dated 14.3.2002, to the Additional Director, National Saving, U.P. Lucknow. A similar recommendation was also made by District Saving Officer, Ghazipur by letter dated 9.10.2002 and 22.2.2003, sending recommendatory letters to Additional Director, National Saving, U.P. Lucknow.

11. It is with reference to the aforesaid letters, the matter came to be reconsidered by Additional Director, National Saving, U.P., who noticed glaring error/mistake he had committed while issuing order dated 18.10.2000. Consequently, Additional Director passed order dated 10.3.2003 (Annexure 4 to the writ petition) cancelling his order dated 18.10.2000 and directing for recovery of salary, already paid to the petitioner.

12. It is not in dispute by learned counsel counsel for the petitioner that order dated 10.3.2003 was not challenged by petitioner before any appropriate forum.

13. After about four years, petitioner submitted a representation dated 26.8.2008 for grant of time bound scale/promotional pay scale. This representation as such was recommended by District Saving Officer, Ghazipur, with a covering letter dated 28.8.2008, sent to Additional Director, National Saving, U.P. Lucknow. The Deputy Director, National Saving, U.P. Lucknow sought an explanation from District Saving Officer, Ghazipur stating that petitioner made a similar request by letter dated 27.3.2008, in reference whereto Directorate issued a letter dated 9.4.2008. Despite it and without complying the same, in what circumstances petitioner's representation dated 26.8.2008 again was recommended by District Saving Officer to the Directorate, on this aspect, his explanation was called upon. The Directorate's letters dated 9.4.2008 in on record at page 44 of the counter affidavit. It says that petitioner's representation/letter dated 27.3.2008 was carefully considered but rejected being without any merits. The District Saving Officer was requested to inform the petitioner accordingly.

14. The petitioner then made representation dated 5.10.2008 to the Additional Director and a reminder dated 3.12.2010. Thereupon, it appears that Joint Director (Administration) National Saving, U.P. Lucknow permitted petitioner to appear in his office and after hearing him, Joint Director (Administration), National Saving, U.P., on his own, made recommendation to the State Government vide letter dated 16.3.2011 requesting to communicate guidance about petitioner's claim for time bound scale/promotional scale on completion on 19 and 24 years of service. Reminders were also sent by Joint Director on 12.7.2011, 5.9.2011 and

9.11.2011. State Government reiterating its stand, as provided in G.O. Dated 12.5.1997, informed Additional Director, vide letter dated 22.11.2011, (Annexure 23 at page 65 of counter affidavit), that since petitioner has forgone his promotions, therefore, he is not entitled for time bound scale/Assured Career Promotion pay scale. It is this decision of State Government, which has been communicated by Joint Director (Administration), National Saving U.P. to the petitioner by his letter dated 28.11.2011.

15. Sri Govind Krishna, learned counsel for the petitioner, despite repeated query, could not explain as to how petitioner became entitled for time bound scale/ promotional scale in the light of clarification issued by State Government by G.O. dated 12.5.1997. He also could not dispute that Additional Director's order dated 18.10.2000, whereby time bound scale was allowed to the petitioner w.e.f. 1.5.1990 was cancelled by order dated 10.03.2013. The said order was never challenged by petitioner before any appropriate forum. In effect, the order dated 10.3.2003 has attained finality.

16. It is true that after about four years, petitioner sought to reagitate the matter by making representation and the authorities have reiterated their stand but these representations or reiteration of earlier stand by respondents, in my view, would not provide a fresh cause action to petitioner so as to cover up one of the important hurdle, which the petitioner has to face i.e. undue delay and laches.

17. Undue delay and laches are relevant factors in exercising equitable jurisdiction under Article 226 of the Constitution of India. Following the cases of Government of West Bengal Vs. Tarun K. Roy and others 2004(1) SCC 347 and Chairman U.P. Jal Nigam and another Vs. Jaswant Singh and another 2006(11) SCC 464, the Apex Court in New Delhi Municipal Council Vs. Pan Singh and others J.T.2007(4) SC 253, observed that after a long time the writ petition should not have been entertained even if the petitioners are similarly situated and discretionary jurisdiction may not be exercised in favour of those who approached the Court after a long time. It was held that delay and laches were relevant factors for exercise of equitable jurisdiction. In M/S Lipton India Ltd. And others vs. Union of India and others, J.T. 1994(6) SC 71 and M.R. Gupta Vs. Union of India and others 1995(5) SCC 628 it was held that though there was no period of limitation provided for filing a petition under Article 226 of Constitution of India, ordinarily a writ petition should be filed within reasonable time. In K.V. Rajalakshmiah Setty Vs. State of Mysore, AIR 1961 SC 993, it was said that representation would not be adequate explanation to take care of delay. Same view was reiterated in State of Orissa Vs. Pyari Mohan Samantaray and others AIR 1976 SC 2617 and State of Orissa and others Vs. Arun Kumar Patnaik and others 1976(3) SCC 579 and the said view has also been followed recently in Shiv Dass Vs. Union of India and others AIR 2007 SC 1330 and New Delhi Municipal Council (supra). The aforesaid authorities of the Apex Court has also been followed by this Court in Chunvad Pandey Vs. State of U.P. and others, 2008(4) ESC 2423.

18. As already discussed above, repeated representations or subsequent

orders cannot renew cause of action and also will not furnish a fresh cause of action so as to cover up entire undue delay and laches. In my view, writ petition, in so far as it has challenged order dated 10.3.2003, is bound to fail only on the ground of delay and laches. Once this order is not to be interfered by this Court, subsequent order, as communicated by second impugned order dated 28.11.2011 also cannot be interfered since it only reiterates what has already been said in 2003.

19. Even otherwise, coming on merits, it is evident that explanation 3, provided in G.O. Dated 12.5.1997, disentitle petitioner, benefit of time bound scale/promotional scale for the reason that he has forgone promotion and therefore, not a person, who has suffered on account of stagnation due to lack of promotional avenues. In my view, grievance of petitioner that he should be given higher scale ignoring his voluntarily forgoing promotion and that too twice, lacks substance and is not tenable either on equity or in law, otherwise. It is not a case where petitioner can be said to have suffered on account of any laxity on the part of respondents but looking to policy, object and purpose of grant of time bound scale/promotional scale i.e. to avoid stagnation and open higher avenues to the employees, who are not able to avail actual opportunity of promotion to higher post, to be compensated by giving higher pay scale. The petitioner having not suffered the same for his own volition, cannot be allowed to complain. Since it is for something he deserve to blame himself.

20. In the entirety of the facts and circumstances, petitioner is not entitled for any relief.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2013

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

Civil Misc. Writ Petition No. 28565 of 2012

Anoop Mishra... Petitioner
Versus
The State of U.P. & Anr.... .Respondents

Counsel for the Petitioner:
Sri Keshri Nath Tripathi,Sri C.P. Gupta
Sri O.P. Mishra

Counsel for the Respondents:
C.S.C., Sri A.K. Sinha, Sri V.P. Mathur.

U.P. Public Service Commission(Reservation for physically Handicapped,dependent of freedom fighters as Ex-Service man)Act 1993-Section 3(5)-Reservation to dependent of freedom fighter-out of 134 post 2% would be 2.68-if principle of round of applied- as per law laid down by Apex court-total vacancy will come-as 3 post and not only two-as calculated by commission-consequential direction issued.

Held: Para-22
Applying the ratio of the case law referred to hereinabove, to the facts of the present case, we are satisfied that the respondents had clearly erred in calculating the vacancies for the category of dependents of freedom fighters. It has not been disputed by the respondents that against 134 posts, 2% reservation for dependants of freedom fighters would come to 2.68. That being the factual position, we are satisfied that in view of the law settled by the Supreme Court as well as this Court the principle of rounding off ought to have been applied against horizontal reservation and if so applied the posts falling in the category of dependents of freedom fighters would be 3 and not 2.

Case Law discussed:
1998(4) AWC 259; 2007(1) AWC 282; (2005) 2 SCC 10; (2008)1 SCC 233; 2007(1) AWC 282; (2012) 8 SCC 568; (2011) 8 SCC 108.

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

1. This is a writ petition by the petitioner seeking a direction to the U.P. Public Service Commission, Allahabad (hereinafter referred to as 'Commission') to declare the petitioner as having been selected for the post of Assistant Commissioner (Trade/Commercial Tax) in the State Combined/ Upper Subordinate Services Examination, 2009 by treating three posts as belonging to reserved category of dependents of freedom fighters instead of two posts. Certain other reliefs have also been sought by the petitioner with regard to application of the scaling system and evaluation of the answer sheets.

2. Briefly stated the facts of the case are that an Advertisement No. A-1/E-A/209 dated 4.4.2009 was issued by the Commission inviting applications in respect of posts in the State Service known as the Combined State/Upper Subordinate Services Examination, 2009. The total number of posts were 754 although initially the advertisement only mentioned 100 vacancies but the same were subject to increase or decrease.

3. The case of the petitioner is that in his application form for the Main Examination, he had given first preference for the post of Deputy Collector, the second preference for Deputy S.P., the third preference for the post of Assistant Commissioner (Trade/ Commercial Tax) and the the fourth preference for the post of Treasury Officer/Account Officer. The further contention of the petitioner is that reservation to the dependents of freedom fighters has been provided in terms of the Provisions of the Uttar Pradesh Public Service Commission (Reservation for Physically Handicapped, Dependents of Freedom Fighters, an Ex-Servicemen) Act, 1993 (Act, 4 of 1993). The reservation quota fixed for dependents of freedom fighters was 2%. This reservation was to be applied horizontally and not vertically.

4. The contention further is that the number of posts of Assistant Commissioner (Trade/Commercial Tax) was 134 and by applying the reservation quota of 2% for dependents of freedom fighters, the figure comes to 2.68 and if the .5 and above is rounded off to 1, the total number of posts available under the dependents of freedom fighters quota would be 3 posts, but the Commission has illegally offered only 2 posts, which is totally against the spirit of the reservation policy applicable to the reserved category. According to the petitioner if the 2% reservation for dependents of freedom fighters had been correctly adopted and the principle of rounding off correctly applied then 3 posts would have become available under the dependents of freedom fighters quota and the petitioner would have found a berth against the said post.

5. We have heard Sri Keshari Nath Tripathi, learned senior counsel assisted by Sri C.P. Gupta, learned counsel for the petitioner as well as Sri Yogendra Kumar Yadav, learned Standing Counsel and Sri A.K. Sinha, learned counsel appearing for the respondent no.2-Commission.

6. The short controversy in the case is as to whether the principle of rounding

off ought to have been applied in the case of horizontal reservation and, if so applied, 2.68 could be treated as 3, in which case instead of 2 posts reserved for dependents of freedom fighters, 3 posts would have become available. It has been submitted by Sri Keshari Nath Tripathi, learned Senior Counsel that the minimum marks obtained by the last selected candidate for the post of Assistant Commissioner (Trade Tax) in the dependents of freedom fighters category was 1059.24, whereas, the petitioner had obtained 1058.42 marks out of 1700 marks and thus he has missed appointment by a narrow margin of only 0.82 marks which is less than 1 mark.

7. The further contention of the learned counsel for the petitioner is that out of the total 134 posts of Assistant Commissioner (Trade Tax), 2% reservation in favour of dependents of freedom fighters would come to 2.68 and if the principle of rounding off had been applied, 3 posts would have become available in the category of dependents of freedom fighters but the respondents have wrongly calculated the number of posts as being only 2 in the category of dependants of freedom fighters. He has further referred to the Annexure-1 to the counter affidavit filed by the State in order to illustrate that so far as vertical reservation is concerned, the respondents have applied the rule of rounding off. By way of illustration he has referred to the post of Deputy Collector for which 3 posts have been allocated under the Scheduled Castes category out of a total number of 14 posts, whereas, if the quota reserved for Scheduled Castes is applied the figure comes to 2.94. Similarly for Other Backward Class reserved category, the total number of posts allocated for the post of Deputy Collector is 4, whereas if the quota prescribed for the Other Backward Classes is applied to the total 14 posts of Deputy Collector the figure comes to 3.78. Thus, it has been submitted that it is not that the respondents are not aware of the rule of rounding off but while they have applied the said principle to the vertical reservation, namely, the quota fixed for Scheduled Castes, Scheduled Tribes and Other Backward Classes, the same principle has not been followed in the matter of horizontal reservation. By way of illustration, it has been shown from Annexure-1 to the counter affidavit that while the posts in the womens category against the total posts of 14 on the posts of Deputy Collector has been shown as only 2 but as per the quota available for women category i.e. 20% the figures come to 2.80 and therefore 3 posts should have been made available for women. By way of illustration, it has further been pointed out that for the post of Assistant Commissioner (Trade Tax), 26 posts out of a total of 134 have been allocated in the women's category and 2 posts in the category of dependents of freedom fighters, whereas, as per the quota of 20% for women's category and 2% for dependents of freedom fighters the figure would come to 26.80 and 2.68 i.e. 27 posts and 3 posts respectively. However, for reasons best known to the respondents the principle of rounding off has not been applied for horizontal reservation while giving the benefit of the same against vertical reservation.

8. In the counter affidavit, at the outset a preliminary objection was raised on behalf of the learned counsel for the Commission, Sri A.K. Sinha that although initially the advertisement mentioned 100 posts but subsequently the number of

posts were increased to 134 posts. Subsequently, the number of posts of Assistant Commissioner (Trade Tax) was increased to 134 when the requisition was sent to the Commission, in which the posts reserved for dependents of freedom fighters against the 2% quota was shown to be only two and this requisition has not been challenged by the petitioner. This document, that is, the requisition dated 25.3.2009 has been filed as Annexure-2 to the counter affidavit filed by the Commission and there is no dispute that in the said requisition the posts allocated to the dependents of freedom fighters in their respective quota was shown as 2.

9. The only other submission of Sri A.K. Sinha, learned counsel for the Commission was that under the Act, 4 of 1993, the reservation quota prescribed for dependents of freedom fighters was 2% and therefore, it could not have exceeded 2% and if the 2% quota of dependents of freedom fighters is applied to the 134 posts of Assistant Commissioner (Trade Tax), the figure would come to 2.68 which would be in excess of 2% reservation quota prescribed for dependents of freedom fighters.

10. The State-respondents in their counter affidavit have also taken the same plea in para 17 that the quota of dependents of freedom fighters is only 2% and if 2% is applied to the 134 posts of Assistant Commissioner (Trade Tax) it would come to 2.68 and if 2.68 is rounded off and treated as 3 posts the resultant figure would exceed the 2% quota fixed for dependents of freedom fighters. The other plea taken by the State-respondents in their counter affidavit is that reservation is to be applied according to roster in the form of a running account from year to year and when a vacancy arises against a particular post the same is to be filled from amongst persons belonging to the category to which the post belongs in the roster.

11. We have given our anxious consideration to the various submissions of the learned counsel and have perused the documents on record.

12. First, the contention of the petitioner in para 11 of the writ petition is that the minimum cut off marks for the posts of Assistant Commissioner (Trade Tax) in dependents of freedom fighters category was fixed as 1059.24 whereas the petitioner had obtained 1058.48 marks and thus the petitioner was not selected for the said post by a narrow margin of only 0.82 marks. The averments in para 11 of the writ petition, have not been denied by the Commission rather it has been stated that "the contents of para 11 of the writ petition are matter of record need no comments." The result of the Examination, 2009 in question is filed as Annexure-7 to the writ petition and at Page 53 of the paper book the minimum marks obtained by the last dependent of freedom fighter candidate is shown as 1059.24 which bears out the averment of the petitioner in para 11 of the writ petition, and the same has not denied by the respondents.

13. Secondly, so far as the objection raised by the learned counsel for the Commission that the petitioner has not challenged the requisition dated 25.3.2009 sent by the State Government is concerned, it has been submitted by the learned counsel for the petitioner that this was an internal communication between the State Government and the Commission and no corrigendum to that

effect was issued or published making any amendment in the initial advertisement and in any case it was not necessary for the petitioner to challenge the requisition or any handwritten calculation made therein fixing the quota of dependants of freedom fighters, inasmuch as it was for the Commission to ultimately calculate the vacancies available for the reserved category of dependents of freedom fighters, according to the reservation quota prescribed for them in the Act, 4 of 1993 irrespective of any handwritten figure mentioned in the requisition by the State Government and the relief in the nature of mandamus sought by the petitioner to the respondents to treat 3 posts instead of 2 posts in the category of dependents of freedom fighters for the post of Assistant Commissioner (Trade Tax) is perfectly correct in the circumstances. In support of his contention, reliance has been placed by the petitioner upon the decision of the Division Bench of this Court reported in 1998 (4) AWC 259 , Akhila Nand Pandey Vs. State of U.P. and others. In that case also the petitioner therein had prayed for a writ of mandamus commanding the respondents to appoint him in the Agricultural Group Services on the basis of the result of Combine State Services Examination, 1993 claiming to be in the category of dependents of freedom fighters entitled to reservation. The Division Bench held that it was the duty of the Commission to enforce the notification dated 4.5.1995 issued in terms of the provisions of Act, 4 of 1993 and therefore, the Commission cannot take shelter of an alleged default made by the State in not intimating to the Commission the vacancies required to be reserved for the dependents of freedom fighters. The Division Bench further held that the Commission failed to act in accordance with law inasmuch as it did not give benefit of reservation to the dependents of freedom fighters on the pretext that the reservation was not made by the State Government. Paras 1, 9 and 10 of the said judgment read as follows:

"1. The petitioner has prayed for a writ of mandamus commanding the respondents to appoint him in the agricultural group services on the basis of the result of Combined State Services Examination of 1993 claiming to be in the category of dependants of freedom fighters entitled to reservation.

9. The provisions of U.P. Act No. IV of 1993 as contained in Annexure-2 to the writ petition, provide for reservation to the dependants of freedom fighters. The reservation to this category to the extent of 2% of the post, is admitted to the U.P. Public Service Commission respondent in paragraph 5 of the counter affidavit wherein, it has been specifically stated that according to the Notification No. 18.1.95-ka-2/95, issued by the State Government on 4th May, 1995, the reservation for dependants of freedom fighters of physically handicapped and ex-army personnel are in the ratio of 2:2:1 respectively.

10. It is, therefore, evident that the dependants of freedom fighters were entitled to reservation on the 2% posts for which the examination was conducted by the U.P. Public Service Commission. The advertisement was made for 200 posts and, it appears that ultimately, selection was made for 206 posts. Hence quota available to the category of dependants of freedom fighters, comes to 4 in number. The reservation,therefore, should have

been made on the 4 posts in the Combined State Services/Upper Subordinate Services. It was the duty of the Commission to enforce the Notification dated 4.5.1995 and, therefore, the Commission cannot take the shelter of an alleged default made by the State Government in not intimating the vacancies to the Commission required to be reserved for the dependants of freedom fighters. The Commission thus, appears to have failed to act in accordance with law inasmuch as it did not give the benefit of reservation to the dependants of freedom fighters on the pretext that the reservation was not made by the State Government."

14. We are in respectful agreement with the observations made by the Division Bench in the case of Akhila Nand Pandey (supra) and in view thereof we find absolutely no substance in the preliminary objection raised by Sri A.K. Sinha, learned counsel for the Commission and reject the same.

15. In 2007 (1) AWC 282, Dr. Rajesh Kumar Tiwari Vs. State of U.P. and ors., also the challenge was to the inappropriate application of reservation quota to the post of Lecturer in Hindi. The relief in the writ petition was one of mandamus commanding respondents to allow the petitioner to appear in the interview for the post of Lecturer Hindi under the category of dependents of freedom fighters. There also a preliminary objection was raised on behalf of the State that the petitioner had not laid any foundation for the application of quota nor had any relief been sought in this regard. Rejecting this objection the Court in para 19 of the said judgment held as follows:

"19. With regard to the question of relief being granted to the petitioners, learned counsel or the respondents have urged that the petitioners have not Laid any foundation with regard to application of quota nor have they sought any relief in this regard and, therefore, this Court may not go in to this question at all. We are afraid that such an argument can sustained. We are hearing these petitions under Article 226 of the Constitution. Once it has come to the knowledge of the Court that the respondents have failed to follow the statutory provisions or have acted in violation of statutory provisions, this Court in its extraordinary jurisdiction can always issue a writ commanding the respondents to apply the provisions correctly. Article 226 of the Constitution confers ample power on High Court to correct an error which is manifest and apparent on the face of the record and also where there is apparent miscarriage of justice. In the present case, both the grounds are established. The contention of the respondents is, therefore, rejected."

16. So far as the principle of rounding off is concerned, the Supreme Court in the case reported in (2005) 2 SCC 10, State of U.P. and another Vs. Pawan Kumar Tiwari and others, has held that the rule of rounding off is based on logic and common sense. Para 7 of the judgment reads as follows:

"7. We do not find fault with any of the two reasonings adopted by the High Court. The rule of rounding off based on

logic and common sense is: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. 46.50 should have been rounded off to 47 and not to 46 as has been done. If 47 candidates would have been considered

for selection in general category, the respondent was sure to find a place in the list of selected meritorious candidates and hence entitled to appointment."

17. In the case of Shiv Prasad Vs. Government of India and others, (2008) 10 SCC 382 the Supreme Court while dealing with vertical reservation and horizontal reservation has held as follows:

"25. In Indra Sawheny (I), Justice Jeevan Reddy, J. dealt with this aspect. His Lordship observed that there are two types of reservations; (i) vertical reservations; and (ii) horizontal reservations. They must be so applied as not to exceed the percentage of reservations which is permissible under law. This can be done by "interlocking reservations". His Lordship proceeded to state:

"812.....There are two types of reservations, which may, for the sake of convenience, be referred to as 'vertical reservations' and 'horizontal reservations'. The reservations in favour of Scheduled Castes, Scheduled Tribes and other backward classes [under Article 16(4)] may be called vertical reservations whereas reservations in favour of physically handicapped [under clause (1) of Article 16] can be referred to as horizontal reservations. Horizontal reservations cut across the vertical reservations what is called interlocking reservations. To be more precise, suppose 3% of the vacancies are reserved in favour of physically handicapped persons; this would be a reservation relatable to clause (1) of Article 16. The persons selected against this quota will be placed in the appropriate category; if he belongs to SC category he will be placed in that quota by making necessary adjustments; similarly, if he belongs to open competition (OC) category, he will be placed in that category by making necessary adjustments. Even after providing for these horizontal reservations, the percentage of reservations in favour of backward class of citizens remains and should remain the same. This is how these reservations are worked out in several States and there is no reason not to continue that procedure. (emphasis supplied)

26. A similar question came up for consideration in Swati Gupta. There, the petitioner appeared in the Combined Pre-Medical Test (CPMT) held by the State. She was not selected. She challenged a notification of the State Government on the ground that the reservation was 65% which exceeded 50% and was thus violative of the constitutional guarantee under Articles 14, 16, 19 and 21 of the Constitution as also the ratio laid down in Indra Sawhney (I). The Government of U.P., however, issued another notification clarifying its stand on reservations.

27. In the amended notification, it was clarified that the reservations for the candidates belonging to other categories, such as, dependents of freedom-fighters, sons/ daughters of deceased/disabled soldiers, physically handicapped candidates, etc. would be 'horizontal' and the candidates selected in those categories would be adjusted in the categories to which they belong, i.e. either reserved category of Schedule Castes (SC), Schedule Tribes (ST), Other Backward Class (OBC) or Open Category (OC) in 'vertical' reservation and it would not violate constitutional guarantee.

28. The Court considered Indra Sawhney (I), applied it to the case on

hand and held that the submission of the State was well founded and the contention of the petitioner that the reservation violated constitutional guarantee of 50% was not well-founded. The Court stated:

"3.....The vertical reservation is now 50% for general category and 50% for Scheduled Castes, Scheduled Tribes and Backward Classes. Reservation of 15% for various categories mentioned in the earlier circular which reduced the general category to 35% due to vertical reservation has now been made horizontal in the amended circular extending it to all seats. The reservation is no more in general category. The amended circular divides all the seats in CPMT into two categories one, general and other reserved. Both have been allocated 50%. Para 2 of the circular explains that candidates who are selected on merit and happen to be of the category mentioned in para 1 would be liable to be adjusted in general or reserved category depending on to which category they belong, such reservation is not contrary to what was said by this Court in Indra Sawhney. (emphasis supplied)."

18. In (2008) 1 SCC 233, Bhudev Sharma Vs. District Judge, Bulandshahr and another, the Supreme Court referring to the facts of that case held that the 2% quota fixed for physically handicapped persons if applied to 30 posts, the figure would come to 0.6 and since 0.6 is more than half, it should be rounded off to 1. Para 2 and 3 of the said judgment read as follows: 3

" 2. The appellant is a blind man. He appeared in the recruitment test held in the year 1992 for selecting candidates for Class-III Posts in Bulandshahr Judgeship in U.P. However, he was not selected and hence he filed a writ petition which was allowed by a learned Single Judge of the Allahabad High Court by his judgment dated 25.09.1997. Against that judgment the State Government filed a letters patent appeal which has been allowed by the impugned judgment by the Division Bench. Hence this appeal.

3. The appellant has relied on G.O. dated 26.08.1993 which is Annexure P-I to this appeal. That G.O. states that the U.P. Government has reserved 2 per cent posts for physically handicapped persons for direct recruitment in all groups of Government services. The physically handicapped persons are those who are blind, deaf and dumb and otherwise handicapped. There were altogether 30 posts for which the selection was held. 2 per cent of 30 is 0.6. Since 0.6 is more than half we round it off and hold that one out of the 30 posts is reserved for physically handicapped persons. Since there was no other physically handicapped person who applied, in our opinion, the appellant was entitled to the post reserved for physically handicapped persons."

19. A Division Bench of this Court in the case of Dr. Rajesh Kumar Tiwari Vs. State of U.P and others, 2007 (1) AWC 282, while dealing with the question of rounding off with regard to the quota fixed for dependents of freedom fighters has held as follows:

"13. In the present case, it is admitted fact that 82 vacancies were advertised and the quota fixed for the dependents of freedom fighters is 2%. Thus, 2% of 82 being more than 1.5 would result in to 2 posts in that quota. The law with regard to

rounding off is very clear and well settled. Where the value is one-half or more, it has to be rounded off to the next whole number and where it is less than one-half, it has to be ignored. In the present case, 2% of 81 comes to 1.62. It being more than one-half , the value to be taken is 2. This view is supported by the decision of the Hon'ble Apex Court in the case of State of U.P. and Anr. v. Pawan Kumar Tiwari and Ors."

20. The state-respondents in their counter affidavit have stated that the reservation has to be applied on the basis of roster in the form of a running account from year to year and the post, which falls against a particular roster has to be filled from the category to which that post belongs in the roster. The plea taken by the State Government is in the abstract as no figures have been given to show as to whether the roster is complete or not. From the facts of the case what emerges is that the reservation is being applied to the vacancies and not to the entire cadre strength. Moreover, the stand taken by the respondents is in respect of vertical reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes as provided in Section 3 of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act 1994, Act 4 of 1994. Sub Section (5) of Section 3 of the Act 4 of 1994 provides for application of reservation on the basis of roster comprising total cadre strength of the public services and posts and the roster so issued is to be implemented in the form of a running account from year to year until the reservation for various categories of persons mentioned in sub-section 1, namely, persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes categories, is achieved and the operation of the roster and the running account shall thereafter come to an end and any vacancy occurring thereafter shall be filled from amongst persons belonging to the category to which the post belongs in the roster sub-section 5 of section 3 of the Act, 1994 reads as follows:

"3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.- [(1) In public services and posts, there shall be reserved at the stage of direct recruitment, the following percentage of vacancies to which recruitments are to be made in accordance with the roster referred to in sub-section (5) in favour of the persons belonging to Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens,-

(a) in the case of Scheduled Castes Twenty one per cent;

(b) in the case of Scheduled Tribe Two per cent;

(c) in case of Other Backward Classes of citizensTwenty-seven per cent:

20. So far as the category of persons belonging to the category of physically handicapped dependents of freedom fighters, Ex-Servicemen are concerned, the Act No. 4 of 1993 makes it clear that the reservation of these categories, which are otherwise known as horizontal reservation is to be applied to the vacancies and not on the basis of cadre strength as horizontal reservation is applicable across all the categories including general candidates. So far as dependents of freedom fighters are concerned, Section 3(1) (i) reads as follows:

"3 (1) (i) in public services and posts two percent of vacancies for dependents of freedom fighters;"

21. This question came up before the Lucknow Bench of this Court for consideration in Writ Petition (S.B.) NO. 1049 of 2010, Atul Awasthi Vs. U.P Cooperative Institutional Service Board, Lucknow through its Chairman and another and the Division Bench of this Court in paras 5, 6 and 7 held as follows:

" 5. Learned counsel for the respondents has argued that the quota provided to dependents of freedom fighter, exserviceman and physically handicapped as per rules, is a horizontal reservation and it has to be worked out on the basis of the vacancies advertized and not on the basis of the total cadre strength. It is further submitted that representation of the petitioner was rightly rejected.

6. Now the short question to be determined in this writ petition is whether 2% quota of freedom fighter has to be calculated on the basis of the total cadre strength or on the basis of the actual vacancies.

7. The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) Act, 1993 (in short referred to as U.P. Act No.

4 of 1993) was promulgated and came in to force with effect from 30.12.1993. According to Section 3 of the U.P. Act No. 4 of 1993, it was provided that there shall be reserved 5% of vacancies at the stage of direct recruitment in favour of the physically handicapped, dependents of freedom fighters and ex-servicemen. Subsection (2) of Section 3 of U.P. Act No. 4 of 1993 provided that the respective quota of the categories shall be such as the State Government may from time to time determine by a notified order. Further, sub-section (3) of Section 3 of U.P. Act No. 4 of 1993 provided the manner in which the reservation was to be applied. For sake of convenience, Section 3 of U.P. Act No. 4 of 1993 is quoted hereunder:

3. Reservation of vacancies in favour of physically handicapped etc.--(1) in public services and posts in connection with the affairs of the State there shall be reserved five per cent of vacancies at the stage of direct recruitment in favour of:

(i) physically handicapped

(ii) dependents of freedom fighters, and

(iii) ex-servicemen

(2) The respective quota of the categories specified in subsection (1) shall be such as the State Government may from time to time determine by a notified order.

(3) The persons selected against the vacancies reserved under sub-section (1) shall be placed in the appropriate categories to which they belong. For example, if a selected person belongs to Scheduled Castes category he will be placed in that quota by making necessary adjustments; if he belongs to Scheduled Tribes category, he will be placed in that quota by making necessary adjustments; if he belongs to Backward Classes category, he will be placed in that quota by making necessary adjustments. Similarly if he belongs to open competition category, he will be placed in

that category by making necessary adjustments.

(4) For the purpose of subsection (1) an year of recruitment shall be taken as the unit and not the entire strength of the cadre or service, as the case may be:

Provided that at no point of time the reservation shall, in the entire strength of cadre, or service, as the case may be, exceed the quota determined for respective categories.

(5) The vacancies reserved under sub-section (1) shall not be carried over to the next year of recruitment."

22. Applying the ratio of the case law referred to hereinabove, to the facts of the present case, we are satisfied that the respondents had clearly erred in calculating the vacancies for the category of dependents of freedom fighters. It has not been disputed by the respondents that against 134 posts, 2% reservation for dependants of freedom fighters would come to 2.68. That being the factual position, we are satisfied that in view of the law settled by the Supreme Court as well as this Court the principle of rounding off ought to have been applied against horizontal reservation and if so applied the posts falling in the category of dependents of freedom fighters would be 3 and not 2.

23. Besides the averments in para 11 of the writ petition that the petitioner had secured 1058.42 marks, whereas, the cut off marks or minimum obtained by the last candidate for dependents of freedom fighters was 1059.24, has not been denied by the respondents in their counter affidavit. All that has been submitted by learned Standing Counsel, during the course of argument is that 1059.24 was not the cut off marks fixed for dependents of freedom fighters.

24. From a perusal of the documents on record, it may be concluded that this may be at the most be a typographical error on the part of the petitioner, but the result of the examination in question, which has been filed as Annexure-7 to the writ petition at page 53, clearly shows that the minimum marks obtained by the candidate belonging to the dependent of freedom fighter category was in fact 1059.24.

25. Sri A.K. Sinha, learned counsel for the Commission has placed reliance upon the decision of the Supreme Court reported in (2012) 8 SCC 568 (Registrar, Rajiv Gandhi University of Health Sciences, Bangalore Vs. G. Hemlatha and others, wherein, referring to the minimum marks prescribed for Post Graduate Course, which was 55%, the petitioner who had obtained 54.71% aggregate in the Bachelor of Science was held ineligible for the said post. The Supreme Court in the said case has upheld the contention of the appellant-University and held that .71% could not be rounded off and 54.71 could not be read as 55% in order to make the petitioner eligible to take the examination for the P.G. Course in M.Sc. (Nursing). In the said judgment the Supreme Court has referred to its earlier judgment reported in (2011) 8 SCC 108, Orissa Public Service Commission and another Vs. Rupashree Chowdhary and another. In the judgment of Rupashree Chowdhary (supra), the Supreme Court has declined to round off .1 as 1. Reliance in that case was placed upon the decisions of the Supreme Court

in the case of Pawan Kumar Tiwari (supra), Bhudev Sharma (supra) and similar other judgments. The Supreme Court rejected the contention of the respondents therein (Rupashree Chowdhary) and while distinguishing the facts of the case in hand from that of Pawan Kumar Tiwari and Bhudev Sharma and others judgments, held that those cases dealt with posts or vacancies where, it was allowed to be rounded off to make 1 whole post but the same principle would not apply in the case of the minimum eligibility criteria/ marks prescribed for a particular course. Para 7 of the Rupashree Chowdhary (supra) judgment reads as follows:

"7. The learned counsel appearing for the respondents during the course of his arguments relied upon the decisions of this Court in State of Orissa Vs. Damodar Nayak, State of U.P. v. Pawan Kumar Tiwari, Union of India V. S. Vinodh Kumar and Bhudev Sharma V. District Judge, Bulandshahr. On scrutiny, we find that the findings recorded in the abovereferred cases are not applicable to the facts of the present case. The facts and findings recorded by this Court in the abovereferred cases are distinguishable to the facts of the case in hand. Almost all the aforesaid cases dealt with post or vacancies where it was allowed to be rounded off to make one whole post. Understandably there cannot be a fraction of a post."

26. Thus, in view of the observations made by the Supreme Court in the case of Rupashree Chowdhary (supra) the case of Rajiv Gandhi University (supra) has no application to the facts of the present case.

27. At this stage Sri Keshari Nath Tripathi, learned Senior Counsel submitted that out of 134 vacancies, only 121 candidates actually joined and therefore there would have been no difficulty for the respondents in calculating the posts in the category of dependents of freedom fighters by applying the principle of rounding off and thereafter making one post available for the petitioner.

28. The fact that out of 134 posts of Assistant Commissioner (Trade Tax) only 121 persons joined has not been denied by the learned Standing Counsel, who has very fairly placed before this Court the order dated 11.7.2013, passed by the Joint Commissioner (Trade Tax) Headquarters, Lucknow, which shows that in the 2009 Batch Examination, out of 134 posts, advertised, only 121 candidates had actually joined.

29. Thus, on a conspectus of the facts and the law laid down by the Supreme Court as well as this Court, we are of the firm opinion that the reservation prescribed for the category of dependents of freedom fighters as provided in the Act 4 of 1993 has not been applied in its true letter and spirit by the respondents and, therefore, the writ petition deserves to be allowed.

30. The writ petition is, accordingly, allowed. A direction is issued to the respondents to apply the principle of rounding off in the quota of dependants of freedom fighters in the batch of examination 2009 in the light of the observations made above and allocate posts in the category of dependents of freedom fighters for the post of Assistant Commissioner (Trade Tax) and thereafter consider the petitioner for appointment against the said post on the basis of the marks obtained by him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2013

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No.31646 of 1998

Vishnu Sahai Srivastava... Petitioner
Versus
The District Inspector of Schools & Ors... Respondents

Counsel for the Petitioner:
Sri Prakash Chandra Srivastava, Dr. H.N. Tripathi

Counsel for the Respondents:
C.S.C., Sri Satish Kumar Rai.

Constitution of India, Art.-226-Service law-claim of salary-for period-not allowed to work-petitioner made to retire on age of 58 years-subsequently DIOS held-retirement age as 60 years-allowed to join-26.07.97 as such worked till 30.06.1998-held-no fault on part of petitioner-entitled for salary for period not allowed to work-principle of 'no work no pay' not applicable.

Held: Para-15
In the case in hand, it is a common case that petitioner's second option has been accepted by the District Inspector of Schools in compliance of the order of this Court dated 04th April, 1997. The order of the District Inspector of Schools dated 19th July, 1997 allowing the petitioner's second option to retire at the age of 60 years has not been challenged by the Committee of Management and in compliance thereof, the petitioner was permitted to join on 26th July, 1997 and he served the institution till 30th June, 1998 when he attained the age of superannuation. A short question arose for consideration in this case is whether the petitioner is entitled for his salary from 01st July, 1996 to 25th July, 1997. From the materials on record it is established that there was no fault on the part of the petitioner. He had made several representations that in view of his second option he was entitled to continue till 30th June, 1998. However, the petitioner was illegally retired and removed on 01st July, 1996 on the ground that he has reached the age of superannuation on attaining the age of 58 years.

Case Law discussed:
(1997) 1 UPLBEC 51; 2007(1) LBESR 538; 2010(3) ADJ 304; (2002) 10 SCC 585; (2007) 7 SCC 689; Civil Appeal No. 6767 of 2013.

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner was an Assistant Teacher in an Intermediate College. He is aggrieved by the communication of the District Inspector of Schools, Allahabad dated 02/05th June, 1998 to the Committee of Management, whereunder petitioner's claim for his arrears of salary from 01st July, 1996 to 25th July, 1997 has not been accepted and the Committee of Management has been directed to take appropriate decision treating the said period as the petitioner was on leave without pay.

2. The foundational facts, in brief, are that the petitioner was appointed as an Assistant Teacher in an Intermediate College, namely, Boys Inter College, C.O.D., Chheoki, District Allahabad (for short, the "Institution"), which is a recognised institution. It receives aid out of the State fund. The provisions of the Uttar Pradesh Intermediate Education Act, 1921 and the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of the Teachers and

other Employees) Act, 1971 are applicable to the institution.

3. Present dispute arose in respect of the option to retire at the age of 60 years. The date of birth of the petitioner is 25th January, 1938. He was initially appointed in the year 1972. The State Government by a Government Order dated 29th August, 1981 offered option to the teachers to either retire at the age of 58 years or 60 years in terms of Rule 15 of the Death and Retirement Rules, subject to certain conditions. It is stated by the petitioner that on 30th December, 1982 he submitted his option for retirement at the age of 58 years. However, he did not receive any communication from the respondents either accepting or rejecting the said option.

4. Later on, the State Government by another Government Order dated 06th October, 1990 offered a fresh liberty to the teachers to change their option to retire either at the age of 58 years or 60 years. It is averred by the petitioner that pursuant to the said Government Order dated 06th October, 1990, he again on 14th December, 1990 submitted his option for retirement at the age of 60 years. Thus, in view of his second option, petitioner was under the impression that he would reach his age of superannuation on attaining the age of 60 years i.e. on 30th June, 1998 but in the month of March, 1996, to his utter surprise, he was asked to submit his papers for pension, etc.

5. It is stated that immediately thereafter the petitioner made a representation dated 08th April, 1996 before the respondent nos. 1 to 3 to the effect that as the petitioner had given his second option on 14th December, 1990 for his retirement at the age of 60 years, there was no question of his being retired in June, 1996 and he would retire on 30th June, 1998. It is stated that whenever the petitioner met the respondents personally, he was assured that appropriate decision shall be taken before his retirement. However, no action was taken and the petitioner was informed in the last week of June, 1996 that his option papers are not traceable in the office of the respondent no. 1, therefore, he would retire on 30th June, 1996. Against this background, the petitioner, having no other option, preferred Civil Misc. Writ Petition No. 11827 of 1997 (Vishnu Sahai Srivastava v. District Inspector of Schools, Allahabad). This Court while disposing of said writ petition on 04th April, 1997 in terms of the judgement of this Court reported in (1997) 1 UPLBEC 51 (Awadhesh Pandey v. Deputy Director of Education, IVth Region, Azamgarh and others), directed the District Inspector of Schools to decide the representation of the petitioner in view of the said judgement.

6. In compliance of the order of this Court and relying upon the aforesaid judgement of this Court i.e. Awadhesh Pandey (supra), District Inspector of Schools considered the cause of the petitioner and vide order dated 19th July, 1997 found that in view of the petitioner's second option, he is entitled to continue in service upto the age of 60 years. A copy of the said order dated 19th July, 1997 has been brought on record as annexure-3 to the writ petition. Thereafter vide communication dated 26th July, 1997 the Principal of the institution was directed for compliance of aforesaid order dated 19th July, 1997. A copy of said order/ communication dated 26th July, 1997 is on the record as annexure-2 to the writ petition. It is stated that the petitioner was permitted by the Committee of Management to join the institution on 26th July, 1997 and he retired after attaining the age of 60 years on 30th June,

1998, but his salary was not paid from 01st July, 1996 to 25th July, 1997.

7. The dispute arose with regard to payment of his salary from 01st July, 1996 upto 25th July, 1997. The stand taken by the Committee of Management was that since there was no direction by the District Inspector of Schools for payment of petitioner's salary from 01st July, 1996 to 25th July, 1997, the petitioner is not entitled for salary on the basis of no work no pay.

8. The petitioner has made several representations to the District Inspector of Schools for payment of his salary from 01st July, 1996 to 25th July, 1997. After several representations, the District Inspector of Schools has passed the impugned order dated 02nd/05th June, 1998, whereby he has directed the Manager/Principal of the College that the said period may be treated as the petitioner was on leave and if petitioner's no leave is due, then said period may be treated as leave without pay. Aggrieved by this order, the petitioner has preferred this writ petition.

9. A counter affidavit has been filed on behalf of the respondent no. 1, District Inspector of Schools. In the counter affidavit it is stated that in compliance of the order of this Court dated 04th April, 1997 the representation of the petitioner was allowed and he was allowed to continue upto the age of 60 years and as the petitioner did not work from 01st July, 1996, when he was retired, till 25th July, 1997 when in compliance of the order of the District Inspector of Schools he was allowed to join, he was not entitled for the salary. It is also stated that as the petitioner's option to retire at the age of 60 years has been accepted, he is not entitled for the gratuity. Only those teachers are entitled for the gratuity who opt to retire at the age of 58 years.

10. Respondent nos. 2 and 3, i.e. Committee of Management and Principal of the institution, have also filed their counter affidavit, wherein it has not been denied that petitioner's second option for his retirement on attaining the age of 60 years was accepted and he retired at the age of 60 years.

11. I have heard Dr. H.N. Tripathi, learned Counsel for the petitioner, learned Standing Counsel for the respondent no. 1, and Sri Satish Kumar Rai, learned Counsel for the respondent nos. 2 and 3.

12. Learned Counsel for the petitioner submits that the petitioner had submitted his first option on 30th December, 1982 for retirement at the age of 58 years, but no communication was made regarding acceptance of the same. Thereafter in pursuance of the Government Order dated 06th October, 1990, which permitted the teachers to change their option, the petitioner submitted his second option on 14th December, 1990 to retire at the age of 60 years, which option of the petitioner was approved by the District Inspector of Schools. Even after the approval of the petitioner's second option, he was retired on 30th June, 1996. The petitioner immediately filed Writ Petition No. 11827 of 1997, which was finally disposed of by this Court on 04th April, 1997 and a direction was issued to decide the representation of the petitioner relying on a judgement of this Court. In compliance of the order of this Court, petitioner's representation was allowed and he was allowed to join on 26th July, 1997, therefore, he was entitled for the salary from 01st July, 1996 till 25th July, 1997, i.e. when he was allowed to join. Learned Counsel for the petitioner further

submits that there was no fault on the part of the petitioner and as such, the petitioner is entitled for salary as well as all other benefits. Learned Counsel for the petitioner has placed reliance on the judgements of this Court in the case of Brijendra Prakash Kulshrestha v. Director of Education, U.P. at Allahabad & ors., 2007 (1) LBESR 538 (All), and Dr. Raj Kumari Singh and another v. State of U.P. and others, 2010 (3) ADJ 304 (DB) to establish that as the petitioner was not allowed to work, the principle of 'no work, no pay' shall not be applicable.

13. Learned Standing Counsel and Mr. Rai, learned Counsel for the respondent nos. 2 and 3, tried to support the stand of the respondents taken in the counter affidavit.

14. I have considered the respective submissions of the learned Counsel for the parties and perused the record.

15. In the case in hand, it is a common case that petitioner's second option has been accepted by the District Inspector of Schools in compliance of the order of this Court dated 04th April, 1997. The order of the District Inspector of Schools dated 19th July, 1997 allowing the petitioner's second option to retire at the age of 60 years has not been challenged by the Committee of Management and in compliance thereof, the petitioner was permitted to join on 26th July, 1997 and he served the institution till 30th June, 1998 when he attained the age of superannuation. A short question arose for consideration in this case is whether the petitioner is entitled for his salary from 01st July, 1996 to 25th July, 1997. From the materials on record it is established that there was no fault on the part of the petitioner. He had made several representations that in view of his second option he was entitled to continue till 30th June, 1998. However, the petitioner was illegally retired and removed on 01st July, 1996 on the ground that he has reached the age of superannuation on attaining the age of 58 years.

16. Pertinently, if the petitioner had retired at the age of 58 years, he would have entitled for payment of gratuity as the Government Order provides that a teacher who opts for retirement at the age of 58 years, will be paid gratuity but the teacher who opts for retirement at the age of 60 years, shall not be paid gratuity. Admittedly, the petitioner has not been paid gratuity as his option to retire at the age of 60 years has subsequently been accepted by the District Inspector of Schools.

17. The principle of 'no work no pay' has been considered by the Supreme Court in long course of decisions. The principle of no work no pay would not be applicable in those cases where the employee was not allowed to work although he was willing to work. Reference may be made to the judgements of the Supreme Court in the cases of Burn Standard Co. Ltd. v. Tarun Kumar Chakraborty, (2002) 10 SCC 585; Commissioner, Karnataka Housing Board v. C. Muddaiah, (2007) 7 SCC 689; and Deepali Gundu Surwase v. Kranti Junior Adhyapak Mahavidyalaya (D.Ed.) and others, Civil Appeal No. 6767 of 2013, decided on 12th August, 2013. In paragraph-17 of Deepali Gundu Surwase (supra) the Supreme Court held as as under:

"17. The very idea of restoring an employee to the position which he held before dismissal or removal or termination of service implies that the employee will be put in the same position in which he would have been but for the

illegal action taken by the employer. The injury suffered by a person, who is dismissed or removed or is otherwise terminated from service cannot easily be measured in terms of money. With the passing of an order which has the effect of severing the employer employee relationship, the latter's source of income gets dried up. Not only the concerned employee, but his entire family suffers grave adversities. They are deprived of the source of sustenance.

The children are deprived of nutritious food and all opportunities of education and advancement in life. At times, the family has to borrow from the relatives and other acquaintance to avoid starvation. These sufferings continue till the competent adjudicatory forum decides on the legality of the action taken by the employer. The reinstatement of such an employee, which is preceded by a finding of the competent judicial/ quasi judicial body or Court that the action taken by the employer is ultra vires the relevant statutory provisions or the principles of natural justice, entitles the employee to claim full back wages.

If the employer wants to deny back wages to the employee or contest his entitlement to get consequential benefits, then it is for him/her to specifically plead and prove that during the intervening period the employee was gainfully employed and was getting the same emoluments. Denial of back wages to an employee, who has suffered due to an illegal act of the employer would amount to indirectly punishing the concerned employee and rewarding the employer by relieving him of the obligation to pay back wages including the emoluments."

18. This Court also in the case of Brijendra Prakash Kulshrestha (supra) has held that an employee is entitled for his full salary for the period he could not work on account of act of the respondents. In the said case also, the dispute was with regard to date of retirement and the employee in the said case was retired at the age of 58 years although he was entitled to work upto the age of 60 years. It is enough to extract only relevant part of the judgement of Brijendra Prakash Kulshrestha (supra), as under:

"35. In these facts and circumstances the appellant is entitled for arrears of salary for the period in question and with great respect to the Hon'ble Single Judge we are unable to agree with the judgment under appeal to this extent. Our view is fortified from the exposition off law laid down by the Apex Court in J.N. Srivastava (supra)1, Shambhu Murari Sinha (supra)2, Srikantha S.M. (supra)3 and Virender Kumar Goel (supra)4 as we have already discussed where in the case of retirement, the employee could not discharge any duty due to such retirement forced upon him by the employer the Apex Court has consistently held that such employee is entitled for full salary. Therefore in our view the appellant is entitled for arrears of salary for the period he could not work on account of act of the respondents i.e. from 1-7-1995 to 30-6-1997."

19. The facts of the present case are identical to the facts of the said case. In view of the law laid down by the Supreme Court and the Division Bench in Brijendra Prakash Kulshrestha (supra), the petitioner is entitled for his salary from 01st July, 1996 to 25th July, 1997 as there was no fault on the part of the petitioner and he, in spite of repeated

representations, was retired on 30th June, 1996.

20. After careful consideration of the facts and circumstances of the case, for the aforestated reasons, I am of the view that end of justice would be subserved in case a direction is issued upon the respondent no. 1 to pay the salary of the petitioner from 01st July, 1996 to 25th July, 1997 within a period of three months from the date of communication of this order. In view of the above, the order/communication issued by the District Inspector of Schools dated 02/05th June, 1998, impugned in this writ petition, needs to be quashed and accordingly it is quashed.

21. Accordingly, the writ petition is allowed.

22. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2013

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE VIPIN SINHA, J.

Civil Misc. Writ Petition No. 45023 of 2010

Sri Navin Tyagi & Anr... .Petitioners
Versus
Union of India & Ors.... Respondents

Counsel for the Petitioner:
Sri Yogendra Nath Rai

Counsel for the Respondents:
C.S.C., Sri R.K. Singh

Constitution of India, Art.-226- Alternative remedy-petitioner seeking enhancement of compensation-by quashing arbitration award-can be challenged under section 34 of arbitration & Cancellation Act 1966-held-petition not maintainable.

Held: Para-24 & 25

24. Thus in view of what has been discussed above and the consistent legal position, the contention of the learned counsel for the petitioners that they cannot seek remedy under the provisions of the Arbitration and Conciliation Act, 1996 is misconceived and fallacious and accordingly rejected.

25. Petitioners may approach the appropriate forum under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The present writ petition is thus not maintainable and accordingly the same is dismissed.

Case Law discussed:
(2011)10 SCC 300; (2006) 4 SCC 445; (2008) 13 SCC 80; (2006) 11 SCC 181; (2011) 5 SCC 758.

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

1. By means of this writ petition petitioners are challenging the award dated 29.07.2009 given by the Arbitrator under Section 3-G(5) of the National Highways Act, 1956. The reliefs as sought in the writ petition are as follows:

I) Issue a writ, order or direction in the nature of certiorari quashing the order dated 29.07.2009 passed by respondent no. 3, District Magistrate, Ghaziabad.

II)Issue a writ order or direction in the nature of mandamus commanding and directing the respondents to enhance the rate of the land compensation of the petitioner Rs. 5000/- per sq. meter or paid as per the rate given by Gail India Limited and Indian Oil Corporation fixed by compromise by both the party Rs. 4400/- per sq. meter and direct the respondents to pay 10% interest along with.

III)Issue any other writ order or direction which this Hon'ble Cort may deem fit and proper under the facts and circumstances of this case.

2. Heard Sri Yogendra Nath Rai, learned counsel for the petitioners, Sri R.K. Singh, learned counsel appearing for opposite party-respondent no. 2 and learned standing counsel for respondent nos. 1 & 3.

3. The contentions as raised in the writ petition are to the effect that the petitioners are aggrieved, and thus are challenging the legality and the validity of the order dated 29.07.2009 passed by the Arbitrator/District Magistrate, Ghaziabad by which the rate of the acquired land of the petitioners has been fixed as Rs. 820.00 by the Arbitrator. It has been contended that the said compensation is totally arbitrary and against the norms.

4. The facts as stated in the writ petition are that the petitioners were the owners of gata No. 155, khasra No. 422, area 5080 sq. meter situate in Village Basantpur Saintali, Pargana Jalalabad, Tehsil Modi Nagar, District Ghaziabad; that petitioners land was acquired for the construction of National High Way (Eastern Periphered Way) and notification under Section 3A was published on 02.08.2006 under the National Highways Act, 1956 in the local newspaper on 23.08.2006 and 24.08.2006 and declaration under Section 3D of National Highway Act was published on 30.11.2006; that petitioners have received compensation as per rate of Rs. 820/- fixed by the competent authority; that without giving any opportunity of hearing to the petitioners, rate was fixed by the competent authority @ Rs. 820/- per sq. meter; that the assessed market rate of the land of the petitioners fixed by the competent authority, court of A.D.M. is very less on 25.01.2008, which is not acceptable by the petitioners; that petitioners land was situated on Delhi Meerut Road which comes under the National Capital Region, the market value of the petitioners' land is not less than Rs. 5,000/- per sq. meter, the assessment of the market rate decided by the Collector Ghaziabad was must less; that the circle rate is not the market value, the judgment given by the competent authority is absolutely illegal and arbitrary and the assessment of the land was not fixed as per norms prescribed for such fixation.

5. Accordingly, it has been prayed by the petitioners that the respondents be directed to pay the compensation at the rate of the market value, same being not less than Rs. 5000/- per sq. meter.

6. Thus, the petitioners are basically aggrieved against the quantum of compensation that has been fixed by the Arbitrator.

7. A counter affidavit has been filed on behalf of respondent no. 2, in which a stand has been taken that as the petitioners have an efficacious alternative remedy available of moving an application under Section 34 of the Arbitration and Conciliation Act, 1996 and thereafter again by filing an appeal under Section 37 of the Act against the order, if any, passed in proceedings under Section 34 of the Act, the writ petition is not maintainable and the same is liable to be dismissed on the ground of alternative remedy, being available to the petitioners.

8. To the said counter affidavit, a rejoinder affidavit has been filed.

9. It has been contended by Sri Yogendra Nath Rai, learned counsel for the petitioners that no remedy lies under the provisions of Arbitration Act as the scope of interference under Section 34 of the Arbitration Act is much limited and an award can be set aside only on certain grounds mentioned therein.

10. The contention as raised at the bar necessitates reference to the following provisions. Section 34 of Arbitration and Conciliation Acţ 1996 is quoted herein below:

34.Application for setting aside arbitral award. "(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and subsection (3).

2. An arbitral award may be set aside by the Court only if-

a. the party making the application furnishes proof that-

i.a party was under some incapacity, or

ii.the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

iii.the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv.the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

b. the Court finds that-

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

ii.the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81."

11. Reference may also be made to certain provisions of National Highways Act, 1956. Section 3G reads herein as under:

3G. Determination of amount payable as compensation.

"(l) Where any land is acquired under this Act, there shall be paid an amount which shall be determined by an order of the competent authority.

(2) Where the right of user or any right in the nature of an easement on, any land is acquired under this Act, there shall be paid an amount to the owner and any

other person whose right of enjoyment in that land has been affected in any manner whatsoever by reason of such acquisition an amount calculated at ten per cent of the amount determined under sub-section (1), for that land.

(3) Before proceeding to determine the amount under sub-section (1) or sub-section (2), the competent authority shall give a public notice published in two local newspapers, one of which will be in a vernacular language inviting claims from all persons interested in the land to be acquired.

(4) Such notice shall state the particulars of the land and shall require all persons interested in such land to appear in person or by an agent or by a legal practitioner referred to in sub-section (2) of section 3C, before the competent authority, at a time and place and to state the nature of their respective interest in such land.

(5) If the amount determined by the competent authority under sub-section (1) or sub-section (2) is not acceptable to either of the parties, the amount shall, on an application by either of the parties, be determined by the arbitrator to be appointed by the Central Government.

(6) Subject to the provisions of this Act, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to every arbitration under this Act.

(7) The competent authority or the arbitrator while determining the amount under sub-section (1) or sub-section (5), as the case may be, shall take into consideration –

(a) the market value of the land on the date of publication of the notification under section 3A;

(b) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the severing of such land from other land;

(c) the damage, if any, sustained by the person interested at the time of taking possession of the land, by reason of the acquisition injuriously affecting his other immovable property in any manner, or his earnings;

(d)if, in consequences of the acquisition of the land, the person interested is compelled to change his residence or place of business, the reasonable expenses, if any, incidental to such change.

12. While raising objection regarding maintainability of the writ petition, learned counsel for the respondent has cited two Division Bench judgements in Writ-C No. 58782 of 2010; Rajesh Prasad And Others Vs. Union of India And Others decided on 06.10.2010, Writ C No. 38273 of 2013; Sudheer Rawal Vs. Union of India And 3 Others decided on 17.07.2013 and a Single Bench judgement in Writ-C No. 27718 of 2013; Waseem Ahmad Khan Vs. State of U.P. Thru D.M. And 3 Others decided on 16.05.2013, wherein the Court has dismissed the writ petitions on the ground that the petitioners have alternative remedy available to them under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 and, therefore, held that the writ petitioner is not maintainable.

13. Prima facie the objection as taken by the learned counsel for the respondent has much water. A perusal of Section 3G sub clause (7) shows that for determining the amount as payable under Section 3G(7), certain parameters are to be considered which have been classified in Clause a,b,c,d. Meaning thereby the

fixation of quantum of compensation is not an exercise in abstract and the same is governed by the parameters given in sub Section (7) and Clause a,b,c,d, which have to be kept in mind by the authority concerned while determining the quantum of compensation. The quantum of compensation as such is a logical conclusion of the procedure to be adopted by the Arbitrator keeping in mind the parameters as given under the Act of 1956, while determining the quantum and thus, the grievance of the petitioners, if any, is to the effect that the quantum of compensation as determined is not in accordance with the parameters as prescribed under the Act, 1956 for the said purpose.

14. At this stage, it is relevant to consider the definition of public policy. Section 34 sub clause (2)(b) of the Act, 1996 provides that an arbitral award may be set aside by the Court only if it is in conflict with the public policy of India. Section 34(2)(b)(i) & (ii) of the Act 1996 are quoted herein as under:

i.the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

ii. the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

15. Thus, it is apparent that if while determining the quantum of compensation under the provisions of National Highways Authority Act, 1956, the Arbitrator has not followed the procedure or has not considered the parameters as given under Clause 3G sub clause (7) and the parameters mentioned therein, then that would be an award against public policy.

16. It would be relevant here to consider the definition of public policy as has been expanded in the recent judgements of Hon'ble Supreme Court. Needless to say that the definition of term public policy has been expanded to a very great extent and in this regard reference may be made to the judgement rendered in the case of Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.; (2003) 5 SCC 705. Relevant extact of the said judgement is being quoted herein below:

"16. The next clause which requires interpretation is clause (ii) of sub-section 2(b) of Section 34 which inter alia provides that the Court may set aside the arbitral award if it is in conflict with the 'Public Policy of India'. The phrase 'Public Policy of India' is not defined under the Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the Act. It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act and Constitutional provisions."

"17. For this purpose, we would refer to few decisions referred to by the learned counsel for the parties. While dealing with the concept of 'public policy, this Court in Central Inland Water Transport Corporation Limited and another v. Brojo Nath Ganguly and another [(1986) 3 SCC 156] has observed thus: -

"92. The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy", or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognized head of public policy, the courts have not shirked from extending it to the new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought- "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well- established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Driefontein Consolidated Gold Mines Ltd. [(1902) AC 484, 500] : "Public Policy is always an unsafe and treacherous ground for legal decision". That was in the year 1902. Seventy-eight years earlier, Burrough, J., in Richardson v. Mellish [(1824) 2 Bing 229, 252] described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderby Town Football Club Ltd. v. Football Assn. Ltd. [(1971) Ch. 591, 606]; "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law",

In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.

It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there

is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.

93. The normal rule of Common Law has been that a party who seeks to enforce an agreement which is opposed to public policy will be non-suited. The case of A. Schroeder Music Public Co. Ltd. v. Macaulay [(1974) 1 WLR 1308], however, establishes that where a contract is vitiated as being contrary to public policy, the party adversely affected by it can sue to have it declared void. The case may be different where the purpose of the contract is illegal or immoral. In Kedar Nath Motani v. Prahlad Rai [(1960) 1 SCR 861], reversing the High Court and restoring the decree passed by the trial court declaring the appellants' title to the lands in suit and directing the respondents who were the appellants' benamidars to restore possession, this Court, after discussing the English and Indian law on the subject, said.

The correct position in law, in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by misstating the facts. If, however, the matter is clear and the illegality is not required to be pleaded or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the court, the plea of the defendant should not prevail.

The types of contracts to which the principle formulated by us above applies are not contracts which are tainted with illegality but are contracts which contain terms which are so unfair and unreasonable that they shock the conscience of the court. They are opposed to public policy and require to be adjudged void."

17. Therefore, in a case where the validity of award is challenged there is no necessity of giving a narrow meaning to the term 'Public Policy of India' on the contrary, a wider meaning is required to be given so that the "patently illegal award" passed by the Arbitrator Tribunal would be set aside.

18. In the same judgement of O.N.G.C. (Supra), the Apex Court has further held in Paragraph Nos. 26, 27, 28, 31 which are quoted herein as under:

"26. It is true that Legislature has not incorporated exhaustive grounds for challenging the award passed by the arbitral tribunal or the ground on which

appeal against the order of the Court would be maintainable."

"27. On this aspect, eminent Jurist & Senior Advocate Late Mr. Nani Palkhivala while giving his opinion to 'Law of Arbitration and Conciliation' by Justice Dr. B.P. Saraf and Justice S.M. Jhunjhunuwala, noted thus:-

"I am extremely impressed by your analytical approach in dealing with the complex subject of arbitration which is emerging rapidly as an alternate mechanism for resolution of commercial disputes. The new arbitration law has been brought in parity with statutes in other countries, though I wish that the Indian law had a provision similar to section 68 of the English Arbitration Act, 1996 which gives power to the Court to correct errors of law in the award.

I welcome your view on the need for giving the doctrine of "public policy" its full amplitude. I particularly endorse your comment that Courts of law may intervene to permit challenge to an arbitral award which is based on an irregularity of a kind which has caused substantial injustice.

If the arbitral tribunal does not dispense justice, it cannot truly be reflective of an alternate dispute resolution mechanism. Hence, if the award has resulted in an injustice, a Court would be well within its right in upholding the challenge to the award on the ground that it is in conflict with the public policy of India."

28.From this discussion it would be clear that the phrase 'public policy of India' is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation. Hence, the award which is passed in contravention of Sections 24, 28 or 31 could be set aside. In addition to Section 34, Section 13(5) of the Act also provides that constitution of the arbitral tribunal could also be challenged by a party. Similarly, Section 16 provides that a party aggrieved by the decision of the arbitral tribunal with regard to its jurisdiction could challenge such arbitral award under Section 34. In any case, it is for the Parliament to provide for limited or wider jurisdiction to the Court in case where award is challenged. But in such cases, there is no reason to give narrower meaning to the term 'public policy of India' as contended by learned senior counsel Mr. Dave. In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice. This Court in Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) By LRs and others [(1991) 3 SCC 67], this Court observed thus:-

"17. .. It cannot be disputed that a contract which has a tendency to injure public interests or public welfare is one against public policy. What constitutes an injury to public interests or welfare would depend upon the times and climes. ... The legislature often fails to keep pace with the changing needs and values nor as it realistic to expect that it will have provided for all contingencies and eventualities. It is, therefore, not only necessary but obligatory on the courts to step in to fill the lacuna. When courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society. Or to put it negatively, to prevent the frustration of the legislation or perversion of the goals and values of the society."

"31. Therefore, in our view, the phrase 'Public Policy of India' used in Section 34 in context is required to be

given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be - award could be set aside if it is contrary to: -

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

19. The aforesaid judgement has been followed in the subsequent judgement of Phulchand Exports Limited Vs. O.O.O. Patriot; (2011) 10 SCC 300.

20. Then again in the case of Hindustan Zinc Ltd. Vs. Friends Coal Carbonisation; (2006) 4 SCC 445, observation of the Apex Court with regard to public policy has been followed.

21. Reference may also be made to the case of Delhi Development Authority Vs. R.S. Sharma And Company, New Delhi; (2008) 13 SCC 80, in which while placing reliance on the case of O.N.G.C. (Supra), the Court has observed as under.

"20 In Hindustan Zinc Ltd. vs. Friends Coal Carbonisation, (2006) 4 SCC 445, the following principles laid down in paragraphs 13 and 14 are relevant for the disposal of the present case:

13. This Court in ONGC Ltd. v. Saw Pipes Ltd. (2003) 5 SCC 705 held that an award contrary to substantive provisions of law or the provisions of the Arbitration and Conciliation Act, 1996 or against the terms of the contract, would be patently illegal, and if it affects the rights of the parties, open to interference by the court under Section 34(2) of the Act. This Court observed: (SCC pp. 718 & 727-28, paras 13 & 31)

13. The question, therefore, which requires consideration is--whether the award could be set aside, if the Arbitral Tribunal has not followed the mandatory procedure prescribed under Sections 24, 28 or 31(3), which affects the rights of the parties. Under sub-section (1)(a) of Section 28 there is a mandate to the Arbitral Tribunal to decide the dispute in accordance with the substantive law for the time being in force in India. Admittedly, substantive law would include the Indian Contract Act, the Transfer of Property Act and other such laws in force. Suppose, if the award is passed in violation of the provisions of the Transfer of Property Act or in violation of the Indian Contract Act, the question would be--whether such award could be set aside. Similarly, under sub-section (3), the Arbitral Tribunal is directed to decide the dispute in accordance

with the terms of the contract and also after taking into account the usage of the trade applicable to the transaction. If the Arbitral Tribunal ignores the terms of the contract or usage of the trade applicable to the transaction, whether the said award could be interfered. Similarly, if the award is a non-speaking one and is in violation of Section 31(3), can such award be set aside? In our view, reading Section 34 conjointly with other provisions of the Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the Act, still however, it couldn't be set aside by the court. If it is held that such award could not be interfered, it would be contrary to the basic concept of justice. If the Arbitral Tribunal has not followed the mandatory procedure prescribed under the Act, it would mean that it has acted beyond its jurisdiction and thereby the award would be patently illegal which could be set aside under Section 34.

31. ... in our view, the phrase `public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term public policy in Renusagar case, it is required to be held that the award could be set aside if it is patently illegal. The result would be --award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality; or

(d)in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

14.The High Court did not have the benefit of the principles laid down in Saw Pipes, and had proceeded on the assumption that award cannot be interfered with even if it was contrary to the terms of the contract. It went to the extent of holding that contract terms cannot even be looked into for examining the correctness of the award. This Court in Saw Pipes has made it clear that it is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

21. From the above decisions, the following principles emerge:

(a) An Award, which is

(i) contrary to substantive provisions of law ; or (ii)the provisions of the Arbitration and Conciliation Act, 1996 ; or

(iii)against the terms of the respective contract ; or

(iv) patently illegal, or

(v) prejudicial to the rights of the parties, is open to interference by the Court under Section 34(2) of the Act.

(b) Award could be set aside if it is contrary to :

(a) fundamental policy of Indian Law; or

(b) the interest of India; or

(c) justice or morality;

(c) The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court.

(d) It is open to the Court to consider whether the Award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India.

22. In Mcdermott International Inc. Vs. Burn Standard Co. Ltd. And Others; (2006) 11 SCC 181, definition of pubic policy as defined in the case of O.N.G.C. (Supra) was followed and the case was affirmed.

23. As even in recent past in the case of J.G. Engineers Private Ltd. Vs. Union of India And Another; (2011) 5 SCC 758, the Supreme Court has again adhered to the definition of public policy as defined in the case of O.N.G.C. (Supra).

24. Thus in view of what has been discussed above and the consistent legal position, the contention of the learned counsel for the petitioners that they cannot seek remedy under the provisions of the Arbitration and Conciliation Act, 1996 is misconceived and fallacious and accordingly rejected.

25. Petitioners may approach the appropriate forum under the provisions of Section 34 of the Arbitration and Conciliation Act, 1996. The present writ petition is thus not maintainable and accordingly the same is dismissed.

26. No order as to costs.
