APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2015

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

Special Appeal Defective No. 10 of 2015

Shiv Shankar Mishra ...Appellant
Versus
State of U.P. & Ors. ..Respondents

Counsel for the Appellant:
Sri R.K. Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-claim of interest on delayed payment of arrears of salary as well as pension-in spite of earlier direction of Writ Court-payment made on highly belated stage-only reason disclosed for non payment the paucity of fund-held-petitioner/appellant entitled for interest on delayed payment on arrears of salary as well as pension-to this extent order by Single Judge modified-appeal disposed of.

Held: Para-9
We, therefore, have come to the conclusion that the learned Single Judge was not justified in declining the prayer for the payment of interest. Insofar as the payment which was made to the appellant on 18 March 2014 is concerned, the appellant was clearly entitled to the payment of interest from the date of the filing of the writ petition in 2010 (Writ -A No. 47141 of 2010). The appellant would also be entitled to the payment of interest on the pensionary payment which was unlawfully withheld from March 2014 until actual payment is made. We direct that interest shall be admissible to the appellant at the rate of 9% per annum from the date on which the respective payments on account of arrears of salary, or as the case may be, towards pensionary dues became due and payable as directed earlier. Interest shall be computed in terms of the aforesaid directions within a period of three months from the date of receipt of a certified copy of this order. The order of the learned Single Judge declining interest shall to that extent stand set aside and be substituted by the aforesaid directions.

Case Law discussed:
(1985) 1 SCC 429; (2014) 8 SCC 894.

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

1. The appellant was working as a collection amin in the office of the Assistant Commissioner / District Assistant Registrar, Cooperative Societies, Bhadohi, impleaded as third respondent to these proceedings. The appellant attained the age of superannuation on 28 February 2013. His grievance was that during the tenure of his service, he was not paid his monthly salary for thirty one months between August 2004 to June 2007 and from January 2010 till the date of his retirement without any justification. Moreover, the appellant was not allowed the benefit of the payment of pay fixation and arrears in accordance with the report of the Sixth Pay Commission as adopted by the State. He filed a writ petition (Writ-A No. 47141 of 2010) for seeking the release of his salary and other retiral dues. A counter was filed on behalf of the respondents stating that an amount which was due had been paid while the balance would be paid over to the appellant as and when funds were made available. The learned Single Judge by an order dated 11 September 2013 disposed of the petition

with the following observations and directions:

"The paucity of fund cannot be taken as a ground for not paying the admitted dues to the petitioner. Petitioner has since retired and, therefore, the petitioner should be duly paid his arrears.

It is submitted that even the pension etc. has not been finalized which is causing grave hardship to the petitioner.

Under the circumstances, the writ petition is disposed of with the direction that the respondent no. 2 will firstly pay the entire admitted arrears to the petitioner within a period of four months and will take immediate steps for determination of pension etc. within the same period and will make all endeavour to release the pension and other retiral dues to the petitioner within the same period.

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

2. Despite the order of the learned Single Judge, the admitted arrears were not paid within a period of four months, following which a contempt petition was filed (Contempt Application (Civil) No. 1765 of 2014). On 13 March 2014, a learned Single Judge acting on the contempt application granted one more opportunity to the respondents to comply with the order within one month failing which it was directed that the opposite parties would remain present before the Court.

3. On 17 February 2014, the Assistant Commissioner and the Assistant Registrar issued a letter to the Additional Commissioner for sanctioning an amount of Rs.12,19,054.00 to the appellant. Eventually, on 20 March 2014, a communication was addressed to the Assistant Commissioner stating that a cheque in the amount of Rs.12,19,054.00 dated 18 March 2014 had been made over.

4. The appellant moved representations on 5 May 2014 and again on 10 June 2014 complaining that his pension had not been released from the month of March 2014 and seeking the payment of interest on the delayed payment of his dues. A writ petition was filed for a direction to pay interest at the rate of 18% per annum on the delayed payment of the arrears of monthly salary and retiral dues. A mandamus was also sought for the payment of the monthly pension of the appellant w.e.f. March 2014.

5. The learned Single Judge, by an order dated 26 November 2014, directed that in view of the fact that the pensionary payments have been stopped w.e.f. March 2014, these should be paid on or before 31 January 2015 failing which, if the payment was not made by the said date, the appellant would be entitled for interest @ 9%. The learned Single Judge has declined to grant interest on the delayed payment of arrears of salary. Moreover, the claim for interest on the delayed payment of the pensionary benefits has also been declined in the sense that if payment is made by 31 January 2015, no interest would be admissible. The learned Single Judge has noted that payment was not released on the ground of paucity of funds and hence, there was no willful default on the part of the respondents in the payment of his salary or pensionary dues. This ground has weighed in denying the claim for interest.

6. The present case is an unfortunate instance where an employee has been left

in the lurch after having rendered long years of service. Both the arrears on account of salary as well as pensionary dues have not been paid on time. When the appellant had moved a writ petition before the Court, an order was passed on 11 September 2013 directing the payment of the admitted arrears within four months and for immediate steps to determine the pensionary dues. This order was not complied with following which, he was constrained to file contempt proceedings. It is only thereafter that on 18 March 2014 the payment of arrears of salary from August 2010 until February 2013 was made. It was only then that the appellant was also paid arrears on account of gratuity, pension and other retiral dues. There was no reason or justification to withhold the payment of salary during the period when the appellant had worked when salary fell due for payment or for the non payment of pensionary and retiral dues, the latter within a reasonable period of retirement. There was no lapse on the part of the appellant. The paucity of funds cannot surely be held up as an excuse not to pay the salary of an employee who had worked for the period for which his salary is due. Similarly, pensionary dues constitute a rightful entitlement of an employee. The State cannot be heard to say that it would fail to pay the pension on time and yet excuse itself from the liability to pay interest.

7. In the case of State of Kerala Vs M Padmanabhan Nair and Som Prakash1, the Supreme Court held as follows:

"Pension and gratuity are no longer any bounty to be distributed by the Government to its employees on their retirement but have become, under the decisions of this Court, valuable rights and property in their hands and any culpable delay in settlement and disbursement thereof must be visited with the penalty of payment of interest at the current market rate till actual payment."

8. In a more recent decision in D D Tewari Vs Uttar Haryana Bijli Vitran Nigam Ltd2, the Supreme Court observed that any culpable delay in settlement and disbursement thereof is to be visited with penalty of payment of interest. Hence, interest @ 9% on delayed payment was awarded to be paid within six weeks failing which interest @ 18% p.a. would need to be paid. An erroneous withholding of gratuity amount to which the employee is legally entitled, entails penalty on the delayed payment.

9. We, therefore, have come to the conclusion that the learned Single Judge was not justified in declining the prayer for the payment of interest. Insofar as the payment which was made to the appellant on 18 March 2014 is concerned, the appellant was clearly entitled to the payment of interest from the date of the filing of the writ petition in 2010 (Writ -A No. 47141 of 2010). The appellant would also be entitled to the payment of interest on the pensionary payment which was unlawfully withheld from March 2014 until actual payment is made. We direct that interest shall be admissible to the appellant at the rate of 9% per annum from the date on which the respective payments on account of arrears of salary, or as the case may be, towards pensionary dues became due and payable as directed earlier. Interest shall be computed in terms of the aforesaid directions within a period of three months from the date of receipt of a certified copy of this order. The order of the learned Single Judge

declining interest shall to that extent stand set aside and be substituted by the aforesaid directions.

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

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.01.2015

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Special Appeal Defective No. 18 of 2015

State of U.P. & Ors. ...Appellants
Versus
Rana Shamsher Singh ...Respondent

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

Counsel for the Respondents:
Sri R.K. Singh

Constitution of India, Art.-226-arrears of salary-petitioner/respondent proceeded on medical leave w.e.f. 21.02.13 to 21.07.2013-the authority treated that period on leave without pay-but imposed punishment of censure for absence on duty without prior information-appeal also rejected-held-order of Single Judge justified-but authorities committed mistake ignoring this aspect-if transfer order passed during leave period and medical leave application given at original place of posting-employee can not be faulted-such treatment absolutely in human approach-entitled for arrears of salary apart from claim of medical-reimbursement payable within two months-appeal disposed of.

Held: Para-6
From record it is apparent that it is not that respondent -Sub Inspector had not informed the authorities about his treatment. He did inform the Superintendent of Police, Chandauli about his medical treatment but objection of the State-appellant is that since he had been transferred during the period of absence, he should have submitted application at PAC Headquarter and not S.P. Chandauli where he was earlier posted. Approach of the appellant appears to be inhuman. Order of his transfer was made during the period of absence i.e. while undergoing treatment, so even if application for leave was made by him to the S.P. Chandauli where he was earlier posted, his leave application could have been forwarded by the S.P. to the appropriate authority. Further, during departmental enquiry, when it has been found that during the period of absence he was undergoing medical treatment relating to his kidney, it cannot be said to be a case of absence without justifiable cause. In the aforesaid circumstances, the writ Court has rightly come to the conclusion that merely because he did not seek prior permission or that he submitted applications in the office where he was earlier posted, may be a good ground for imposing some minor punishment but the same cannot be a ground for denial of pay for the period of absence particularly when punishment of censure has already been imposed. In our view, instead of leave without pay, medical leave should have been granted to the respondent-Sub Inspector.

(Delivered by Hon'ble Rakesh Tiwari, J.)

1. There is delay of 78 days in filing the present appeal. After hearing the submissions and going through the affidavit filed in support of delay condonation application, in our view, the cause shown is sufficient. Accordingly, the delay in filing the appeal is condoned and the delay condonation application is allowed.

2. State of U.P. has preferred this intra Court appeal against judgment and order dated 2.9.2014 passed in Writ

Petition No. 45937/2014, Rana Shamsher Singh Vs. State and others,.

3. We have heard Sri H.M. Srivastava appearing for the appellant - State and perused the record.

4. Facts relevant to this appeal are that Rana Shamsher Singh, a sub inspector in P.A.C. remained absent from duty w.e.f. 21.2.2013 to 21.7.2013, for he was admitted in a hospital for operation of kidney and he informed the authorities in that regard. After his joining the duty, an inquiry was conducted wherein it was found that he was underoing aforesaid treatment but he absented himself without prior permission, hence after show cause notice and its reply by him, leave without pay was sanctioned and punishment of censure was imposed on him. Appeal preferred against the said order having been rejected, he filed the aforesaid writ petition. The writ Court while disposing of the writ petition, has directed the appellate authority to reconsider the matter regarding denial of pay for the period of absence and take a fresh decision in the matter within three months, against which present appeal has been filed.

5. Learned standing counsel for the appellant has submitted that respondent-Sub Inspector, did not seek prior permission before availing medical leave, therefore, the authority has rightly passed the orders for leave without pay applying the principle of 'No work no pay' and censure entry.

6. From record it is apparent that it is not that respondent -Sub Inspector had not informed the authorities about his treatment. He did inform the Superintendent of Police, Chandauli about his medical treatment but objection of the State-appellant is that since he had been transferred during the period of absence, he should have submitted application at PAC Headquarter and not S.P. Chandauli where he was earlier posted. Approach of the appellant appears to be inhuman. Order of his transfer was made during the period of absence i.e. while undergoing treatment, so even if application for leave was made by him to the S.P. Chandauli where he was earlier posted, his leave application could have been forwarded by the S.P. to the appropriate authority. Further, during departmental enquiry, when it has been found that during the period of absence he was undergoing medical treatment relating to his kidney, it cannot be said to be a case of absence without justifiable cause. In the aforesaid circumstances, the writ Court has rightly come to the conclusion that merely because he did not seek prior permission or that he submitted applications in the office where he was earlier posted, may be a good ground for imposing some minor punishment but the same cannot be a ground for denial of pay for the period of absence particularly when punishment of censure has already been imposed. In our view, instead of leave without pay, medical leave should have been granted to the respondent-Sub Inspector.

7. Moreover, the Writ Court has recorded that from perusal of the impugned order dated 24.2.2014 it is apparent that the order is cryptic one and bereft of any consideration of the reply submitted as well as the recitals contained in the inquiry report.

8. For the aforesaid reasons, since the principle of 'No work no pay' would not apply in the facts and circumstances of this case, we quash the order dated 24.2.2014 sanctioning leave without pay as well as order dated 23.5.2014 of the appellate authority appended as annexure no. 14 and

15 respectively to the writ petition. The respondent shall be treated on medical leave for the aforesaid period of absence and shall be paid salary and medical reimbursement within a period of two months.

9. With the above directions, the appeal stands disposed of. The judgment and order passed by the writ Court regarding reconsideration of matter by appellate authority stands modified to the above extent. No order as to costs.

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.01.2015

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

Crl. Misc. Leave Application (Defective) No. 67 of 2013
(U/s 372 Cr.P.C.)

Manoj Kumar Singh ...Appellant
Versus
State of U.P. & Ors. ...Opp. Parties.

Counsel for the Appellant:
Sri Satish Chandra Singha

Counsel for the Respondents:
A.G.A., Sri Rajiv Sharma

Cr.P.C. Section-372-Right to appeal against acquittal-appeal by 'victim' as defined under Section 2(wa)-whether a guardian or legal heirs of victim can be allowed to prefer appeal on behalf of victim?-question referred to larger Bench.

Held: Para-25
Considering the aforesaid position that emerges, we find that it is necessary to refer this question of the maintainability of an appeal on behalf of a person claiming to be a "victim" for an authoritative pronouncement by a Larger Bench as in view of the decisions aforesaid it will be difficult to agree with the view expressed by the Division Bench in the case of Edal Singh (Supra) decided on 10.4.2014. Consequently, the following questions are referred for being placed before a Larger Bench to answer the aforesaid issue in the light of the observations made herein above namely:

1. "Whether the definition of the word "victim" as used in Section 2 (wa) would mean any person other than a "guardian" or "legal heir" also for the purpose of maintaining an appeal under Section 372 Cr. P.C."

2. Whether the ratio of the decision of the Division Bench of this Court in the case of Edal Singh Vs. State (Supra) states the law correctly keeping in view the conflicting ratios of the Full Bench decision of the Punjab & Haryana High Court in the case of M/s. Tata Steel Ltd. (Supra) and that of the Patna High Court in the case of Parmeshwar Mandal (Supra).

Case Law discussed:
(2001) 3 SCC 462; (1985) 2 SCC 537; (2001) 6 SCC 338; (2010) 6 SCC 1; (2010) 12 SCC 599; (2014) 4 SCC 252; (2014) 1 P.L.R. 1; Criminal Appeal (DB) No. 1078 of 2012; D.B. Criminal Revision Petition No. 411 of 2012; Crl. Misc. application u/s 372 Cr.P.C. (Leave to Appeal) No. 172 of 2014.

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

1. Heard Sri Satish Chandra Sinha, learned counsel for the appellant and Sri Rajiv Sharma for the State.

2. This appeal has been preferred under Section 372 Cr. P.C. along with Delay Condonation Application. At the time of entertaining the same following order was passed by the Division Bench on 31.05.2013 :

"This application for grant of leave to appeal has been filed by Manoj Kumar

Singh, who is the brother-in-law of the deceased. The informant father of the deceased has not preferred any appeal against acquittal.

The application for condonation of delay in filing the appeal has been filed supported by an affidavit.

The question arises that as to whether the applicant Manoj Kumar Singh has a right to file an appeal under section 372 Cr.P.C. or not.

Learned counsel appearing on behalf of the applicant prays for and is granted three weeks' time to prepare the case.

List this application along with appeal in the second week of July, 2013 before the appropriate Bench."

3. One of the questions that was posed at the time of entertaining the appeal, as to whether the present applicant Manoj Kumar Singh did have any right to prefer the appeal under Section 372 Cr. P.C. or not.

4. It is admitted on record that the appellant has described himself as the brother-in-law of the deceased i.e. husband of the sister of the deceased.

5. The acquittal is founded on the witnesses having become hostile including the parents of the deceased. In these circumstances, it is difficult to accept the appellant as a victim so as to entitle him to file the present appeal when his wife, who is the sister of the deceased, is alive and could have filed an appeal.

6. It would be apt to quote Section 2 (wa) of the Code of Criminal Procedure, 1973 which provision has been inserted by Act No. 5 of 2009 w.e.f. 31.12.2009. The same is extracted hereunder :

"(wa) - "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir;

7. Prior to the coming of the said amendment, the issue as to who would be entitled to file an Appeal under Section 372 Cr. P.C. can be gathered from the position that was explained in the case of J. K. International Vs. State (Govt. of NCT of Delhi) and others reported in (2001) 3 SCC 462. The Apex Court considered the provisions of Section 301 and 302 of the Code of Criminal Procedure and deliberated on the issue as to when a private person can be permitted to conduct a prosecution and then also relied on the decision, Bhagwant Singh Vs. Commissioner of Police reported in (1985) 2 SCC 537, to speak in favour of the informant where the Apex Court gave its opinion with reference to Section 173 (2) (i) of the Code. The Apex Court then held that the doors cannot be closed in such a situation and the complainant deserves to be heard.

8. Then comes the next decision in the case of Puran Vs. Rambilas and another reported in (2001) 6 SCC 338, where also this issue was considered, though in a different context of cancellation of a bail. That was a case where a third party had moved a bail cancellation application. It was held that the power that was vested in the High Court for cancellation under Section 439 of Code of Criminal Procedure can be invoked either by the State or by any aggrieved party.

9. However, problems were being faced and consequently an amendment was brought and Section 2 (wa) was introduced.

10. The power of the court and the filing of appeal where the State was lagging behind also came up for consideration in the conduct of fair trial in the case of Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi) reported in (2010) 6 SCC 1. It was after the media had reflected extensively on the credibility of the investigation and the trial that the matter was taken up by the Delhi High Court and suo motu directions were issued for filing of an appeal. However, the aforesaid, provision does not appear to have been considered in the said case.

11. Then comes the decision in the case of National Commission for Women Vs. State of Delhi and another reported in (2010) 12 SCC 599, where the provisions of Section 372 of the Code of Criminal Procedure were considered but it was held to the contrary that since an appeal is a creature of statute, and cannot lie under an inherent power, then in that event to permit any body or an organization to file an appeal would be dangerous and would cause utter confusion in the criminal justice system. This change was registered in the aforesaid decision and then the matter was again referred to in the case of National Commission for Women Vs. Bhaskar Lal Sharma and others reported in (2014) 4 SCC 252, where this issue of the locus standi of National Commission for Women of being heard was taken up and referred.

12. There are three other decisions that we have come across of other High Courts namely that of the Full Bench of Punjab and Haryana High Court in the case of M/s. Tata Steel Ltd. Vs. M/s. Atma Tube Products Ltd. and others reported in (2014) 1 P.L.R. 1. The second decision is in the case of Parmeshwar Mandal Vs. State of Bihar and others (Criminal Appeal (DB) No. 1078 of 2012) by a Division Bench of the Patna High Court dated 26.11.2013 and the third decision is of the Rajasthan High Court in the case of Dhanne Singh Vs. State of Rajasthan (D. B. Criminal Revision Petition No. 411 of 2012) decided on 2.12.2014. Here also the word "victim" and the word "complainant" have been considered.

13. However, in view of the judgments of the Apex Court in the case of National Commission for Women (Supra) it would be appropriate to consider the applicability of the ratio of the aforesaid decisions in the present case.

14. At this stage a couple of definitions of the word "guardian" as used in Section 2 (6) of the U. P. Children Act, 1951 and the definition of the word "guardian" under Section 4 (2) of the Guardians and Wards Act, 1890 has to be taken into consideration. This is to be read with the definition of the word "person" as defined in Section 11 of the Indian Penal Code. This reference is necessary inasmuch as Section 2 (y) of the Code of Criminal Procedure requires that words and expressions used in the Code and not defined, but defined in the Indian Penal Code will have the meaning respectively assigned to them in that Code.

15. The word "victim" has been clearly defined in the Criminal Procedure Code to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and it also includes his or her guardian or legal heir.

16. With the aforesaid definitions and the judgments at hand it would be

appropriate to refer to the status of the present appellant who is the husband of the sister of the deceased. He does not appear to be either the informant or the witness of the crime. There is no fact or foundation that may indicate any loss having been suffered by the appellant. There is no authorisation by any of the family members of the deceased in favour of the appellant. The parents of the deceased Prem Singh and her mother Madhuri Singh had virtually not supported the prosecution story. The trial court did not find any evidence worth the name to prosecute the accused, but that is a different matter altogether which can be looked into when the appeal is filed by an aggrieved person or any other person who may fall within the definition of the word "victim", as aforesaid. The appellant, in our opinion, does not fall within the definition either as a guardian, legal heir or victim himself, more so when the own sister of the deceased has not come forward to file the appeal. In the aforesaid circumstances, we prima facie do not find any locus of the appellant to present this appeal.

17. This, however, does not in any way prevent any other person who may fall within such definition to file an appeal or the State which is under an obligation to file an appeal particularly in such matters. It is, therefore, open to the State to maintain its appeal and a copy of this order shall be made available to the learned Government Advocate for information.

18. We, however, find that the view that has been expressed by us herein above may require an authoritative pronouncement as we have come across another Division Bench judgment in the case of Edal Singh Vs. State of U. P. and others in Criminal Misc. Application u/s 372 Cr. P.C. (Leave to Appeal) No. 172 of 2014 decided on 10.4.2014 where the learned Division Bench has made the following observations :-

We also have some doubts where the appellant, who is not the grand father, but grand uncle of the deceased Babloo has any locus standi to file this appeal, as the right of filing the appeal, which has been conferred under section 372 Cr. P. C. has been given to a victim who has been defined under section 2(wa) to mean a person who has suffered any loss or injury caused by reason of the act or omission for which the accused persons have been charged and the expression "victim" includes his or her guardian or legal heir. It cannot be said that the grand uncle i.e. the brother of the grand father would be any person, who could be considered to have suffered any loss or injury. Also the grand uncle not being a lineal ascendant or descendant would not be his legitimate legal heir and we doubt that such an enlarged meaning as has been suggested by the learned counsel for the appellant has been given to any person to file an appeal. We, therefore, do not find any perversity or illegality in the judgment of the Trial Court calling for interference in the order of acquittal recorded by the Trial Court. The application for leave to appeal is rejected and the appeal is, consequently, dismissed."

19. The aforesaid Division Bench, however, does not take notice of the judgments which have been referred to by us herein above. In particular we would refer to the judgment of the Full Bench of Punjab & Haryana High Court in the case of M/s. Tata Steel Ltd. (Supra) where the

Full Bench went on to answer the question directly raised in the following terms in paras no. 64 to 69 :-

"64. It was contended and rightly so that the meaning of the term "victim" or that of his/her "legal heir" deserves to be given widest amplitude to meet with all kinds of peculiar or unforeseen situations, two of which are illustratively given below:-

(a) where a major, unmarried orphan is murdered and the accused person(s)/undertrial(s) was/were acquitted of the charges and the State does not prefer an appeal against the acquittal.

(b) where the entire family is murdered and the accused person(s)/under trial was/were acquitted of the charges and the State does not prefer an appeal against the acquittal.

In both the mis-happenings there may not be any person known as 'legal heir' or a 'guardian' to file an appeal against unwarranted acquittal and it will be against all canons of justice to say that the appellate Court in such like situations would be helpless and the offenders will go unpunished. Since the Legislature has finally granted the right to appeal to a 'victim', it is the duty of the Court to trenchantly affirm such right and provide appropriate remedy.

65.We say so also for the reason that the right to 'engage an advocate' or to 'prefer an appeal' under proviso to Section 372 does not ipso facto entitle the appellant to claim compensation as a 'legal heir' or the next of kin of a deceased 'victim'. That being so, every class or category of legal heirs of a deceased 'victim' can have locus to invoke the remedy under proviso to Section 372 of the Code, without reading into Section 2(wa) that if Class-I legal heir of a 'victim' opts out of filing any appeal, the other legal heirs would also suffer from the same disability.

66.The legislative intentment can be given its fullest effect by permitting all legal heirs, irrespective of their classification under the personal law to prefer appeal under proviso to Section 372. Such a purposive interpretation of the expression "legal heir" within the meaning of Section 2(wa) does no violence to nor does it conflict with Section 357 or 357-A of the Code. Even if a Class-II legal heir prefers an appeal say against inadequate compensation, the appellate court in the event of enhancement of compensation shall be obligated to disburse the enhanced amount to those persons only who are entitled to the same under Sections 357(1)(c) or 357-A of the Code, as the case may be. We, therefore, hold that the expression "legal heir" within the meaning of Section 2(wa) of the Code does not exclude other than the Class-I legal heirs of a deceased 'victim' nor the right to 'engage an advocate' or prefer an appeal is restricted to those persons only to whom compensation is payable under Sections 357, 357-A of the Code or under the Fatal Accidents Act, 1855.

67. The above-stated interpretation saves the Court from legislating and re-writing Section 2(wa) and is otherwise in conformity with the pro-victim jurisprudence advanced by the Supreme Court in PSR Sadhanantham; Ramakanth Rai; M/s JK International and Puran etc. cases.

68. The multiplicity of appeals by more than one legal heir should hardly be a deterrent to hold otherwise as such like procedural difficulties can be effectively streamlined by the Appellate Court through an appropriate set of rules or

instructions to its Registry. For example, if the appeal is preferred by other than a Class-I legal heir, such person can be required to disclose particulars of the Class-I legal heir(s), if any, and hearing of such an appeal can be deferred till the appellate court is satisfied that the Class-I legal heirs have not chosen to prefer appeal despite informed knowledge of the order which can be appealed against under proviso to Section 372 of the Code. More than one appeal, if preferred by different legal heirs, can also be not a cause of concern nor a serious impediment as all such appeals can be clubbed and decided together by passing one consolidated order.

69. It thus finally emerges that the Legislature, before and after amendment of the Code vide Act No.5 of 2009, has recognized and conferred one right or the other on the following categories of persons:-

(i) a 'victim' as defined in Section 2(wa) which includes his/her 'legal heirs' can be permitted by the Court under Section 24(8) to engage an Advocate of his/her choice to assist the prosecution and if he/she is aggrieved at the acquittal of an accused (except acquittal in a case instituted on a complaint), the conviction of the accused for a lesser offence or the imposition of inadequate compensation on such accused, such 'victim' (including his/her legal heirs) have got a right under proviso to Section 372 to prefer an appeal to the Court to which an appeal ordinarily lies against the order of conviction of such Court;

(ii) the legal heirs comprising the wife, husband, parent and child of a deceased 'victim' only are entitled to the payment of compensation under Section 357(1)(c) of the Code;

(iii) in the case of death of a 'victim', only those of his/her dependants who have suffered loss or injury as a result of the crime and who require rehabilitation, are eligible to seek compensation in terms of the scheme formulated under Section 357-A of the Code;

(iv) While the persons falling within the categories at Sr. No.(ii) & (iii) above shall necessarily include and form part of the persons falling in category No.(i), however, vice versa may not always be true.

(B) Whether 'complainant' in a private complaint-case, who is also the 'victim' and the 'victim' other than the 'complainant' complainant' in such cases are entitled to present appeal against the order of acquittal under proviso to Section 372 or have to seek 'special leave' to appeal from the High Court under Section 378(4) Cr.P.C.?"

20. The Full Bench in the case of any private complaint case answered the issue in para 82 as follows :

"82. The above discussion thus can be summed up to say that –

(i) the 'complainant' in a complaint-case who is a 'victim' also, shall continue to avail the remedy of appeal against acquittal under Section 378(4) only except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372;

(ii) the 'victim', who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the un-amended

provisions read with Section 378 (4) of the Code;

(iii) the Legislature has given no separate entity to a 'victim' in the complaint-case filed by a public servant under a special Statute and the appeal against acquittal in such a case can also be availed by the 'complainant' of that case under Section 378(4) of the Code only.

(iv) those 'victims' of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek 'leave' or 'special leave' to appeal from the High Court in the manner contemplated under Section 378(3) & (4), for the Legislature while enacting proviso to Section 372 has prescribed no such fetter nor has it applied the same language used for appeals against acquittals while enacting sub-Section (3) & (4) of Section 378 of the Code.

21. The other question answered by the Full Bench in para 93 to 95 is as follows :

"(D) Whether presentation of appeal against acquittal is a 'right' or an 'obligation' of the 'State' stemming from the Constitution?

93 The evolution of right to appeal against acquittal discussed in extenso in the earlier part of this order unveils that the right to appeal against acquittal has seen roller-coaster like changes ranging from the 'no right to appeal' [1861] to 'the unconditional right to appeal' [1898] followed by a 'conditional right to appeal' [1973 Code] and again 'unconditional right to appeal' in some of the cases to be filed in the Court of Session [2005] in favour of the State. While the complainant in a case instituted on complaint got a conditional right to appeal against acquittal under Section 378(4) [1973], a 'victim' as defined or explained by us has also now got unconditional right to appeal [2009].

94. Right to live with human dignity without any fear or actual subjection to any kind of unlawful, unsocial and physical or mental abuse and be a member of the self-regulated civic society too is one of the most cherised fundamental right bestowed on every person under Article 21 of the Constitution. The protection or conferment of certain rights on a victim under the Code therefore cannot be mirrored as a favour shown to him/her by the Legislature. These are only a minuscule part of the fundamental rights of vast magnitude guaranteed under the Constitution. The State as a custodian of the power for enforcement of the rule of law owes a corresponding duty to protect these Fundamental Rights. The State also performs the duty of parens patriae besides making an endeavour to fulfill the promises contained in Articles 38 or 39-A of the Constitution. The right to prosecute a wrong-doer, to bring his guilt home and to compel such guilty person to undergo the awarded sentence is an essential part of the State's enormous duties. The presentation of appeal against an unmerited and reckless acquittal is also an integral duty of a welfare State, who "has an overall control over the law and order and public order of the area under its jurisdiction", even if such a duty has been assigned by the Legislature as a 'right' in the literal sense. State of Rajasthan vs. Sohan Lal & Ors. (2004) 5 SCC 573, lends full support to us in this regard when it holds that "The State does not in pursuing or conducting a criminal case or an appeal, espouse any right of its own but really vindicates the cause of society

at large, to prevent recurrence as well as punish offences and offenders respectively, in order to preserve orderliness in society and avert anarchy, by upholding the rule of law".

95. In an era of enlightened and well-informed society who justifiably demands its rights or frowns upon the belied promises, it will be too farfetched to say that the 'duty' of the State under Sections 377 or 378 is actually a 'right' exercisable at the discretion of State Executive. The fact that the Legislature has chosen to grant unconditional right to appeal to a 'victim' as compared to the conditional right given to a State under Section 378(3) implies towards the failure of the State machinery in preserving the fair balance upto the expectations of the people. The State therefore no longer enjoys any privileged status as an 'appellant' and hitherto there shall be no legal distinction between an appeal preferred by the 'State' or a 'victim'."

22. There are other questions answered but we find that there has been an extensive consideration by the Full Bench of the Punjab & Haryana High Court which may require an authoritative pronouncement even if we take our view and the view expressed in Edal Singh's case (Supra) to be correct.

23. The aforesaid decision of the Punjab and Haryana High Court has also been followed by the Rajasthan High Court in the case of Dhanne Singh Vs. State of Rajashsan (Supra). However, the Division Bench of the Patna High Court has not agreed with the view taken by the Punjab & Haryana High Court in the case of Parmeshwar Mandal Vs. State of Bihar (Supra).

24. We have taken all the three decisions on record and we find that the Patna High Court has in paragraph 38 to 44 held as under:-

"38. It may be pointed out that the definition of "victim" contained in the 154th Report of the Law Commission was too wide and sweeping, which has not been accepted by the Legislature. Instead Legislature has chosen to define the expression "victim" in much narrower terms by including only the above three category of persons in the definition who get a vested right to appeal in terms of the said proviso to section 372. In the opinion of this Court, in the first category, any person, who can establish before the Court, to its satisfaction, that he has suffered "loss" or "injury", as a result of the crime complained of, can qualify as "victim". Hence, if the subject of the crime is dead or incapacitated to the extent or suffers from such a disability that he/she cannot take steps to exercise his/her right under the said proviso to Section 372, any of his/her next of kin, who can establish before the Court, to its satisfaction, that the crime had caused "loss" or "injury" to him/her also, besides to the subject of the crime, can, in the opinion of this Court, maintain an appeal under the said proviso. The expressions "loss" or "injury", have not been defined in the Code. Hence, by virtue of Section 2 (y) of the Code, definition of injury given in Section 44 of the Indian Penal Code has to be imported to determine the scope and limitation of the word "injury" in Section 2 (wa). Section 44 of the Indian Penal Code defines "injury" denoting 'any harm whatever illegally caused to any person in body, mind, reputation or property'. So far as the word "loss" used in the said proviso is concerned, its definition is also not available in the Code. The nearest definition is available

in section 23 of the Indian Penal Code which defines "wrongful loss". But this definition is confined to loss of property only. On the other hand, dictionary meaning of "loss", and its types, runs into many pages in the Black's Law Dictionary and Oxford Advanced Learner‟s Dictionary. However, as held by the said Full Bench also, in the opinion of this Court, the expression "loss" used in the said proviso to Section 372, has to be understood as synonymous to the word "injury" used therein, and in the context of the definition of "injury" appearing in the Penal Code only, and not with the aid of its dictionary meaning. In this context, the following observations of the Apex Court in the case of CCE Vs. Fiat India (P) Ltd. [(2012)9 SCC 332] settles down the rule of interpretation in clear terms :

"39. It is well settled that whenever the legislature uses certain terms or expressions of well-known legal significance or connotations, the courts must interpret them as used or understood in the popular sense if they are not defined under the Act or the Rules framed thereunder. "Popular sense" means "that sense which people conversant with the subject-matter, with which the statute is dealing, would attribute to it."

(emphasis supplied)

39. Therefore, this Court is of the opinion that, it has to be ultimately left to the prudence of the Court to assess whether the appellant before it had actually suffered any 'loss' or 'injury' in the course of the crime complained of, or not, so as to be eligible to maintain his appeal in terms of the said proviso. By not providing the definitions of the expressions in the Code, or qualifying them in any manner, the Legislature clearly intended to leave it to the Court, to arrive at a conclusion independently in respect of standing of an appellant before it, in the facts and circumstances of each case, as and when it may be called upon to do so.

40. The other two categories, included in the definition of 'victim' - guardian and legal heir - have also been given the liberty to step into the shoes of a 'victim', by virtue of the language of the said definition clause, notwithstanding the fact that they may not have suffered any 'loss' or 'injury' on account of the crime complained of. Here again the expressions 'guardian' and 'legal heir' are not explained in the clause itself nor have been defined in the Code. As against this, if we refer to Sections 198, 198(1)(a), 256 and 394 of the Code, it is clear that wherever the Legislature intended to clarify the persons eligible to take steps in a criminal proceeding under the Code, it did clarify it in clear terms. Hence, this deliberate omission by the Legislature to define 'guardian' or 'legal heir' in the Code, in the opinion of this Court, clearly depicts its intention to leave an appellant, preferring an appeal under the said proviso to Section 372 of the Code, solely on the basis of his/her status as a 'guardian' or a 'legal heir', to establish the legal heirs of his status as such, either in terms of and under the provisions of the laws governing the field, with all their limitations and qualifications, or otherwise also (e.g. a judicial order).

41. In the opinion of this Court, the wide interpretation given by the Full Bench to the expression 'legal heir' may lead to unwarranted results, in as much as, for example, if all the heirs of a Hindu, as the per the Hindu Succession Act, 1956, i.e. class I heirs, class II heirs, agnates and cognates, get simultaneous right to prefer an appeal in terms of the proviso to section 372, it may virtually open gates

for 'pro bono publico' appeals, denounced by the Apex Court, and may expose the accused to perpetual risk of harassment on account of malafide litigations. This Court is also of the opinion that, if such liberal interpretation of the expression 'legal heir' is allowed to be read in clause 2(wa), the status of 'legal heir' itself may become a major and primary issue in a given case, essentially to be decided first on examination of evidence, documentary as well as oral. In this context, this Court is also of the opinion that, if once an appeal against any of the three kinds of order, mentioned in the said proviso, preferred by a person claiming to have suffered loss or injury or a 'guardian' or a 'legal heir', is entertained on merits by the appellate court, to whatever result, no fresh/second appeal by any other party/person can/should be entertained against the same order.

42. Therefore, this Court, with all humility, is unable to accept the said conclusion of the Full Bench and respectfully agrees with the judgment of the Delhi High Court [2007(8) (AD) (Delhi) 478], and other judgments referred to in the judgment of the Full Bench, and the with the judgment of the Andhra Pradesh High Court in the case of Dr. Sudhakar (supra) on the issue, in which it has been held that, for the purposes of determining the locus standi of the legal heir of a victim to file an appeal under the said proviso to Section 372, the court has to necessary fall back upon the line of succession to his property laid down in his/her personal law. This Court also endorses the view of Guwahati High Court Agartalla Bench) in Gaurang Deo Nath [Cr.Appeal No.13 of 2011 (C)], that in case of allegations of crime being committed was on the husband of the deceased (e.g.- u/s 304B IPC), father of the lady (or her any close relation) may also come within the definition of 'victim', on account of loss or emotional injury suffered by him, so as to maintain his appeal under the said proviso to Section 372 of the Code. The two examples, cited by the Full Bench in paragraph 65, to justify 'widest amplitude' given to the expression 'legal heir', are misconceived. In both the examples the order of succession, in terms of the personal law, still remains open and therefore the apprehension of the right of appeal granted to the victim under the said proviso to Section 372 of the Code getting frustrated, is unfounded.

43. The second question was discussed by the Full Bench from paragraphs 71 to 82 and it was summed up in paragraph 83 and answered in paragraph 139, as reproduced above. The Full Bench has tried to distinguish between a case investigated by the police on a complaint/information received and report submitted and a case of complaint filed by a complainant in the court directly and proceeded with under chapter XV of the Code, and has held that a complainant in a complaint case and a victim other than the complainant in the complaint case has the only remedy by way of an appeal under Section 378(4) of the Code against an order of acquittal, except in cases where guilt is established but conviction is for lesser offence or with imposition of inadequate compensation, in which case only he/she will have a right to appeal under proviso to Section 372 of the Code.

44. With all reverence to the Full Bench, this Court is unable to agree with this proposition of law also. If that would have been the intention of the Legislature, instead of giving unfettered right to the victim to file appeal in the opening

section of the Chapter itself, it could have added one more sub-section in Section 378 itself. It has to be presumed that when unfettered right of appeal was being conferred upon the victim in the opening section of the Chapter itself, the Legislature was conscious of the restricted right of appeal granted to the State and the complainant under Section 378 of the Code. The recommendations in the Malimath Committee Report, which has been adopted and implemented in the form of amendment in various provisions of the Code of Criminal Procedure by Act 5 of 2009, would show that, by the amendment, victim was intended to be placed at much higher pedestal in criminal justice delivery system than the State (prosecuting agency) or the complainant. Therefore, instead of adding one more sub-section in Section 378, providing for a right of appeal to a victim also, at par with the complainant of a complaint case, or with State in a police case, he/she has been conferred upon the right in the opening section of the Chapter itself without any qualifications. Clearly by introducing this amendment, the Legislature has recognized the victim in his/her independent capacity in the criminal justice delivery system than the State or informant or complainant. If the interpretation of the Full Bench is accepted, it will result into the victim getting a right to file an appeal only for a lesser wrong done to him/her by a criminal court, i.e. for convicting the accused for lesser offence or for awarding lesser compensation, but will not be able to file an appeal, without a special leave, for greater wrong done to him/her by acquitting the accused altogether. Therefore, this Court is of the opinion that no distinction can/should be made between a case instituted by a complainant/informant with the police and by a complainant before the Court directly, for the purposes of determining the scope and ambit of right of a victim to file an appeal under the said proviso to Section 372. Consequently, this Court is of the opinion that, any person, covered under the definition of 'victim' as contained in clause (wa) of Section 2 of the Code, and thus getting a right to file an appeal in terms of the said proviso to Section 372, cannot be held, in any way, handicapped in exercise of his/her said right by the provisions of Section 378 of the Code specially in the background of disadvantageous status of victim in the present criminal justice delivery system in the country. This view of the Court, on this issue, stand buttressed also by the findings of the Full Bench in respect of question (C) holding that the victim is not obligated to seek 'leave' or 'special leave' of the High Court for presentation of appeal under the said proviso to Section 372 of the Code and also by the learned Single Judge of Allahabad High Court in the case Ashok Kumar Srivastava (supra) and by a Division Bench of Delhi High Court in its judgment dated 24.01.2011 in the case of Jagmohan Bhola Vs. Dilbagh Rai Bhola & Ors."

25. Considering the aforesaid position that emerges, we find that it is necessary to refer this question of the maintainability of an appeal on behalf of a person claiming to be a "victim" for an authoritative pronouncement by a Larger Bench as in view of the decisions aforesaid it will be difficult to agree with the view expressed by the Division Bench in the case of Edal Singh (Supra) decided on 10.4.2014. Consequently, the following questions are referred for being placed before a Larger Bench to answer

the aforesaid issue in the light of the observations made herein above namely :

1. "Whether the definition of the word "victim" as used in Section 2 (wa) would mean any person other than a "guardian" or "legal heir" also for the purpose of maintaining an appeal under Section 372 Cr. P.C."

2. Whether the ratio of the decision of the Division Bench of this Court in the case of Edal Singh Vs. State (Supra) states the law correctly keeping in view the conflicting ratios of the Full Bench decision of the Punjab & Haryana High Court in the case of M/s. Tata Steel Ltd. (Supra) and that of the Patna High Court in the case of Parmeshwar Mandal (Supra).

26. Let the papers be placed before Hon'ble the Chief Justice for referring the aforesaid questions to be answered accordingly.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Special Appeal No. 1015 of 2014

Mohd. Irfan ...Appellant
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Appellant:
Sri Suresh Chandra Dwivedi

Counsel for the Respondents:
C.S.C., Sri Pankaj Srivastava

High Court Rules-Chapter VIII-Rule-5-Special Appeal-against the order passed in Habeas Corpus petition-whether maintainable?-held-'yes'-if related to determination of civil rights.

Held: Para-10
Hence, in view of the legal position discussed above, the special appeal against an order passed on the writ petition of habeas corpus, if related to the determination of civil rights, is maintainable.

(B) Constitution of India, Art.-226-Habeas Corpus-custody of minor child about 2 ½ years-under Mohammedan Law-father entitled to received custody-but welfare of minor child-being paramount consideration-where father married second time-while respondent being natural mother-not interested into any marriage-Learned Single Judge rightly directed appellant to handover the custody of minor child in favor of respondent-require no interference.

Held: Para-20
Thus, the paramount consideration before this Court is the welfare of the child and keeping in view the welfare of the infant and the fact that admittedly her father has remarried whereas her natural mother has not performed re-marriage, the real mother Shaista Anjum appears to be best person for having the custody and care of the infant girl Amal Irfa. The learned writ court has rightly ordered the father/appellant to hand over the minor child Amal Irfa and we find no good ground to interfere in the said order.

Case Law discussed:
1980 (Supp.) Supreme Court Cases 696; 2011 (89) ALR 779; Mohammedan Law Volume 11 pages 304; (2001) 5 Supreme Court Cases 247.

(Delivered by Hon'ble Vijay Lakshmi, J.)

1. This intra-court appeal arises out of the judgment and order dated 8.10.2014 passed by learned Single Judge in Habeas Corpus Writ Petition No.

12616 of 2014 ( Amal Irfa Vs. State of U.P. and 2 others) whereby the learned Single Judge while allowing the writ petition has directed the appellant, who is the father of corpus -little girl Amal Irfa to hand over her custody to her mother Mrs. Shaista Anjum at the earliest and not later than 15th October, 2014.

2. At the very outset, learned counsel for the respondent Mrs. Shaista Anjum has raised a preliminary objection regarding the maintainability of this special appeal on the ground that the proceedings in writ of habeas corpus are criminal in nature, so special appeal against it is not maintainable in view of provision of Chapter VIII Rule 5 of Allahabad High Court Rules which specifically bars special appeal against an order of single judge passed in exercise of criminal jurisdiction.

3. On the other hand, learned counsel for the appellant has submitted that the special appeal is maintainable against such order and that is why the Stamp Reporter has not reported anything against its maintainability.

4. We have heard learned counsel from both the sides on the point of maintainability of this special appeal.

5. The writ jurisdiction is an extra ordinary jurisdiction providing a constitutional remedy for enforcement of not only fundamental rights but also for enforcement of any legal right whether civil, criminal, administrative or relating to personal laws. Right to appeal is a statutory right and a person can invoke such right if it is so provided by Statute.

6. Chapter VIII Rule 5 of Allahabad High Court Rules, 1952 which is reproduced below, provides for special appeal :

"5. Special appeal - An appeal shall lie to the Court from a judgment {not being a judgment passed in the exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction (or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of Appellate or Revisional Jurisdiction under any such Act} of one Judge."

7. A perusal of the aforesaid provision shows that a special appeal will not lie when :

1.the judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the superintendence of the Court;

2.the order made by one Judge in the exercise of revisional jurisdiction;

3.the order made by one Judge in the exercise of the power of superintendence of the High Court;

4.the order made by one Judge in the exercise of criminal jurisdiction;

5.the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by the tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;

6. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award by the Government or any officer or authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the concurrent list in the Seventh Schedule to the Constitution of India."

8. Hon'ble Supreme Court in the case of Union of India and others Vs. Inderjit Barua and others; 1980 (Supp) Supreme Court Cases 696; has observed that writ of habeas corpus cannot said to be purely criminal in nature. Earlier under Section 491 of old Code of Criminal Procedure, 1898, power was conferred on the High Court to issue writ of habeas corpus. So writ of habeas corpus was treated as a criminal proceeding. However, Section 491 of old Cr.P.C. was ultimately omitted by the new Cr.P.C. of `1973 and there is no provision analogous to it in the new Cr.P.C. After coming into force of our constitution, the scope of writ of habeas corpus become much larger and wider as our Constitution does not make any difference between civil and criminal nature of the proceedings so far as the writ jurisdiction is concerned. Moreover, the present petition relates to the custody of child which is a civil right. A Coordinate Bench of this Court in the case of Riya Singh Vs. State of U.P.; 2011 (89) ALR 779 has observed as under :

"....certain category of special appeals have been excluded from the purview of Chapter VIII, Rule 5 but there is no exclusion with regard to judgment of learned Single Judge deciding a writ petition in the nature of Habeas Corpus. Had the Legislature intended to exclude the said appeal also, the same could have been specifically provided."

9. Learned counsel for respondent no. 3 could not show any provision under which special appeal against an order passed in the writ of habeas corpus is not maintainable.

10. Hence, in view of the legal position discussed above, the special appeal against an order passed on the writ petition of habeas corpus, if related to the determination of civil rights, is maintainable.

11. By means of this appeal, Sri Suresh Chandra Dwivedi, learned counsel for the appellant has assailed the validity and correctness of the order passed by the learned Single Judge on the following grounds :-

1)the order impugned has been passed in complete violation of principle of natural justice.

2)Learned Single Judge has not decided the habeas corpus petition but he has decided the guardianship application which is without jurisdiction.

3)The case laws cited in the impugned judgment are not applicable to the present controversy.

4)According to the Muslim Law, father is the natural guardian of a child. After divorce between the parties, the appellant was maintaining his daughter Amal Irfa (corpus) with the help of his family members. Hence the impugned order is against the law of "Shariyat".

5)The impugned order has been passed without affording any opportunity of hearing to the appellant for rebuttal of the allegations made in the habeas corpus petition.

6)The habeas corpus petition in this case was not maintainable. The petitioner had chosen a wrong forum and instead of filing a case under Guardianship Act, she had filed the habeas corpus petition.

7)The question relating to custody of child could have only be decided under Muslim Guardians Act because both the parties are muslims. But the learned single judge has passed the order without jurisdiction.

8)Smt. Shaista Anjum, ex-wife of the appellant, by means of agreement of divorce dated 10.2.2014 had herself abandoned her rights as she was not interested in maintaining her daughter Amal Irfa, Therefore, she had no right to file habeas corpus petition. However, the learned Single Judge without taking note of the divorce agreement dated 10.2.2014 has passed the impugned order which is liable to be set aside.

9)The habeas corpus petition has been decided by the learned single judge without calling for counter affidavit, therefore, the impugned order is liable to be set aside.

10)There is no such allegation in the habeas corpus petition that Amal Irfa has been illegally detained by the appellant and in absence of illegal detention, the said habeas corpus petition is not maintainable.

12. We have heard Sri Suresh Chandra Dwivedi, learned counsel for the appellant, Sri Pankaj Srivastava, learned counsel appearing for respondent no. 3 and learned A.G.A. appearing on behalf of respondent nos. 1 and 2 and perused the records.

13. Briefly stated, the facts giving rise to the controversy involved in this writ petition, are that Shaista Anjum, (the mother) through whom the habeas corpus writ petition was moved, was married to Mohd. Irfan on 2.12.2010. Out of their wedlock Amal Irfa (corpus) was born (who is aged about two and half years at present). Unfortunately, the marriage wrecked on the bedrock of strained relations. The appellant by proclamation thrice as 'Talak', 'Talak, 'Talak' divorced his wife. It has been further alleged in the writ petition that the appellant (respondent No. 3 in the writ petition) with his aides came at the house of the parents of Shaista Anjum, where she was staying. He forcibly obtained her signatures on a fabricated 'Talaknama' and snatched the girl child Amal Irfa from her mother, who made vain attempt to lodge FIR and being unsuccessful moved an application under Section 156 (3) Cr.P.C. before the Magistrate concerned. In the writ petition, it was prayed that the petitioner being an infant in need of care and protection of her mother and the mother being the best qualified to cherish a child during infancy, the respondent no. 3 be directed to deliver the custody of corpus Amal Irfa to her mother.

14. A perusal of the impugned order shows that the writ court vide order dated 27.2.2014 issued notice upon respondent no. 3 ( here appellant) directing him to file his counter affidavit and also to produce in court his minor daughter Amal Irfa on the next date of listing. The appellant appeared before the writ court through his learned advocate and produced his minor daughter. Sri Irshad Ahmad and Sri Sheikh Moazzam Inam, Advocates filed their power for the Respondent No. 3 on 22.4.2014, but despite the fact that two learned advocates were there to represent the appellant/respondent no. 3 and despite having considerable time and opportunity since 22.4.2014 till 8.10.2014 i.e. about 6 months, he did not file any counter affidavit. Under these circumstances, learned writ court heard both the parties and passed the impugned judgment.

15. In view of the aforesaid facts and circumstances, we find no force in the argument advanced by learned counsel for the appellant that he was denied of natural justice and no opportunity of hearing or filing counter affidavit was given to him.

16. The age of the infant girl was only 2 years 3 months at the time of judgment by the writ court. At present too she does not look more than 2½ or 3 years of age. There is no doubt that under Mohammadan Law, the father is the natural guardian but the mother is entitled to the custody (Hizanat) of her child until she attains puberty. This position continues even through the mother is divorced except in cases where she re-marrys.

17. Amir Alli in Mohammedan Law Volume 11 at page 304 has observed:

"The mother can on no account give up her right of 'Hizanat' for even if she were to obtain a Khula in lieu of abandonment of her right to her child custody Khula will be valid and she will retain a right of Hizanat"

18. In the case of Syed Saleemuddin Vs. Dr. Rukhsana and others; (2001)5 Supreme Court Cases 247 the Hon'ble Apex Court has held that :

"In an application seeking a writ of habeas corpus for custody of minor children, the principal consideration for the court is to ascertain whether the custody of the children requires that the present custody should be changed and the children should be left in the care and custody of somebody else. The principle is well settled that in a matter of custody of a child the welfare of the child is of paramount consideration for the court."

19. The father (appellant) was summoned by us alongwith minor Amal Irfa in court on 26.11.2014 and he had admitted the fact that after divorce with Shaista Anjum, he had re-married. Thus, on one side there is step mother to look after the child and on the other side the child has the benefit of love, care and affection of her real mother. In a proceeding concerning the custody of a minor, the Courts must have supreme regard to the welfare of the minor as first and paramount consideration and must treat any rights, priorities or preferences of the parents or of either of them or of any other person as subordinate thereto.

20. Thus, the paramount consideration before this Court is the welfare of the child and keeping in view the welfare of the infant and the fact that

admittedly her father has remarried whereas her natural mother has not performed re-marriage, the real mother Shaista Anjum appears to be best person for having the custody and care of the infant girl Amal Irfa. The learned writ court has rightly ordered the father/appellant to hand over the minor child Amal Irfa and we find no good ground to interfere in the said order.

21. The special appeal is liable to be dismissed and is hereby dismissed. In compliance of the order dated 8.10.2014 passed by the writ court whereby the writ court had fixed the specific date for delivery of child, the interim custody of child Amal Irfa has already been given to her real mother Mrs. Shaista Anjum in the court. The minor Amal Irfa shall remain in custody of her mother till she attains the age of puberty. The appellant Mohd. Irfan shall bear all the expenses necessary for her proper maintenance till she attains the age of puberty. The father shall have the right to visit and see his daughter Amal Irfa once in a month at the house of some common relative which the party may decide with the help of their learned counsel.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Special Appeal No. 1088 of 2014

State Bank of India, Corporate Center, Mumbai & Ors. ...Appellants
Versus
Rajesh Kumar & Anr. ...Respondents

Counsel for the Appellants:
Sri S.K. Kakkar

Counsel for the Respondents:
A.S.G.I., Sri Siddharth Khare

Constitution of India, Art.-226-Termination of Assistant clerk-during probation period-on ground during written examination petitioner allowed another person by personification-hence appointment being void ab inito-on basis of hand writing expert signature on admit card found different than admitted signature-Single Judge quashed termination being punitive in nature-can not be passed without full fledge enquiry-confirmed-so far 50% back wages concern shall be subject to outcome of disciplinary proceeding if Bank decide to initiate disciplinary proceeding as per direction of Single Judge-order modified-appeal disposed of.

Held: Para-8 & 9

8. In this view of the matter, the order of the learned Single Judge insofar as it directs reinstatement of the respondent and holds that the termination should have been preceded by a full fledged disciplinary enquiry, cannot be faulted. As the record before the Court would indicate, the termination of service was preceded by a report of a forensic expert. The forensic expert opined that the material produced before him establishes an act of impersonation. In a disciplinary enquiry, if this allegation is to be proved, the employee, who was a probationer, would have an opportunity of stating his defence and rebutting the case of the Bank. But more importantly, once it is evident from the order of termination that the cancellation of appointment was on account of a misconduct allegedly committed by the respondent, a disciplinary enquiry ought to have been held.

9. However, on the issue of back wages and other consequential benefits, we are of the view that the learned Single Judge, while exercising jurisdiction under Article 226 of the Constitution,

ought to have taken due steps to structure the relief so as to protect the public interest. We deem it appropriate and proper to grant liberty to the State Bank of India to hold a disciplinary enquiry against the respondent in accordance with law. The competent authority would consider whether, in accordance with the applicable service rules, the respondent should be placed under suspension in contemplation of a disciplinary enquiry. We direct that the Bank shall take a decision on whether it intends to commence a disciplinary proceeding against the respondent within a period of three months of the receipt of a certified copy of this order. In the event that within the aforesaid period of three months, the Bank decides to hold a disciplinary enquiry against the respondent in terms as aforesaid, the impugned direction of the learned Single Judge for the payment of 50% back wages and other consequential benefits, shall stand set aside and the ultimate decision in regard to the payment of the back wages and other consequential benefits shall abide by the result of the disciplinary proceedings.

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

1. This appeal arises from a judgment of the learned Single Judge dated 5 November 2014.

2. The respondent applied for appointment on the post of an Assistant Clerk in pursuance of an advertisement which was issued by the State Bank of India in August 2009. The respondent was appointed on 3 December 2010 and joined his services as an Assistant Clerk at Dohri Ghat Branch of the Bank in district Mau. He was deputed for training and on successful completion thereof, he was placed on probation by an order dated 13 June 2011. The probationary period was extended by three months since the work of the respondent was not found to be satisfactory. The services of the respondent were terminated by an order dated 27 August 2011 of the Regional Manager at Gorakhpur by cancelling his appointment, treating it as void ab initio.

3. The ground on which the order of appointment was cancelled was that at the written examination conducted by the Bank on 8 November 2009 in pursuance of the recruitment process, it was not the respondent who had appeared but, according to the Bank, some one else had appeared against the candidature of the respondent impersonating him. The Bank treated this as a suppression of a material fact that the respondent had not appeared at the written examination and had allowed some one else to appear. The appointment was treated as void ab initio particularly, placing reliance on Clause 17 (i) of the General Instructions, which stipulated that if it was detected at any stage of the recruitment that a candidate does not fulfil the eligibility norms and/or that the candidate had furnished any incorrect or false information or suppressed any material fact, the candidature would stand cancelled and if such shortcomings are detected even after appointment, the services are liable to be terminated. Similarly, reliance was placed on a condition of the letter of appointment under which suppression of material facts would lead to the appointment being regarded as void ab initio.

4. The Bank filed a counter affidavit in response to the petition filed by the respondent challenging the order of termination. The case in the counter affidavit was that a re-verification was done after the appointment was made, when the Bank had called upon the

respondent to submit his photographs and also provide his signatures. In the meantime, the Gorakhpur Office of the Bank received the file from the Zonal Office, which had conducted the examination, which contained the photographs of the person who had appeared at the written examination as well as in the interview along with the call letter. According to the Bank, the photographs submitted by the respondent did not tally with those of the person who had appeared at the written examination giving rise to an apprehension of impersonation. The Branch Manager of the Bank, by a letter dated 29 April 2011, informed the controlling authority to have the matter investigated. Thereafter, the matter was referred to a hand-writing (forensic) expert for verification of the thumb impression and the signatures on the call letter of the present incumbent who was actually working in the Bank. The report of the forensic expert was relied upon by the Bank in support of its contention that the respondent had been guilty of impersonation. The report of the forensic expert dated 6 July 2011 was annexed to the counter affidavit and, insofar as is material, reads as follows:

"On the basis of the above differences in the pattern and the flow of ridges, the thumb impression of Right Thumb of the person who appeared in the Examination marked as DTI-1 which is on the Call Letter taken at the time of examination is different with the specimen thumb impression of Right Thumb of Sri Rajesh Kumar marked as RTI-2."

5. On these facts, the learned Single Judge came to the conclusion that the termination of service of the respondent was for an act of impersonation and fraud. Hence, the termination of the respondent was not a termination simpliciter, but the foundation and basis of the termination was a misconduct of impersonation in the written examination. The learned Single Judge relied upon a letter of the Bank dated 13 September 2011, which specifically contained a statement that the respondent had been impersonated at the written examination. This, it was held, would amount to a stigma warranting a proper disciplinary enquiry before termination. The learned Single Judge has directed reinstatement with payment of 50% back wages.

6. When this special appeal came up for hearing on 27 November 2014, the Court directed that another special appeal, being Special Appeal No.998 of 2014 be also listed together with the present special appeal since common issues have been raised.

7. During the course of the hearing, it is clear from the records that the basis and foundation of the order of termination is an allegation that the respondent did not appear at the written examination which was conducted by the Bank on 8 November 2009 and had been impersonated by some one else. The foundation and basis of the order of termination is an act of misconduct by the respondent. The Bank has terminated the services of the respondent on the basis that it was not the respondent who had appeared at the written examination but some one else had appeared on his behalf, as a result of which, the employment was procured by an act of fraud and by suppressing material facts. The order of termination is not even facially an order of termination simpliciter since the order

itself carries a stigma by referring to the fact that the respondent had been impersonated at the written examination.

8. In this view of the matter, the order of the learned Single Judge insofar as it directs reinstatement of the respondent and holds that the termination should have been preceded by a full fledged disciplinary enquiry, cannot be faulted. As the record before the Court would indicate, the termination of service was preceded by a report of a forensic expert. The forensic expert opined that the material produced before him establishes an act of impersonation. In a disciplinary enquiry, if this allegation is to be proved, the employee, who was a probationer, would have an opportunity of stating his defence and rebutting the case of the Bank. But more importantly, once it is evident from the order of termination that the cancellation of appointment was on account of a misconduct allegedly committed by the respondent, a disciplinary enquiry ought to have been held.

9. However, on the issue of back wages and other consequential benefits, we are of the view that the learned Single Judge, while exercising jurisdiction under Article 226 of the Constitution, ought to have taken due steps to structure the relief so as to protect the public interest. We deem it appropriate and proper to grant liberty to the State Bank of India to hold a disciplinary enquiry against the respondent in accordance with law. The competent authority would consider whether, in accordance with the applicable service rules, the respondent should be placed under suspension in contemplation of a disciplinary enquiry. We direct that the Bank shall take a decision on whether it intends to commence a disciplinary proceeding against the respondent within a period of three months of the receipt of a certified copy of this order. In the event that within the aforesaid period of three months, the Bank decides to hold a disciplinary enquiry against the respondent in terms as aforesaid, the impugned direction of the learned Single Judge for the payment of 50% back wages and other consequential benefits, shall stand set aside and the ultimate decision in regard to the payment of the back wages and other consequential benefits shall abide by the result of the disciplinary proceedings.

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

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ORIGINAL JURISDICTION
CRIMIINAL SIDE
DATED: LUCKNOW 15.12.2014

BEFORE
THE HON'BLE VISHNU CHANDRA GUPTA, J.

U/S 482/378/407 No. 1277 of 2007

Rakesh Yadav & Anr. ...Applicants
Versus
State of U.P. Opp. Party

Counsel for the Applicants:
Dr. Lalta Prasad Mishra, Sri Abhishek Ranjan

Counsel for the Respondents:
Govt. Advocate

Cr.P.C. Section 482-Offence under section 302/307 IPC-applicants seeking quashing of order-rejecting application u/s 207 for inspection of Maruti Car by prosecution-before –committal of case-learned Magistrate rightly taken view that car not withing definition of 'document' under Section 3 of Evidence Act-held such application nothing but to prolong the proceeding-misconceived-rejected-direction

to expedite disposal of case and to avoid unnecessary adjournments.

Held: Para-13
In view of the above, this Court is of the firm view that move of petitioners was intended to prolong the proceedings initiated against them and they have upto some extent succeeded therein. As such this application is misconceived one and the same has rightly been rejected by the learned Magistrate vide order impugned.

(Delivered by Hon'ble Vishnu Chandra Gupta, J.)

1. By means of the present petition under section 482 Code of Criminal Procedure (for short Cr.P.C.), the petitioners have prayed for quashing of the order impugned dated 17.4.2007 passed by the Chief Judicial Magistrate, Sitapur in Criminal Case No. 98 of 2008 arising out of case crime no. 537 of 2004 P.S. Khairabad, District Sitapur, whereby the application moved under section 207 Cr.P.C. has been rejected holding that before committal of case there is no provision for inspection by to accused of the car in question.

2. Petitioners are accused persons in Criminal Misc. Case No. 537 of 2004, under Sections 302,307 I.P.C., P.S. Khairabad (State Vs. Udai Raj Singh and others). They moved application under section 207 Cr.P.C. before learned Chief Judicial Magistrate, Sitapur praying therein that they may be allowed to inspect the Maruti car which have marks of firing and presently in supurdagi (interim Custody) of deceased's wife under the order of the learned Magistrate dated 24.3.2005 with conditions that as and when the car is required, the same shall be produced in court by her on its own expenditure and during pendency of the case she shall neither sale out nor transfer the car to anyone nor change the shape of the car. The possibility can not be ruled out that there might be difference in between exact position marks on the car and documents furnished in this regard. So, they may be permitted to inspect the car in question before committal of case.

3. The learned Magistrate after hearing the submissions rejected the application moved under section 207 Cr.P.C by impugned order holding therein that there is no provision under Section 207 Cr.P.C. for inspection of car in question by the accused persons before committal of case. It is a question of evidence and if needed by the trial court the car may be produced by the prosecution.

4. Feeling aggrieved by the impugned order, the petitioner challenged the same in this petition under Section 482 Cr.P.C. A co-ordinate bench of this Court vide order dated 25.05.2007 stayed the further proceedings of the court below. Since then the proceedings of the case are held up.

5. Heard learned counsel for the petitioner Dr. L. P. Mishra, Senior Advocated assisted by Shri Hari Om Bajpai,and learned A.G.A.

6. It has been submitted by learned counsel for the petitioners that the petitioners have right to get the inspection of car before committal of case in view of provision of Section 207 Cr.P.C. If inspection is denied shall cause serious prejudice to the accused and the same shall defeat the object of fair trial guaranteed under Article 21 of Constitution of India.

7. On the contrary learned A.G.A. submits that while interpreting the

provisions under statute nothing could be added or subtracted from the statutory provision. The provisions of Section 207 Cr.P.C. are simple, clear and unambiguous. Therefore, the request made by the accused-petitioners for inspect of the car is misconceived and by this petition the petitioners succeed in achieving the goal of protracting the trial for considerable long time. This Court after exercising jurisdiction conferred under section 482/483 Cr.P.C. may not only dismiss this petition but also direct that trial should be concluded within a reasonable period as this court thinks fit.

8. Section 207 Cr.P.C. is extracted herein below:----

*"207. Supply to the accused of copy of police report and other documents. In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-*

*(i) the police report;*

*(ii) the first information report recorded under section 154;*

*(iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;*

*(iv) the confessions and statements, if any, recorded under section 164;*

*(v)any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:*

P*rovided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:*

*Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."*

9. The perusal of Section 207 Cr.P.C. makes it abundantly clear that what should be supplied to the accused before committal of case to the court of Session in a case instituted on police report. This section requires to furnish a copy of police report, first information report recorded under Section 154, the statements recorded under Sub-section (3) of Section 161 Cr.P.C. of all persons whom the prosecution proposes to examine as its witnesses, the confessions and statements, if any, recorded under Section 164 and any other document or relevant extract thereof forwarded to the Magistrate with the police report under Sub-Section (5) of Section 173.

10. The provision of inspection is given in second proviso to section 207, which deals with power of Magistrate for allowing inspection. It categorically provides that If the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall allow the accused or his pleader in court to inspect it. Therefore, Section 207 restricts the right of the accused to the extent of furnishing copies of documents and papers contained in Section 207 and not

beyond that, the inspection of document may be permitted and not of material which does not fall within the definition of document.

11. Word "Document" has not been defined under Code of Criminal Procedure. The definition of 'document' is given in Indian Evidence Act as well as in Indian Penal Code. The definition of document given in section 3 Evidence Act is reproduced herein below:

*"Section 3. Interpretation clause*

*"Document" --"Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."*

*The definition of document given in section section 29 in IPC is quoted herein below;*

*Section 29. "Document"*

*29. "Document".--The word "document" denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter.*

*Explanation 1.--It is immaterial by what means or upon what substance the letters, figures or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.*

*Illustrations*

*A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.*

*A cheque upon a banker is a document.*

*A power-of-attorney is a document.*

*A map or plan which is intended to be used or which may be used as evidence, is a document.*

*A writing containing directions or instructions is a document.*

*Explanation 2.--Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section, although the same may not be actually expressed.*

*Illustration*

*A writes his name on the back of a bill of exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words"pay to the holder" or words to that effect had been written over the signature."*

12. The definition in Evidence Act and in Penal Code makes it abundantly clear that document means any matter expressed or described upon any such substance by means of letter and figure or marked or by more than one of those means which intent to be used or which may be used for the purpose of recording that matter. Therefore the matter expressed or described upon the substance may be a document but not that substance over which the matter is expressed or described. It is not denied that photographs of car were taken and supplied to the accused petitioners.

13. In view of the above, this Court is of the firm view that move of petitioners was intended to prolong the proceedings initiated against them and they have upto some extent succeeded therein. As such this application is misconceived one and the same has rightly been rejected by the learned Magistrate vide order impugned.

14. At this stage no interference is warranted by this Court in the impugned

order. The petition sans merits and is liable to be dismissed.

15. While dismissing this petition this Court with object to secure the ends of justice issue following directions:-

16. That if the case has not yet been committed to the court of Session be commit by the concerned learned Magistrate within a period of two weeks from the date of communication of this order.

17. If the case has already been committed to the Court of Session, the learned Sessions Judge or any other Court where trial is pending, shall expedite the hearing of trial by strictly observing the provisions contained in Section 309 Cr.P.C. and to proceed with the case on day to day basis.

18. The trial Court shall make an endeavor to conclude the trial within a period of six months from the date of communication of this order.

19. It is also made clear that learned Magistrate or the trial court, as the case may be, shall not grant any frivolous adjournments to the accused petitioners. If the accused persons try to prolong the proceedings by seeking unnecessary adjournments, the coercive steps may be adopted against them including cancellation of bail, if required.

20. The Office shall ensure that the copy of this order be communicated to the learned Chief Judicial Magistrate Sitapur and Sessions Judge Sitapur positively within a period of 10 days from today. The learned Magistrate and learned Sessions Judge as the case may be, shall comply with the order in letter and spirit.

21. The Senior Registrar of the Court shall ensure the compliance of this order.

22. In view of the above this petition is dismissed with aforesaid directions.

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APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2014

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE DINESH GUPTA, J.

First Appeal From Order No. 3392 of 2014

Smt. Neelam & Ors. Appellants
Versus
Nawab Ahamad & Ors. ...Respondents

Counsel for the Appellants:
Sri Ratnesh Kumar Pandey

Counsel for the Respondents:
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U.P. Motor Vehicle Act 1988-Section-221-readwith C.P.C. Order 47-Power of review by accident claim Tribunal-except the provisions contained under Section 221-no other provision of Civil code applicable-review being creature of statute-in absence of power to review-Tribunal rightly rejected-no interference in appeal required.

Held: Para-9
From the aforesaid, what emerges is that if Statutory Authority/Quasi Judicial Officer/Tribunal, does not have any express power of review under the Statutes, the subsequent order passed by it recalling/modifying or reversing its earlier order is nullity, as such order is non est and void. Therefore, we are of the view that there is no illegality and infirmity in the impugned award which is hereby confirmed.

Case Law discussed:
(2011) 4 SCC 750

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

1. Heard learned counsel for the claimants/appellants and perused the record.

2. Claim Petition No. 23 of 2009 was filed by the claimants/appellants against Nawab Ahmad and others, claiming compensation for the death of Vijay Kumar Agarwal in a road accident. The Motor Accident Claims Tribunal, Bulandshahr, vide judgment and award dated 14.9.2010, dismissed the claim petition on the ground that the claimants have failed to establish that accident had occurred due to carelessness of driver of Santro Car No. H.R. 25A.J./8972.

3. Not being satisfied with the judgment and award dated 14.9.2010, claimants/appellants have filed a Review Petition, bearing No. 18 of 2010, seeking review of the judgment and award dated 14.9.2010. The Tribunal, after hearing the parties and perusing the evidence on record, dismissed the review petition vide judgment and order dated 26.9.2014, which is impugned in the instant appeal, holding that the Motor Accident Claims Tribunal has no power to review its award and as such, review petition is not maintainable.

4. Counsel for the claimants/appellants has submitted that the Tribunal, while passing the judgment and award dated 14.9.2010 in Claim Petition No. 23 of 2009, had not taken into consideration the entire facts and evidence on record and erred in dismissing the Claim Petition. Therefore, claimants/appellants had filed review petition. The Court below, without appreciating the evidence on record, erred in dismissing the Review Petition by the impugned order only on the ground that the Review Petition is not maintainable.

5. A specific query was put to the learned Counsel for the claimants/appellants as to whether there is any specific provision in the Motor Vehicles Act to review the judgment and award passed by the Motor Accident Claims Tribunal, the answer was in negative.

6. At this juncture, we would like to point out that Section 221 of the U.P. Motor Vehicles Rules, 1998 deals with the applicability of certain provisions of the Code of Civil Procedure and it reads as under :

*"221. Code of Civil Procedure to apply in certain cases. The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunal, namely, rules 9 to 13 and 15 to 30 of Order V; Order IX; rules 3 to 10 of Order XIII; rules 2 to 21 of Order XVI; Order XVII; and rules 1 to 3 of Order XXIII."*

7. Order XLVII of the Code of Civil Procedure deals with the power of review conferred to the Court. A perusal of the aforesaid Rule 221 would indicate that Order XLVII which deals with the power of review cannot be applied by the Motor Accident Claims Tribunal. Only the provisions/Orders mentioned in the aforesaid Rule 221 can be applied by the Motor Accident Claims Tribunal.

8. In New India Assurance Co. Ltd. v. Bimla Devi and others : 1999 1 TAC 449 (Alld. DB), a Division Bench of this

Court has held that the Motor Accident Claims Tribunal has no power to review. In CTO v. Makkad Plastic Agencies (2011) 4 SCC 750, the Apex Court observed as follows:

"Review is a creature of statute and such an order of review could be passed only when an express power of review is provided under statute. In the absence of any statutory provision for review, exercise of power of review under the garb of clarification/ modification/correction is not permissible."

9. From the aforesaid, what emerges is that if Statutory Authority/Quasi Judicial Officer/Tribunal, does not have any express power of review under the Statutes, the subsequent order passed by it recalling/modifying or reversing its earlier order is nullity, as such order is non est and void. Therefore, we are of the view that there is no illegality and infirmity in the impugned award which is hereby confirmed.

10. For the reasons aforesaid, the appeal is dismissed. Under the facts and circumstances of the case, there is no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE SHASHI KANT, J.

Civil Misc. Writ Petition No. 4649 of 2013

Radheyshyam Nishad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri R.C. Yadav, Sri Mahtab Husain

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

Constitution of India Art.- 226-Cancellation of fair price shop license-in view of G.O. 17.08.2002-petitioner being resident of another village-and the father's name different than natural father-explanation-that petitioner was granted license on consideration of fact that no any villager of concern village willing to get license-and being adopted son-difference of father name justified-held-G. O. having no applicability of retrospective effect-not applicable-non consideration of fact of adoption-no misrepresentation on part of petitioner found-cancellation-set-a-side.

Held: Para-7
We are of the view that the Government Order dated 17th August 2002 cannot be made applicable retrospectively, it only applies prospectively and only applies in a case of settlement of fresh fair price shop in a village. So far as the parentage of the petitioner is concerned, the name of the real father of the petitioner was Sukhdev. The petitioner explained that he has been adopted by Faujdar Nishad on 05.09.1974 and, therefore, he has shown the name of his father as Faujdar Nishad, which is not disputed by any of the authority and, therefore, we do not see any misrepresentation relating to the disclosure of the parentage on the part of the petitioner.

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

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

2. By means of present writ petition, the petitioner is challenging the order dated 18th October 2012 passed by respondent no. 2- Sub Divisional Magistrate, Sadar, District Ghazipur by which fair price shop licence has been cancelled on the ground

that the petitioner was a resident of village Chochakpur, Block Karanda, Tehsil Sadar, District Ghazipur and was not a resident of village Narayanpur and therefore in view of the Government Order No. 2715 dated 17.08.2002, the petitioner is not entitled to run the fair price shop and the petitioner has shown his father's name as Faujdar Nishad, while correct name of his father is Sukhdev, which is shown in the Khatauni and in the Parivar register.

3. The learned counsel for the petitioner submitted that the petitioner has been granted licence in the year 1993 on the basis of the resolution dated 16th March 1993 on the ground that no one is ready to take the shop of this village and, therefore, it has been decided on the basis of the then Government Order, dated 3rd July 1990, unanimously to select Sri Radhey Shyam, son of Faujdar Nishad. Since then the petitioner was running the fair price shop. It is is true that on several occasions his licence has been suspended but on the explanation submitted by the petitioner, the licence has been restored by the competent authority.

4. It is further submitted that the Government Order No. 2715 dated 17.08.2002 is not applicable to the petitioner, as the petitioner had been issued licence in the year 1993 on the basis of the the existing Government Order. So far as the parentage of the petitioner is concerned, it was explained that the petitioner's real father was Sukhdev but he has been adopted by Faujdar Nishad on 05.09.1974 and, therefore, he started writing his father's name as Faujdar Nishad in place of Sukhdev, therefore, the licence has not been rightly cancelled.

5. We have considered the rival submissions and perused the record.

6. The petitioner has been granted licence of the Fair Price Shop at village Narayanpur on the basis of the resolution of Gram Sabha, Narayanpur dated 16.03.1993, wherein it has been resolved that no person of the village is ready to take the shop and it was unanimously resolved to select Sri Radhey Shyam resident of Chochakpur, therefore, there was no suppression of fact on the part of the petitioner. The petitioner has been issued licence on the consideration that he was not the resident of village Narayanpur and was a resident of Chochakpur.

7. We are of the view that the Government Order dated 17th August 2002 cannot be made applicable retrospectively, it only applies prospectively and only applies in a case of settlement of fresh fair price shop in a village. So far as the parentage of the petitioner is concerned, the name of the real father of the petitioner was Sukhdev. The petitioner explained that he has been adopted by Faujdar Nishad on 05.09.1974 and, therefore, he has shown the name of his father as Faujdar Nishad, which is not disputed by any of the authority and, therefore, we do not see any misrepresentation relating to the disclosure of the parentage on the part of the petitioner.

8. In view of the aforesaid facts and circumstances of the case, we are of the view that the impugned order dated 18.10.2012 is not sustainable and is liable to be set aside.

9. In the result, the writ petition is allowed and the impugned order dated 18th October 2012 is set aside. The licence of the petitioner is restored.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.12.2014

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Service Single No. 4735 of 2013

Ram Sewak Gupta ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri D.S. Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-withholding gratuity -admittedly neither any departmental enquiry either prior or after retirement pending-recovery based upon audit report not sustainable-quashed.

Held: Para-14 & 17
14. As observed above, admittedly, in the instant case, no departmental or judicial proceeding or any such inquiry was pending, hence there cannot be any justification for withholding the gratuity of the petitioner.
17. Merely on the basis of said audit report without the charge of causing loss being established in a full-fledged departmental inquiry, no recovery of alleged loss caused to the State Exchequer can be made.

Case Law discussed:
Special Appeal Defective No. 1278 of 2013; 1993 (7) SLR 706; 2006 (110) FLR 101.

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

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

2. The petitioner, who has retired on 30.06.2012 from the post of Marketing Inspector, has filed this petition with the prayer that the order dated 24.07.2013 passed by the Regional Food Controller, Faizabad Region, Faizabad whereby part of the gratuity amount of Rs.2,62,271/- has been withheld for recovering the same on account of the alleged loss caused to the State Exchequer by the petitioner, be quashed. The petitioner has also prayed that the pension payment order dated 04.01.2013 be also quashed to the extent it withholds the amount of leave encashement. Further prayer has been made for commanding the opposite party no.4 to accord the benefit of IIIrd Assured Career Progression to the petitioner with effect from 01.12.2008 in terms of the prevalent Government Order and further that the petitioner be permitted to withdraw the GPF amount.

3. So far as the prayer relating to withholding of the leave encashement amount is concerned, learned counsel for the petitioner states that the said amount has been released. Accordingly, the prayer made in this petition in respect of the same has been rendered infructuous. As regards the prayer relating to grant of the benefit of IIIrd Assured Career Progression to the petitioner, it has been informed that the said benefit has also been given to him which renders the prayer made in this regard infructuous. The petitioner, has, since been permitted to withdraw the amount of GPF, hence in this view, the prayer made in this regard has also become infructuous.

4. The sole issue which now survives for consideration in this case is as to whether the part of the amount of gratuity i.e. the sum of Rs.2,62,271/- has legally been withheld by the Regional

Food Controller, Faizabad Division, Faizabad by passing the impugned order.

5. It has been submitted by the learned counsel for the petitioner that at the time of retirement, the petitioner was not facing any departmental inquiry, neither any departmental proceedings were initiated after his retirement in terms of the provision contained in Regulation 351-A of the Civil Service Regulations, hence there was no occasion for the respondents to have withheld the part of the amount of gratuity.

6. Per contra, learned counsel appearing for the State has vehemently argued that on the basis of special audit report, it was determined that the petitioner has caused loss of Rs.2,62,271/-, hence the loss caused to the State Exchequer has been sought to be recovered by withholding the amount equal to the loss, from the gratuity of the petitioner by the Regional Food Controller, Faizabad Division, Faizabad by means of order dated 24.07.2013.

7. I have considered the arguments advanced by learned counsels appearing for the parties.

8. Admittedly, no departmental proceedings were instituted, neither the same were pending against the petitioner on the date of retirement. It is also not denied that no departmental proceedings, after seeking approval of the competent authority under Regulation 351-A of the Civil Service Regulations, have been initiated against the petitioner.

9. In the counter affidavit, it has been stated by the respondents that on the basis of liability of a sum of Rs.2,62,271/-, which has been determined on the basis of audit report, the amount has been ordered to be recovered from the gratuity amount of the petitioner. No other reason has been indicated by the respondents for withholding the amount of gratuity for recovery of the alleged loss caused to the State Exchequer.

10. The U.P. Recruitment Benefit Rules 1961 provides that recovery from the gratuity of retired employee can be made only if the conditions of Regulation 351-A of the Civil Service Regulation are fulfilled. As observed above, in the instant case, there is no material which in any manner suggests that any departmental proceedings were initiated against the petitioner by taking recourse to the provisions of Regulation 351-A of the Civil Service Regulations.

11. Learned Standing Counsel appearing for the State has, however, sought to defend the impugned order of recovery from the gratuity amount on the basis of decision rendered by a Division Bench of this Court in the case of State of U.P. and others vs Jai Prakash, decided on 17.12.2013 in Special Appeal Defective No.1278 of 2013. The Division Bench in the aforesaid case has held that Government has the power to withhold the gratuity, however, the gratuity can be withheld only until conclusion of departmental or judicial proceedings or any inquiry by administrative tribunal.

12. Referring to the provision contained in Regulation 351-AA, this Court in the said case of State of U.P and others vs Jai Prakash (supra) has held that death-cum-retirement gratuity may be withheld until the conclusion of departmental or judicial proceedings and the issue of final orders thereon.

13. Thus, condition precedent for withholding or making recovery from the gratuity is pendency of departmental or

judicial proceedings or any inquiry by the administrative tribunal and in absence of these inquiries or proceedings pending on the date of retirement, gratuity of the retiring employee cannot be withheld.

14. As observed above, admittedly, in the instant case, no departmental or judicial proceeding or any such inquiry was pending, hence there cannot be any justification for withholding the gratuity of the petitioner.

15. In fact, the impugned order does not withhold part of amount of gratuity; rather it seeks to recover the same citing the cause that the petitioner has been responsible for causing loss to the State Exchequer to the extent of the amount mentioned in the impugned order.

16. The question, thus, is as to whether without holding any departmental inquiry and without determining the responsibility of the petitioner for the alleged loss, solely on the basis of audit report, can any recovery from the petitioner be made.

17. It is well established that audit report cannot be used as substantive evidence of the genuineness or bonafide nature of the transactions referred to in the accounts. As has been held by this Court in the case of Dilip Singh Rana vs State of U.P. reported in 1993 (7) SLR 706, audit is only official examination of the accounts in order to make sure that the accounts have been properly maintained according to prescribed mode and further that audit report is a statement of facts pertaining to the maintenance of accounts coupled with the opinion of the auditor and thus it can only give rise to reasonable suspicion of commission of a wrong. Merely on the basis of said audit report without the charge of causing loss being established in a full-fledged departmental inquiry, no recovery of alleged loss caused to the State Exchequer can be made.

18. In similar circumstances, recovery sought to be made from the gratuity of a retired government employee on the basis of some audit report was not approved by a Division Bench of this Court in the case of Radhey Shyam Dixit vs State of U.P. and others, reported in 2006 (110) FLR 101.

19. For the reasons disclosed above in the instant case as well, the recovery of the part of the amount of gratuity of the petitioner, which has been sought to be made by passing the impugned order dated 24.07.2013, cannot be permitted to be sustained.

20. In the result, the writ petition is allowed and the impugned order dated 24.07.2013 passed by the Regional Food Controller, Faizabad Region, Faizabad as contained in annexure no.1 to the writ petition is hereby quashed. It is directed that payment of entire gratuity amount shall be made to the petitioner within six weeks from the date of production of certified copy of this order.

21. However, there will be no order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2014

BEFORE
THE HON'BLE MAHESH CHANDRA TRIPATHI, J.

Civil Misc. Writ Petition No. 10039 of 2013

Kaleem Ullah Khan ...Petitioner

Versus

State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bal Krishna Pandey, Sri Amit Singh Chauhan, Pooja Srivastava, Sri Neeraj Srivastava, Sri Navin Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Cancellation of fair price shop license-without supplying the copy of complaint-charge sheet-without oral enquiry-without copy of enquiry report-without following procedure of enquiry contained in G.O. 29.07.04-held-order impugned not sustainable-quashed-with liberty to pass fresh order in accordance with law.

Held: Para-13
Applying the ratio of the law laid down in the aforesaid case, the court finds that the inquiry proceedings were conducted in flagrant defiance of the Government Order dated 29.7.2004 and the law laid down by this Court and therefore, the case of the petitioner was severely prejudiced thereby making the impugned orders dated 29.09.2012 and 16.01.2013 unsustainable in law.

Case Law discussed:
[2003] (21) LCD 610]; 2008 (3) ADJ 36 (DB); 2010 (6) ADJ 339.

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

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

2. By means of the present writ petition, the petitioner has prayed for quashing the order dated 29.09.2012 passed by respondent No. 3 by which the fair price shop of the petitioner had been cancelled.

3. Aggrieved with the said cancellation order, the petitioner had preferred statutory appeal, which was also rejected by the respondent No. 2 vide an order dated 16.01.2013.

4. Brief facts giving rise to the present writ petition are that the petitioner is a fair price shop dealer in Mohalla Gher Hasan Khan, Rampur since the date of his allotment and his work and conduct is satisfactory and no complaint has ever been made against the petitioner regarding irregularities in distribution of essential commodities by the valid ration card holders till date.

5. It has been averred in the writ petition that the respondent No. 2 suspended the fair price shop of the petitioner on the basis of mala-fide complaint as well as on report being submitted by the Supply Inspector and directed the petitioner to submit his reply. Thereafter, in pursuance to the suspension order, the petitioner submitted his explanation before the respondent No. 2 alongwith documents and affidavit of villagers denying the entire allegation levelled against him. It has also been averred that the respondent No. 2, without considering the explanation given by the petitioner and without perusing the evidence on record cancelled the licence of fair price shop of the petitioner.

6. Being aggrieved with the cancellation order, the petitioner had preferred an Appeal No. 31 of 2012-13 (Kaleem Ullah Khan Vs. State of U.P. and others) alongwith stay application before the respondent No. 2 under Section 28 (3) of U.P. Essential Commodities (Distribution) Order, 2008. Thereafter the respondent No. 2, without considering the

facts of the case and without perusing the material on record, had dismissed the appeal of the petitioner.

7. Learned counsel for the petitioner submits that a Division Bench of this Court in Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation ltd. [2003](21) LCD 610] held that after a charge-sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. He further submits that no doubt, the aforesaid principles have been laid down by the Division Bench in the service matter but the same principle would also be applicable while making an inquiry in the present matter. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date so fixed the oral and documentary evidence against the employee should first be led in his presence. Thereafter the employer must adduce his evidence first. The reason for this principle is that the charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. The person who is required to answer the charge must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination, as he desires. Then he must be given a chance to rebut the evidence led against him.

8. It is settled principle that if any material is sought to be used in an enquiry, the copies of material must be supplied to the party against whom such an enquiry is held. The Disciplinary Authority as well as Appellate Authority did not consider this aspect of the matter and expressed their concurrence to the finding of the Inquiry Officer, without applying their independent and free mind. The Appellate Authority while considering the appeal of the petitioner failed to appreciate the fact that the Enquiry Officer at the back of the petitioner had proved charges without affording reasonable opportunity to controvert the same. Therefore, the order of Appellate Authority is bad in law and cannot be sustained.

9. Learned counsel for the respondents submits that the impugned orders are sustainable and the same had been passed strictly in accordance with law and as per record.

10. On the facts of the present case, the petitioner ought to have been permitted to participate in the aforesaid inquiry and the statements of the complainants should not have been recorded in the presence of the petitioner, and without furnishing the statement of the complainants to him and without giving him an opportunity to cross-examine the complainants, who had deposed against the petitioner, and thus any such action based on any such report or evidence could not become a foundation for passing an order of cancellation of fair price licence of the petitioner as cancellation has civil consequences.

11. Learned counsel for the petitioner further submits that it was incumbent upon the inquiry officer to follow the procedure, which is prescribed in Government Order dated 29.07.2004, which provides the procedure for suspension/cancellation of fair price shop lecence, so that the officers cannot proceed in illegal manner, and

unnecessary litigation may be avoided. He also placed his reliance upon a Division Bench judgment of this Court in Civil Misc. Writ Petition No. 58470 of 2005 (Harpal Vs. State of U.P. and others), decided on 26.2.2008, reported in 2008(3) ADJ 36 (DB). For ready reference the relevant paras nos. 9 to 15 are reproduced here in below:-

*"9. From a reading of Clause 30 it is clear that the Uttar Pradesh Scheduled Commodities Order, 1990 was superseded and repealed. Clause 31 of 2004 Order states that it will have effect irrespective on any thing contrary to it contained in any earlier order issued by the State Government. The 2004 Order was issued by the State Government for maintaining the supplies of food grains and other essential commodities and for securing their equitable distribution and availability at fair prices. Its Clause 21 is concerned with monitoring of fair price shops by the food officer and he was to make regular inspections. Clause 22 of the Order gave power to the Food Officer and other officers the power of entry, search and seizure and Clause 23 gave power to the State Government to authorize any person to inspect the stocks of scheduled commodities other than the officer mentioned in Clause 22. So far as the maintenance of supply of food grains and other essential commodities and their distribution and availability at fair price shop was concerned the 2004 Order provided stringent methods to deal with the erring licensees of fair price shops. But the 2004 Order did not provide any procedure for suspension/cancellation of the licences or agreement of fair price shop licensees. The 2004 Order did not lay down any procedure as to how and in what manner the licence/agreement of a fair price shop licensee/agent could be suspended or cancelled nor any time frame had been provided. On the other hand, the Government order dated 29.7.2004 prescribes the procedure for taking recourse to suspension/cancellation by the officers and fixes a time frame for taking action against the licensees. The Government order dated 29.7.2004 does not contain any provision which is contrary to 2004 order. The 2004 Order has not superseded the Government order dated 29.7.2004. The G. O. dated 29.7.2004 and 2004 Order dated 20.12.2004 operate in different fields with the same object to ensure equitable and fair distribution of essential commodities to the people. We are of the considered opinion that the G.O. dated 29.7.2004 and the 2004 Order dated 20.12.2004 are valid and are still in force and are applicable in the State of Uttar Pradesh.*

*10. The next question is whether the impugned suspension order has been passed in violation of principles of natural justice? From the perusal of the suspension order it is clear that no opportunity of hearing was afforded to the petitioner either at the time of enquiry or before passing of the order suspending the fair price shop licence/agreement of the petitioner. In the counter-affidavit it had not been stated that opportunity of hearing was given at any stage. The enquiry was conducted behind the back of the petitioner. The entire proceedings were in violation of the principles of natural justice. The argument of learned Additional Chief Standing Counsel that principles of natural justice do not apply to the cases where fair price shop licence had been granted in view of the decision in Gopi's case, cannot be accepted. The G.O. dated 29.7.2004 clearly mandates*

*and directs the authorities to comply with the principles of natural justice before suspending/cancelling fair price shop licences/agreements. It appears that this G.O. dated 29.7.2004 was not placed before the Division Bench which decided Gop's case and in Ignorance of this Government order the decision has been rendered and the decision has been passed in sub-stlientio in view of the law declared by the Apex Court in State of U.P. and another v. Synthetics and Chemicals and Anr. MANU/SC/0616/1991 : 1993(41)ECC326 . Since the G.O. dated 29.7.2004 was not considered by this Court the decision in Gopi's case cannot be said to be a good law or a precedent.*

*11. The next question is whether the petitioner has to be relegated to alternative remedy of filing an appeal to challenge the suspension order which has been passed in violation of principles of natural justice? The learned Additional Chief Standing Counsel has vehemently urged that even if there was violation of principles of natural justice the petitioner had an alternative remedy to file an appeal before the Commissioner challenging the suspension order. It is true that the suspension or cancellation of a fair price shop licence could be challenged under Clause 28(3) of the Uttar Pradesh Scheduled Commodities Distribution Order, 2004 before the concerned Divisional Commissioner, but the appeal under Clause 28(3) lies only against the suspension or cancellation of agreement of the fair price shop. But where an order is passed suspending/cancelling the fair price shop licence/agreement in violation of principles of natural justice the alternative remedy would not be a bar and a writ petition would be maintainable under Article 226 of the Constitution of India. It has been held by the Apex Court in Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. MANU/SC/0664/1998 : AIR1999SC22 that even if an alternative statutory remedy is available it would not be a bar in maintenance of a writ petition under Article 226 of the Constitution in at least three contingencies, (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged. We have already held that it was mandatory for the authorities/officers to comply with the principles of natural justice before suspending/cancelling the fair price shop licences/agreements. Therefore, we are of the considered opinion that the impugned suspension order has been passed in violation of principles of natural justice, the writ petition filed by the petitioner without availing the alternative remedy of appeal, is maintainable under Article 226 of the Constitution.*

*12. The last question is whether on merits the suspension order is liable to be set aside? In view of the findings recorded by us that the suspension order was passed in violation of principles of natural justice, it is not necessary to examine whether the order suspending the licence of the petitioner was in 'accordance with Government orders, but since the Additional Chief Standing Counsel has vehemently attempted to defend the order on merits, we consider it necessary to examine the correctness of the suspension order in brief. The petitioner's fair price shop licence/agreement has been suspended. The suspension order does not*

*disclose that any opportunity of hearing was given to the petitioner. It appears that Sub-Divisional Magistrate, Faridpur, Bareilly on the basis of oral complaints of the villagers got an enquiry conducted against the petitioner on 27.5.2005 and in the enquiry it was found that the shop was closed and rate board was not put outside the shop. The fair price shop licensee was charging Rs. 12 per litre in excess of the scheduled price of kerosene oil which was violation of condition No. 24 (Ga) of the licence/agreement. In the enquiry ration cards were also inspected and it was found that every month kerosene oil was not properly distributed. Sugar was also not properly distributed to persons who were below the poverty line which was violation of condition No. 3 of the licence/agreement. The shop of the petitioner was suspended and attached to another fair price licensee Devendra Kumar Pathak. It is not mentioned in the suspension order that who conducted the enquiry and when? It is also not clear that if the shop was closed at the time of enquiry then from where this fact was revealed that the petitioner was charging Rs. 12 per litre in excess of scheduled price of kerosene oil and from where the ration cards were inspected by the enquiry officer. The impugned suspension order does not disclose that any show-cause notice was issued to the petitioner to submit his reply as to why the petitioner's licence may not be cancelled. According to learned Counsel for the petitioner on the basis of such vague allegations licence/agreement of the petitioner could not be suspended. He has placed reliance on the decisions of this Court in Civil Misc. Writ Petition No. 60978 of 2005, Smt. Alka Rani v. State of U.P. and Ors. decided on 14.9.2005. The order of the Division Bench is extracted below:*

*"We have heard the learned Counsel for the petitioner and the learned standing counsel. Petitioner's fair price shop licence was suspended and by the impugned order dated 22.8.2005 it has been cancelled. The cancellation order says that despite opportunity the petitioner did not submit any reply.*

*Normally, we would have directed the petitioner to avail alternative remedy of appeal, but we find from the show cause notice (Annexure-4 to this writ petition) that almost all the charges are absolutely vague without giving any specific instance and without mentioning any material on the basis of which each of the charges is proposed to be proved against the petitioner. For example when charge No. 2 says that distribution according to entitlement of ration cardholders has not been made every month, the notice should also have indicated when and to which card holders distribution was not made. Similarly, when charge No. 4 says that kerosene oil is being sold at the rate of Rs. 11 per litre, it should have been disclosed when and from which person such extra value was charged.*

*Without specific instances of this kind and without informing the material which is sought to be read against the petitioner in support of these charges, no proper effective defence or reply was possible. The only thing, which the petitioner could have done, was to make an equally vague denial that he was not guilty of these charges, which ultimately would lead nowhere. Levelling of charge is easy, proving of charge is another matter. A person can be punished for proved charges and not for levelled charges. The standard of proof may vary but nevertheless proof must be there. If evidence is there to prove charges, this Court will not go into sufficiency of the evidence. But a finding based on no evidence is not sustainable.*

*In the circumstances, we find that the impugned order is based on no material. The writ petition is allowed. The impugned order dated 22.8.2005 is quashed."*

*13. The decision in Smt. Alka Rani's case applies to the facts of the case in hand, as in this case also allegations are vague and specific instances and material sought to be read in support of the allegations against the petitioner have not been mentioned. If no material is mentioned in the suspension order then substituting the material in the counter-affidavit would be of no help to the respondents. We further find that along with the suspension order no show-cause notice had been issued to the petitioner directing him to show-cause as to whey his fair price shop licences/agreement may not be cancelled. The impugned suspension order is vitiated on this ground alone being in violation of mandatory requirements of G.O. Dated 29.7.2004.*

*14. For the aforesaid reasons, we are in agreement with learned Counsel for the petitioner that the impugned suspension order is vague and on the basis of which petitioner's fair price shop licence/agreement could not be cancelled and the impugned order deserves to be quashed.*

*15. In the result, this writ petition succeeds and is allowed. The impugned suspension order dated 25.5.2005 passed by respondent No. 2, Annexure-1 to the writ petition, is quashed"*

12. In Abu Baker Vs. State of U.P. and others 2010 (6) ADJ 339, this court had held as follows: -

*"There is no material on record indicating either the petitioner was given any opportunity to cross-examine the witness who had deposed against him or the copies of the statements of witnesses so recorded were furnished to him. Thus what follows from the above discussion is that the petitioner has been penalised on the basis of the statements of Antodaya and BPL card holders recorded behind his back although neither the copies of the statements of the aforesaid witnesses were furnished to the petitioner nor he was given any opportunity to cross-examine the witness so examined."*

13. Applying the ratio of the law laid down in the aforesaid case, the court finds that the inquiry proceedings were conducted in flagrant defiance of the Government Order dated 29.7.2004 and the law laid down by this Court and therefore, the case of the petitioner was severely prejudiced thereby making the impugned orders dated 29.09.2012 and 16.01.2013 unsustainable in law.

14. The writ petition succeeds and is hereby allowed. The orders impugned dated 29.09.2012 and 16.01.2013 are hereby quashed. However, it shall be open for the respondents to pass fresh orders in the light of the observations made hereinabove and in accordance with law within a period of two months from the date of the production of the certified copy of this order. No order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2014

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE MRS. VIJAY LAKSHMI, J.

Criminal Misc. Writ Petition No. 22824 of 2014

Hari Nandan ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Moti Lal, Smt. Meera

Counsel for the Respondents:
A.G.A., Sri Shivam Yadav

Constitution of India, Art. 226-Quashing FIR-offence under Section 138-B of Electricity Act-on allegations even on disconnection-petitioner found consuming electricity power-on ground of provision of Section 41-A of Cr.P.C.-punishment being lesser that 7 years-arrest can not be affected in routine manner as well as as per law laid down by Apex Court in Arnesh Kumar case-held-under Section 151-A police having power to investigate-having special provision under Section 153 and 154 of Electricity Act-from perusal of FIR cognizable offence made out-no interference call far-the rulings relied by petitioner-not applicable-petition dismissed on ground of remedy to approach before special Court constituted under special Act-petition dismissed.

Held: Para-22, 23 &24
22. A perusal of the first information report has been lodged against the petitioner shows that cognizable offence is made out against the petitioner. Therefore, prayer (I) of the writ petition seeking relief for quashing of the FIR cannot be granted and as a consequence the petitioner is not entitled for relief no.(II) for stay of arrest.

23. Even otherwise proceeding under Section 135 of the Act had been taken against the petitioner which relates to theft of electricity, second proviso to Section 135 (1)(A) provides further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hour from the time of such disconnect:

24. In the circumstances, we are not inclined to interfere in the matter and the petitioner has an efficacious remedy by moving the Special Court constituted under the Special Act which is the Electricity Act and the matter is specified therein.

Case Law discussed:
2014 (8) SCC 273; Laws (All)-2011-9-22.

(Delivered by Hon'ble Rakesh Tiwari, J.)

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

2. The petitioner has challenged the validity, propriety and legality of the first information report in case crime No.225 of 2014, under Section 138-B of Electricity Act registered at P.S. Binawar, District Budaun, whereas it has been alleged that a team of Assistant Engineer along with others visited the villages Sadullahpur Kitara, Chandaura, Bichharayya, etc. under the Police Station Binawar on 19.6.2014. The enforcement party found that 14 persons of aforesaid village had connected their electricity connections after the electricity department had earlier disconnected their electricity connections. As regard the petitioner is concerned, it is stated in the first information report thus:

" इसके बाद ग्राम बिछरया पहुॅचे। अशोक कुमार एस0/ओ0 रामपाल बुक सं0 1123/कने0 सं0 024282 बकाया 51540 बकाया हरिनन्दन एस0/ओ0 गंगा सिह बंक सं0 1123/कने0 सं0 050739 बकाया 47752 बकाया घरेलू मोहनलाल ए0/ओ0 ख्याली राम बुक सं0 1120/कने0 सं0 051942 बकाया 36145 बकाया पर कटा कनेक्शन चलता हुआ पाया गया।"

3. The petitioner was proceeded against under Section 148-B of the Electricity Act for the offence committed by him, which is punishable up to 3 years, is cognizable as non-bailable as provided under the Electricity Act.

4. The contention of the learned counsel for the petitioner is that Section

151-A of the aforesaid Act, gives only power of investigation to the concerned police station but provisions of Chapter XII of Cr.P.C. does not provide for any power of arrest yet the police of P.S. Binawar are making attempt to arrest the petitioner, which is without jurisdiction.

5. It is further contended that Section 41-A Cr.P.C provides that arrest of the accused person for offence punishable with imprisonment of 7 years or less are not to be made in a routine manner and arrest can be effected only after issuance of notice and in default of conditions mentioned therein. The contention of the learned counsel for the petitioner is that no inspection, search and seizure of any domestic places or domestic premises shall be carried out between sunset and sunrise except in the presence of an adult male member occupying such premises.

6. In support of his contention, counsel for the petitioner has placed reliance upon the decision rendered in Arnesh Kumar Vs. State of Bihar and another, 2014 (8) SCC 273, wherein the Apex Court has observed that directions issued therein shall apply in all such cases where offence is punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine- Police officers shall not arrest the accused unnecessarily and Magistrate shall not authorise detention casually and mechanically- Failure to comply with these directions, shall apart from rendering police officers concerned liable for departmental action, also make them liable to be punished for contempt of court- Authorising detention without recording reasons by Judicial Magistrate concerned shall be liable for departmental action by appropriate High Court- Copy of judgment to be forwarded to Chief Secretaries as also DGs of Police of all States, Union Territories and Registrar General of all High Courts for ensuring compliance therewith- Police- Arrest- Penal Code, 1860- S.498A- Constitution of India, Arts.21 and 22(2).

7. The petitioner in this regard has further placed reliance upon the decision rendered in Shaukin Vs. State of Uttar Pradesh, Laws (All)-2011-9-22.

8. From the extract quoted by us in the body of judgment, it is clear that electricity dues were not paid by Ashok Kumar S/o Ram Pal, Harinandan S/o Ganga Singh, Gharelu Mohanlal S/o Khyali Ram and their energy supply line was earlier disconnected but at the rime of raid their electricity connection found to be re-connected while amounted to theft of electricity.

9. As regard the judgment cited by the learned counsel for the petitioner in Arnesh Kumar (supra) is concerned that judgment has overlooked the context in which has been rendered. In that case Arnesh Kumar was the Apex Court was considering the power to police, to arrest an accused, without warrant, under Section 498-A read with Section 4 of Dowry Prohibition Act, 1961. Therefore the Court in the facts and circumstances of the case held that due to the rampant misuse of these provisions, it would be prudent and wise for a police officer not to make any arrest without some investigation for recovery to a reasonable satisfaction, as to genuineness of the allegations.

10. As stated earlier, this is not a case under the Dowry Prohibition Act or Section 498-A of the Act. It rather is a

case under the Electricity Act, 2003, where the checking party under the Assistant Engineer of the department had visited the village at the spot and found theft of electricity being committed by reconnecting the power supply by the consumers without payment of dues.

11. Shri Shubham Yadav, learned counsel for the respondents submits that compounding for offence under section 152 (1) is permitted under Section 152(4) of the Electricity Act. It only once to a person or consumer. He further states that petitioner had also availed this opportunity, and therefore, he cannot now claim compounding again for a second time under the provisions of the Act.

12. After hearing counsel for the parties it appears that admittedly, the electricity supply of the petitioner had been disconnected earlier and on inspection by the it team was found to be re-connected illegally by the petitioner and the impugned FIR against him was lodged. The petitioner has prayed for the following reliefs;

I)issue an order, direction or writ in the nature of certiorari, call for record and quash the FIR at case crime no.225/2014 u/s 138-B Electricity Act, P.S. Binawar, Budaun dated 19.6.2014 (Annexure '1').

II) issue an order, direction or writ in the nature of mandamus and direct the respondents not to arrest the petitioner in F.I.R at case crime no.225/2014 u/s 138-B Electricity Act, P.S. Binawar, Budaun dated 19.6.2014 (Annexure '1').

III) issue any other writ, order, direction, which this Hon'ble Court may deem just and expedient in the interest of justice.

IV) award cost of this petition in favour of the petitioner.

13. From the F.I.R, it is apparent that search/inspection operation was initiated at 11.05 A.M on 19.6.2014 and after search and investigation about 18 connections in three villages as mentioned in the FIR, was lodged at 5 p.m. The first information report has been lodged in the mid of June, 2014. Therefore, search was not carried out after sunset or before sunrise.

14. On examining of Section 138 of the Electricity Act, it is apparent that the appellant had violated the provision of the aforesaid Act read with the first information report. Under Section 147 of the Electricity Act, 2003, the penalties imposed under this Act, shall be in addition to, and not in derogation of, any liability in respect of payment of compensation or, in the case of a licence, the revocation of his licence which the offender may have incurred. He may also note that violation of provision under Section 151 is cognizable offence.

15. The police under Section 151A has power to investigate. An offence punishable under the Act and is vested all the power under Chapter XII of the Code of Criminal Procedure, 1973.

16. Further more Section 151-B not provides this:

"151-B. Certain offences cognizable and non-bailable- Notwithstanding anything contained in the Code of Criminal Procedure, 1973, an offence punishable under sections 135 to 140 or section 150 shall be cognizable and non-bailable."

17. Compounding of offences which is provided under Section 152(4) which read thus:

"152. Compounding of offences.-

(4) The compounding of an offence under sub-section (1) shall be allowed only once for any person or consumer."

18. In so far as the two judgments cited by the learned counsel for the petitioner that the Electricity Act and its provision will prevail Special Law except they are not in derogation to the provision of Criminal Procedure. We may also note that Sections 153 and 154 the Electricity Act, which provides Special Courts which read thus:

"153. Constitution of Special Courts.- (1) The State Government may, for the purposes of providing speedy trial of offences referred to in [ sections 135 to 140] and section 150], by notification in the Official Gazette, constitute as many Special Courts as may be necessary for such area or areas, as may be specified in the notification.

(2) A Special Court shall consist of a single Judge who shall be appointed by the State Government with the concurrence of the High Court.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he was, immediately before such appointment, an Additional District and Sessions Judge.

(4) Where the office of the Judge of a Special Court is vacant or such Judge is absent from the ordinary place of sitting of such Special Court, or he is incapacitated by illness or otherwise for the performance of his duties, any urgent business in the Special Court shall be disposed of-

(a) by a Judge, if any, exercising jurisdiction in the Special Court;

(b) where there is no such other Judge available, in accordance with the direction of District and Sessions Judge having jurisdiction over the ordinary place of sitting of Special Court, as notified under sub-section (1).

154. Procedure and power of Special Court.- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under ( sections 135 to 140 and section 150] shall be triable only by the Special Court within whose jurisdiction such offence has been committed.

(2) Where it appears to any court in the course of any inquiry or trial that an offence punishable under (section 135 to 140 and section 150) in respect of any offence that the case is one which is triable by a Special Court constituted under this Act for the area in which such case has arisen, it shall transfer such case to such Special Court, and thereupon such case shall be tried and disposed of by such Special Court in accordance with the provisions of this Act:

Provided that it shall be lawful for such Special Court to act on the evidence, if any, recorded by any court in the case of presence of the accused before the transfer of the case to any Special Court:

Provided further that if such Special Court is of opinion that further examination, cross-examination and re-examination of any of the witnesses whose evidence has already been recorded, is required in the interest of justice, it may re-summon any such witness and after such further examination, cross-examination or re-examination, if any, as it may permit, the witness shall be discharged.

(3) The Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code of Criminal Procedure,

1973 (2 of 1974), try the offence referred to in [ sections 135 to 140 and section 150] in a summary way in accordance with the procedure prescribed in the said Code and the provisions of section 263 to 265 of the said Code shall, so far as may be, apply to such trial:

Provided that where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try such case in summary way, the Special Court shall recall any witness who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the said Code for the trial of such offence:

Provided further that in the case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding five years.

(4)A Special Court may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to, any offence tender pardon to such person on condition of his making a full and true disclosure of the circumstances within his knowledge relating to the offence and to every other person concerned whether as principal or abettor in the commission thereof, and any pardon so tendered shall, for the purposes of section 308 of the Code of Criminal Procedure, 1973(2 of 1974), be deemed to have been tendered under Section 307 thereof.

(5)The [ Special Court shall] determine the civil liability against a consumer or a person in terms of money for theft of energy which shall not be less than an amount equivalent to two times of the tariff rate applicable for a period of twelve months proceeding the date of detection of theft of energy or the exact period of theft if determined whichever is less and the amount of civil liability so determined shall be recovered as if it were a decree of civil court.

(6)In case the civil liability so determined finally by the Special Court is less than the amount deposited by the consumer or the person, the excess amount so deposited by the consumer or the person, to the Board or licence or the concerned person, as the case may be, shall be refunded by the Board or licensee or the
concerned person, as the case may be, within a fortnight from the date of communication of the order of the Special Court together with interest at the prevailing Reserve Bank of India prime lending rate for the period from the date of such deposit till the date of payment.

Explanation.- For the purposes of this section, "civil liability" means loss or damage incurred by the Board or licensee or the concerned person, as the case may be, due to the commission of an offence referred to in [ section 135 to 140 and section 150]"

19. With a notification constituted Special Court was notified by the Uttar Pradesh Shashan No.1232/VII-NYAYA-2- 204-206/81 Dated: Lucknow dated August 31,2004, which read thus:

" In exercise of the powers under section 153 of the Electricity Act, 2003 (Act no.36 of 2003) the Governor is pleased to constitute all the Fourth Senior most courts of Additional District and Sessions Judge of the district and where there is no such court, the court of the Senior most Additional District & Sessions Judges of the district, as the Special Courts under sub-section (1) of

the said section and to appoint with the concurrence of the Chief Justice of the High Court of Judicature at Allahabad, all the presiding officers of the said courts as the Judges thereof for the purposes of providing speedy trial of offence referred to under section 135 to 141 of the said Act within their respective jurisdictions."

20. The Registrar General, High Court of Judicature at Allahabad had circulated notification vide C.L. No.29/ Main-B/Admin.(A-3) dated 21.9.2004 had conferred the powers of Special Courts to one of the existing Sessions Courts to try cases falling under the Electricity Act, 2003. The letter read thus:

" From,
O.N. Khandelwal, H.J.S.,
Registrar General,
High Court of Judicature at Allahabad.
To,
All the District & Sessions Judges,
Subordinate to the High Court of Judicature at Allahabad.
C.L. No. 29/ Main-B/Admin.(A-3) Dated: Alld: 21.9.2004.
Subject:- Conferment of powers of Special Courts to one of the existing Sessions Courts to try cases falling under the Electricity Act-2003.

Sir,
On the above subject, I am sending herewith a copy of Government Notification No.1232/VII-Nyaya-2-2004-206/81, dated August 31, 2004, regarding constitution of IV Seniormost court of Additional District & Sessions Judge in each district as Special Court under section 153 of the U.P. Electricity Act-2003 and where such Additional District and Sessions Judge is not available, the Seniormost Additional District & Sessions Judge of the district as Special Court under the aforesaid Act.
I am, therefore, to request you kindly to ensure compliance of the aforesaid Government Notification.
Enclosure:-
Yours faithfully,
As above.
Registrar General"

21. From the above, it is crystal clear that Special Courts have also been constituted and have been conferred power to try such cases as the instant case falling under the Electricity Act, 2003, which are functioning.

22. A perusal of the first information report has been lodged against the petitioner shows that cognizable offence is made out against the petitioner. Therefore, prayer (I) of the writ petition seeking relief for quashing of the FIR cannot be granted and as a consequence the petitioner is not entitled for relief no.(II) for stay of arrest.

23. Even otherwise proceeding under Section 135 of the Act had been taken against the petitioner which relates to theft of electricity, second proviso to Section 135 (1)(A) provides further that such officer of the licensee or supplier, as the case may be, shall lodge a complaint in writing relating to the commission of such offence in police station having jurisdiction within twenty four hour from the time of such disconnect:

24. In the circumstances, we are not inclined to interfere in the matter and the petitioner has an efficacious remedy by moving the Special Court constituted under the Special Act which is the

Electricity Act and the matter is specified therein.

25. For the aforesaid reason, petition is dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2014

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

Civil Misc. Writ Petition No. 26980 of 2012

Munna Lal Sharma ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Pulak Ganguly, Sri Arun Kumar Singh-I

Counsel for the Respondents:
C.S.C., Sri A.K. Lal, Sri Sujeet Kumar Rai

Persons with disabilities(Equal opportunities, Protection of Rights and full participation) Act 1995-Section-47- petitioner working as cadre secretary-due to loss of vision of both eyes (optic atrophy) proceeded on medical leave-of 18 months, duly sanctioned-denial of salary in spite of direction of Court-rejecting the claim-decided to compulsory retire-held amount to termination-just contrary, to mandate of overriding provisions of Act 1995-direction issued to pay entire arrears of salary with all service benefits to pay 9% interest thereon till actual payment made.

Held: Para-15
In view of this submission, while setting aside the order dated 8.11.2012 retiring the petitioner from service, the respondents are directed to pay the petitioner entire arrears of salary till 8.11.2012 along with all services benefit admissible to the petitioner with interest @ 9% till the date of actual payment. It is directed that computation be done and payment shall be made to the petitioner within a period of two months from the date a certified copy of this order is produced.

Case Law discussed:
(2003) 4 SCC 524; 2010 (8) ADJ 280; (2004) 6 SCC 708.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Shri Arun Kumar Singh, learned counsel for the petitioner, learned Standing Counsel for respondent Nos. 1 to 3,Shri Sujeet Kumar Rai, learned counsel respondent No.4 and Shri A.K. Lal learned counsel for respondent No.5.

2. While working as Secretary of the Cooperative Society Bijnor, namely, Kisan Sewa Sahkari Samiti, Saidpur, District Bijnor, petitioner has suffered visual impairment and lost his eyesight resultantly he has acquired complete visual disability i.e. blindness. The petitioner started losing his eyesight in the month of September, 2006 and had become 100% visually disabled in February, 2009. He has applied for medical leave which was sanctioned for the period from 15.1.2007 to 16.1.2008 and 16.1.2008 to 30.6.2008 by the Secretary/General Manager, District Cooperative bank, Bijnor. His salary has not been paid, therefore, he has approached this Court by filing writ petition No. 49740 of 2010 which was disposed on 19.8.2010. The order passed by this Court is as under:-

"Learned Standing Counsel represents respondent Nos.1 to 4.

Issue notice to respondent No.5.

The petitioner was serving as Cadre Secretary, Shadipur Kisan Sewa

Cooperative Society Ltd. For the reasons, which could not be ascertained by the eye specialists, he started losing his eye sight. The petitioner could not recover even after treatment and has been certified to be 100% disabled on account of loss of vision in both the eyes [optic Atrophy both eye; visual disability 100% (hundred)] certified by the Chief Medical Officer, Udham Singh Nagar on 16.2.2009.

He had proceeded on leave and was sanctioned 18 months' medical leave (from 15.1.2007 to 16.1.2008 and thereafter from 16.1.2008 to 30.6.2008) by the Secretary/General Manager, District Cooperative Bank, Bijnor.

It is stated that inspite of sanction of leave and the protection given to him under Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995,(In short PWD Act, 1995) the society has not paid salary and has not provided a sheltered appointment to the petitioner. The petitioner has approached the Asstt. Registrar under Section 71 of the U.P. Cooperative Societies Act with an application dated 8.6.2010 for orders and recovery of arrears of salary from the society.

All the respondents are allowed three weeks' time to file counter affidavit. The petitioner will have one week, thereafter, to file rejoinder affidavit.

List on 27th September, 2010.

In the meantime, we direct the Asstt. Registrar, Cooperative Society, U.P. Distt. Bijnor to conclude the proceedings under Section 71 of the U.P. Cooperative Societies Act within a month; he will ensure the payment of atleast half of the salary to the petitioner for the period for which the leave was sanctioned from 15.1.2007 to 16.1.2008 and thereafter from 16.1.2008 to 30.6.2008, to be credited to the bank account of the petitioner positively within one month."

3. Pursuant to the order of this Court dated 19.8.2010 petitioner's representation dated 8.6.2010 was considered and rejected vide order dated 12.9.2011 passed by the District Assistant Registrar, Cooperative Societies, Bijnor. Rejecting the claim of the petitioner for payment of salary the ground taken is that the petitioner was absent with effect from 1.7.2006 and decision has been taken by the Society to retire the petitioner on account of its bad financial condition. On 29.11.2011 District Administrative Committee has taken a decision to retire the petitioner from service. Consequently order dated 8.12.2011 was passed retiring the petitioner from service.

4. The present writ petition is directed against the order dated 12.9.2011 passed by the District Assistant Registrar and the order dated 8.12.2011 passed by the Member Secretary, District Administrative Committee/ General Manager, District Cooperative Bank.

5. Assailing the orders impugned, learned counsel for the petitioner submits that admittedly the petitioner has acquired visual disability while in service and hence the petitioner is protected under Section 47 of the PWD Act, 1995 which provides that an employee who is already in service and acquires a disability during his service should be provided suitable post, if it is available. In case, It is not possible to adjust the employee against any post, supernumerary post is to be created, he shall be allowed to continue till the date of superannuation. Service

benefit cannot be denied to the employee on account of disability acquired while in service.

6. Learned counsel for the petitioner has placed reliance upon the judgment of Apex Court in Bhagwan Das and another Vs. Punjab State Electricity Board, 2008 AIR SCW 534, wherein similar situation came up for consideration before the Apex Court. It was held in paragraphs 13 and 14, which are as follows:-

"13.Appellant No.1 was a Class IV employee, a Lineman. He completely lost his vision. He was not aware of any protection that the law afforded him and apparently believed that the blindness would cause him to lose his job, the source of livelihood of his family. The enormous mental pressure under which he would have been at that time is not difficult to imagine. In those circumstances it was the duty of the Superior Officers to explain to him the correct legal position and to tell him about his legal rights. Instead of doing that they threw him out of service by picking up a sentence from his letter, completely out of context. The action of the concerned officers of the Board, to our mind, was deprecatable."

14.We understand that the concerned officers were acting in what they believed to be the best interests of the Board. Still under the old mind-set it would appear to them just not right that the Board should spend good money on someone who was no longer of any use. But they were quite wrong, seen from any angle. From the narrow point of view the officers were duty bound to follow the law and it was not open to them to allow their bias to defeat the lawful rights of the disabled employee. From the larger point of view the officers failed to realise that the disabled too are equal citizens of the country and have as much share in its resources as any other citizen. The denial of their rights would not only be unjust and unfair to them and their families but would create larger and graver problems for the society at large. What the law permits to them is no charity or largess but their right as equal citizens of the country."

7. In Bhagwan Dass (Supra) observations made in Kunal Singh Vs. Union of India, (2003) 4 SCC 524 has been relied upon. While interpreting import of section 47 of PWD Act, 1995 it was held that there cannot be any discrimination in Government employments and no establishment shall dispense with or reduce in rank, an employee who acquires a disability during his service. Sub-Section (2) of Section 47 of PWD Act, 1995, further provides that no promotion shall be denied to a person merely on the ground of his disability.

In paragraph 9 of the Kunal Singh(Supra) it was held as follows:-

"Chapter VI of the Act deals with employment relating to persons with disabilities, who are yet to secure employment. Section 47, which falls in Chapter VIII, deals with an employee, who is already in service and acquires a disability during his service. It must be borne in mind that Section 2 of the Act has given distinct and different definitions of "disability" and "person with disability". It is well settled that in the same enactment if two distinct definitions are given defining a word/expression, they must be understood accordingly in terms of the definition. It must be

remembered that person does not acquire or suffer disability by choice. An employee, who acquires disability during his service, is sought to be protected under Section 47 of the Act specifically. Such employee, acquiring disability, if not protected, would not only suffer himself, but possibly all those who depend on him would also suffer. The very frame and contents of Section 47 clearly indicate its mandatory nature. The very opening part of Section reads "no establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service". The Section further provides that if an employee after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits; if it is not possible to adjust the employee against any post he will be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier. Added to this no promotion shall be denied to a person merely on the ground of his disability as is evident from sub-section (2) of Section 47. Section 47 contains a clear directive that the employer shall not dispense with or reduce in rank an employee who acquires a disability during the service. In construing a provision of social beneficial enactment that too dealing with disabled persons intended to give them equal opportunities, protection of rights and full participation, the view that advances the object of the Act and serves its purpose must be preferred to the one which obstructs the object and paralyses the purpose of the Act. Language of Section 47 is plain and certain casting statutory obligation on the employer to protect an employee acquiring disability during service. " Further reliance has been placed upon the judgment of Union of India and others vs. State of U.P. and another 2010(8) ADJ 280, wherein it was observed that the PWD Act 1995 guaranteed to a person, who develops disability as defined in the Act from being put off the employment. He has to be offered an alternate/sheltered job. The right of the disabled person to receive sympathetic consideration to continue in employment on acquiring disability during course of his tenure has been replaced by a statutory right by PWD Act, 1995 .This statutory right is not subject to any discretion and cannot be defeated on the prejudice of the employer unless the establishment has exempted any particular category of work and valuable right of an employee, who has acquired disability during the course of employment is guaranteed under section 47 of the PWD Act, 1995. It was held that services of the petitioner therein who has acquired disability during the course of tenure in service could not be terminated . Reliance has been placed in Kunal Singh(supra) and Union of India Vs. Sanjay Kumar Jain (2004), 6, SCC 708.

8. Keeping in view of the above legal position, present case is to be examined. Admittedly in the instant case, the petitioner has acquired visual disability during service. He submitted leave application and leave for certain period was granted to the petitioner. However, salary was not paid as such he had to rush to this Court. Pursuant to the order of this Court dated 19.8.2010 an amount of Rs. 58,000/- was paid to the petitioner towards half salary for the period from 15.1.2007 to 30.6.2008. However remaining amount of Rs. 58,600/- has been refused by order dated

12.9.2011 on the ground that decision has been taken by the Committee to retire the petitioner on account of bad financial condition of the Society. It is further apparent from the order passed by the Assistant Registrar, decision taken whatsoever to retire the petitioner from the service was not served upon the petitioner. However, payment of salary for the rest of the period and half salary from 15.1.2007 to 30.6.2008 has been denied on the ground that the petitioner was absent without leave with effect from 1.7.2006.

9. It is apparent from the order dated 20.5.2009 passed by Member Secretary, District Administrative Committee that leave for the period from 16.1.2007 to 15.1.2008 was accorded on full salary, whereas leave from 16.1.2008 to 30.6.2008 was sanctioned on half salary. As leave of the petitioner was sanctioned, there was no question of withholding the salary for the period of leave. Admittedly only half salary has been paid for the period from 15.1.2007 to 30.6.2008, however, the petitioner is found entitled for the payment of full salary for the period of leave i.e. 15.1.2007 to 30.6.2008. The sanctioned leave on half salary from 16.1.2008 to 30.6.2008 is not justifiable for the reason that the petitioner has submitted medical papers for sanction of medical leave and the fact that he has acquired complete visual impairment thereafter. It is apparent from the record that since after 30.6.2008, petitioner has approached the respondents on various occasions. He has prayed for payment of salary for the period of leave and further to allow him to continue. Respondent did not allow the petitioner to continue and did not offer an alternate/sheltered job. The denial of salary to the petitioner on the ground that he has remained absent from 1.7.2006 is nothing but an act of termination of the services of the petitioner, which is clearly prohibited under section 47 of the PWD Act 1995 . Further the petitioner was made to retire by order dated 8.12.2011 pursuant to the decision taken by the District Administrative Committee on 29.11.2011 but admittedly salary for the said period has not been paid to the petitioner. It appears that certain disciplinary inquiry was also initiated against the petitioner at some point of time for his absence but was not continued thereafter. It does appear from the record that the petitioner has approached the respondents continuously but he was not offered an alternative job. In Kunal Singh(Supra) the Apex Court has observed that Section 8 of the PWD Act 1995 provides that it was the duty of the Superior Officer to explain to the employee, who has suffered disability, the correct legal position and informed of his legal rights. Petitioner was approaching the authorities but his legal rights have not been taken care of. Instead a disciplinary proceeding was initiated against him, the salary for the period of his sanctioned medical leave has not been paid till date. These facts indicate that the authorities were not fully conscious of their statutory obligations.

10. There is nothing on record to indicate that an effort was made to find out alternative job for the petitioner as mandated under PWD Act 1995. Even in case, no such job was available, the petitioner was required to be kept on a supernumerary post until suitable employment could be found for him. On the other hand taking recourse of provision of Rule 27(ss) of Regulations

1978 for appointment of Cadre Secretary,the Petitioner was made to retire on 8.12.2011.This litigation in this Court is for payment of salary for the period of medical leave and, thereafter, against the order of retiring the petitioner from service on the ground of medical incapacitation being in violation of section 47 of PWD Act 1995.

11. The order of retirement is nothing but termination of services of the petitioner on the ground of permanent disability suffered by him. Admittedly disability occurred during the course of employment and,therefore, the provision of section 47 of PWD Act 1995 would be attracted. It is held in Kunal Singh(Supra) that PWD Act 1995 is specific legislation dealing with persons' disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non deorogant would apply. It was held that the decision to grant invalidity pension to the appellant therein under Rule 38 of CCS (Pension) Rules, 1972, was no ground to deny the protection mandatorily made available to the appellant under Section 47 of the PWD Act 1995. Rule 38 of Central Civil Services (Pension) Rules cannot override Section 47 of the PWD Act 1995.Reference was also taken to Section 72 PWD Act 1995 which provides that the PWD Act 1995 override any other enactment or any instructions enacted or issued for the benefit of person with disability. It was directed that as appellant therein has acquired disability during his service he could be shifted to some other post with the same payscale and all service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. Paragraphs 11 and 12 of Kunal Singh(Supra) are relevant and reproduced as under:-

11.We have to notice one more aspect in relation to the appellant getting invalidity pension as per Rule 38 of the CCS Pensions Rules. The Act is a special Legislation dealing with persons with disabilities to provide equal opportunities, protection of rights and full participation to them. It being a special enactment, doctrine of generalia specialibus non derogant would apply. Hence Rule 38 of the Central Civil Services (Pension) Rules cannot override Section 47 of the Act.

Further Section 72 of the Act also supports the case of the appellant, which reads: - "72. Act to be in addition to and not in derogation of any other law. - The provisions of this Act, or the rules made thereunder shall be in addition to, and not in derogation of any other law for the time being in force or any rules, order or any instructions issued thereunder, enacted or issued for the benefits of persons with disabilities."

12.Merely because under Rule 38 of CCS Pension Rules, 1972, the appellant got invalidity pension is no ground to deny the protection, mandatorily made available to the appellant under Section 47 of the Act. Once it is held that the appellant has acquired disability during his service and if found not suitable for the post he was holding, he could be shifted to some other post with same pay-scale and service benefits; if it was not possible to adjust him against any post, he could be kept on a supernumerary post until a suitable post was available or he attains the age of superannuation, whichever is earlier. It appears no such

efforts were made by the respondents.They have proceeded to hold that he was permanently incapacitated to continue in service without considering the effect of other provisions of Section 47 of the Act. "

12. In the instant case recourse has been taken to Rule 27(c) of Service Regulation 1978 pertaining to appointment of Cadre Secretary which provides that on account of long medical incapacitation of an employee a decision can be taken to retire him from service.

13. Present is not a case of medical incapacitation of an employee rather it is case where the petitioner has acquired disability during his service. The word "disability" has been defined in section 2(i) of PWD Act 1995.Section 47 of the Act clearly provides that the services of employee could not be dispensed with if he has acquired disability during his service. The recourse of Rule 27(s) of Regulations of Rules pertaining to Cadre Secretary could not be taken and the petitioner could not have been retired from 8.12.2011.Petitioner has a statutory right to continue in service till the age of superannuation. He is entitled to continue in service or another suitable post/sheltered job which should be offered to the petitioner till age of retirement on the same payscale and service benefit.

14. The respondents have proceeded to hold that the petitioner was permanently medically incapacitated to continue in service and had retired him without considering the effect of PWD Act 1995. The order dated 8.12.2011 passed by respondent no.4 District Administrative Committee retiring the petitioner from the service is,therefore, illegal and is hereby set aside. However, at this stage the submission of the learned counsel for the petitioner needs consideration that the petitioner does not want to continue in service and has had suffered a lot on account of repeated litigations and enormously suffered as a result of his disability and inhumane approach adopted by the respondents. He has,therefore, decided not to challenge the order of retirement but the petitioner is pressing his entitlement for full payment and all service benefits till date of his retirement i.e. till 8.12.2011.

15. In view of this submission, while setting aside the order dated 8.11.2012 retiring the petitioner from service,the respondents are directed to pay the petitioner entire arrears of salary till 8.11.2012 along with all services benefit admissible to the petitioner with interest @ 9% till the date of actual payment. It is directed that computation be done and payment shall be made to the petitioner within a period of two months from the date a certified copy of this order is produced.

16. In view of the above observation, the order passed by the Assistant Registrar dated 12.9.2011 denying salary to the petitioner on account of his absence during the period of medical leave with effect from 1.7.2006 is unsustainable and is hereby set aside.

17. With the above direction,the writ petition is allowed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2014

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 28049 of 2014
connected with
WRIT - B No. 35709 of 2014, WRIT - B No. - 61754 of 2014, WRIT - B No. - 62775 of 2014, WRIT - B No. - 45974 of 2011, WRIT - B No. - 42349 of 2014, WRIT - B No. - 48014 of 2014, WRIT - B No. - 15297 of 2014, WRIT B No. - 11369 of 2014, WRIT- B No. - 51548 of 2014, WRIT - B No. - 50816 of 2014, WRIT - B No. - 34567 of 2014, WRIT - B No. - 27643 of 2014, WRIT - B No. - 24386 of 2014, WRIT - B No. - 26995 of 2014, WRIT - B No. - 28050 of 2014, WRIT - B No. - 28842 of 2014, WRIT - B No. - 40719 of 2014, WRIT - B No. - 41037 of 2014, WRIT - B No. - 27137 of 2010, WRIT - B No. - 67061 of 2014 and WRIT - B No. - 6121 of 1979

Daswant Ram ...Petitioner
Versus
Consolidation Commissioner U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Nand Lal Yadav, Sri Prem Chandra

Counsel for the Respondents:
C.S.C., Sri R.C. Upadhyay

U.P. Consolidation of Holdings Act-Section-6(1) read with Consolidation Rules-17-Cancellation of consolidation operation challenged on allegations of non compliance of Rule 17-held-provision of Rule 17 are illustrative and not exhaustive as per law of D.B. so for non assignment of any reason is concern-also misconceived as per law Industrial Syndicate Bank case-power delegated to director of consolidation by notification 1956-without challenges-no finding required.

Held: Para-10
Besides, this submission has already been considered and decided by the judgement passed by me in a bunch of cases, while sitting in Lucknow Bench, wherein the leading case was Writ (Consolidation) No. 535 of 2013: decided on 13.3.2014. By this judgement, relying upon a Division Bench decision reported in 1976 RD 35: Industrial Syndicate Ltd. Versus State of U.P. it has been held that the notifications issued under section 6(1) of the Act are conditional legislation and, therefore, can be challenged only on the grounds available for challenging any piece of legislation. No such ground has been raised in any of these writ petitions, and, therefore, they are liable to be dismissed in view of the earlier decision noted above.

(B)U.P. Consolidation of Holdings Act, - Section 6(1)-writ of mandamus-seeking enforcement of direction as the local consolidation authorities-not proceeded for cancellation of consolidate operation-held-provision of section 6(1) of Act being part of conditional legislation-in absence of competence or being ultra virus-no direction can be issued-petition misconceived-dismissed.

Held: Para-16
As already noticed above, the notification under section 6(1) of the Act is a piece of conditional legislation. It is within the competence of the legislature to legislate in the manner it thinks appropriate. In my opinion, such conditional legislation can be challenged either on the ground of lack of legislative competence or on the ground that it is ultra vires. No such plea has been raised in the writ petition and, therefore, it is liable to be dismissed. For the same reason, this Court is not competent to issue a mandamus directing the State Government to cancel the notifications issued under section 6(1) of the Act, nor directions can be issued to the State Government to issue a notification under section 6(1) and cancel the consolidation operations. Therefore, the relief for mandamus is misconceived and no such mandamus can be issued by this Court.

Case Law discussed:
1976 RD 35;

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

1. This bunch of writ petitions involve similar controversy and can be broadly categorized into following groups.

2. In the first group of cases, the notifications issued under section 6(1) of the U..P. Consolidation of Holdings Act (for short, the Act), cancelling the consolidation operations in the unit are under challenge. This group includes the following writ petitions: WRIT - B Nos. - 11369, 24386, 27643, 28050, 28842, 40719, 41037, 45974, 50816, 51548, 61754 and 67061, all of the year 2014.

3. In the second group of cases, a mandamus has been sought, commanding the respondents to take an appropriate decision on the representations made by the petitioners therein, seeking cancellation of the consolidation operations. In this group are WRIT -B NOS. 27237, 35709, and 62775, all of 2014.

4. The third group consists of cases where the representations made by the villagers for canceling the consolidation operations have been rejected. In this group are WRIT -B NOS 27137 of 2010 and 28049 of 2014.

5. The fourth group consists of cases where recommendations have been made by the consolidation authorities for issuance of notifications under section 6(1) of the Act. These are WP Nos. 42349 and 34567, both of 2014. In these two cases, a writ of mandamus has been sought for enforcing the recommendations made.

6. In WP No. 26995 of 2014, the recommendation made for issuance of notification under section 6(1) of the Act has been challenged.

7. Under the circumstances, it would be appropriate to consider the aforementioned categories of cases separately.

8. In the first group of cases, the argument is that the notifications under section 6(1) are not in consonance with Rule 17 of the Rules framed under the Act. The second contention raised is that the consolidation operations have been largely completed and, therefore, the same should not be canceled. It has also been argued that the notifications, canceling the consolidation operations, can be issued only when the conditions specified in Rule 17 are made.

9. As far as the argument regarding non-compliance of the conditions enumerated in Rule 17 of the Rules is concerned, it would suffice to state that the conditions enumerated in Rule 17 are only illustrative and not exhaustive as is clear from a bare reading of the rule itself, which provides that "the notification made under Section 4 of the Act, may among other reasons, be cancelled in respect of whole or any part of the area on one or more of the following grounds, ...".

10. Besides, this submission has already been considered and decided by the judgement passed by me in a bunch of cases, while sitting in Lucknow Bench, wherein the leading case was Writ (Consolidation) No. 535 of 2013: decided on 13.3.2014. By this judgement, relying upon a Division Bench decision reported in 1976 RD 35: Industrial Syndicate Ltd. Versus State of U.P. it has been held that the notifications issued under section 6(1) of the Act are conditional legislation and, therefore, can be challenged only on the grounds available for challenging any piece of legislation. No such ground has been raised in any of these writ petitions, and, therefore, they are liable to be dismissed in view of the earlier decision noted above.

11. One of the additional submissions made in the Writ Petition No. 28842 of 2014 is that the notification under section 6(1) of the CH Act is cryptic and does not assign any reason; therefore, such an action is not justified in a welfare State and also because the UP Consolidation of Holdings Act is a welfare legislation, enacted to consolidate fragmented holdings of tenure-holders so as to enhance agricultural productivity and to make the agricultural operations more convenient and simpler. In my considered opinion, this ground, though prima facie attractive, cannot be accepted in view of the ratio in the case of Industrial Syndicate Ltd. Vs. State of U.P., reported in 1976 RD 35 wherein it has been held that no reasons are required to be assigned while issuing a notification under section 6(1) of the Act.

12. The second ground taken is that the notification has been issued by the Director of Consolidation, whose powers are defined under section 3(4) of the Act. The power to issue a notification under section 6(1) is with the State Government. There is no provision under the Act whereby the State Government is authorized to delegate its powers to the Director of Consolidation and, therefore, the impugned notification is without jurisdiction.

13. A perusal of the impugned notification shows that the powers under section 6(1) of the Act have been delegated by means of a notification issued in the year 1956. This notification, delegating the power to the Director of Consolidation, has been specifically mentioned in the impugned notification, but has not been challenged in the writ petition and, therefore, there is no justification to consider this argument raised on behalf of the petitioner.

14. In the second category of cases, recommendations for cancelling the notifications under section 4 have been made by the consolidation authorities and such recommendations are sought to be enforced by issuance of a writ of mandamus. The Division Bench decision in the case of Industrial Syndicate Ltd. (supra), has held that notifications under section, especially under sections 4 and 6(1) of the U.P. Consolidation of Holdings Act are conditional legislation, and any direction by a writ court in this regard would amount to directing the legislature to legislate in a particular manner, which is not permissible. For this reason alone, no mandamus can be issued by this Court. Therefore, the writ petitions wherein mandamus has been prayed for are liable to be dismissed.

15. In the Writ Petition No. 61754 of 2014, the grievance of the petitioner therein is that the consolidation authorities had recommended that the consolidation operations be not cancelled, yet the notification under section 6(1) of the Act was issued. Since the notification has been issued contrary to the recommendation of the local consolidation authorities, the same is liable to be quashed.

16. As already noticed above, the notification under section 6(1) of the Act is a piece of conditional legislation. It is within the competence of the legislature to legislate in the manner it thinks appropriate. In my opinion, such conditional legislation can be challenged either on the ground of lack of legislative competence or on the ground that it is

ultra vires. No such plea has been raised in the writ petition and, therefore, it is liable to be dismissed. For the same reason, this Court is not competent to issue a mandamus directing the State Government to cancel the notifications issued under section 6(1) of the Act, nor directions can be issued to the State Government to issue a notification under section 6(1) and cancel the consolidation operations. Therefore, the relief for mandamus is misconceived and no such mandamus can be issued by this Court.

17. In the last group of cases, the recommendations made by the consolidation authorities have been challenged. A recommendation, in any case, is a mere recommendation and it is for the authorities concerned to either act in accordance with the recommendations or to take a decision contrary to what has been recommended. The recommendation is, at best, an opinion of the authority concerned keeping in mind the facts and circumstances prevalent in the unit. It is made only to aid the State Government in taking an appropriate decision in the matter and, therefore, in my considered opinion, the same is not open to judicial review. Moreover, in case such a recommendation is interfered with, it would again amount to issuing directions to the State Government to issue a conditional legislation in a particular manner, which, as already observed, the Court is not competent to do.

18. It would be appropriate to notice the facts and arguments in WP No. 67061 of 2014. In the instant case, it has been argued that the consolidation operations were cancelled on the ground that a part of the land of the unit was covered by a notification under section 3 of the Municipalities Act. It is for this reason that the consolidation operations were cancelled as the same land cannot be subject-matter of notifications both under section 3 of the Municipalities Act and section 4 of the UP CH Act.

19. Learned counsel for the petitioners does not dispute this position. His submission is that the notification under section 3 of the Municipalities Act pertained to only a part of the land of the unit, and did not pertain to the entire unit. He has, therefore, submitted that the consolidation operations should have been cancelled only with regard to area covered under section 3 of the Municipalities Act and that there is no justification for cancelling the consolidation operations as regards the remaining area. Relying upon Rule 17, learned counsel for the petitioner has submitted that the State Government is empowered to cancel a notification under section 4 of the CH Act either as a whole or as regards a part or parts of the area under such notification.

20. Sri Sanjai Goswami, learned Addl. Chief Standing Counsel, has, on the contrary, submitted that the notification under section 4 has been cancelled also on account of the fact that a highway divides the village in two parts. As a result thereof, and on account of this highway being an important one, which is a bye-pass known as the Sultanpur-Banaura-Mau-Gorakhpur Bye-pass, the value of the land in the unit has increased considerably and in case the consolidation operations are conducted, it would result in compulsory five percent reduction in the area of each tenureholder, as is mandatory under the Act. This, in turn, will result in a huge financial loss to the tenureholders. He, therefore, submits that the notifications have been issued for

cogent reasons and, therefore, should not be interfered with. He has, lastly, submitted that in in any case the State Government is not required to assign any reason for issuing the notifications in view of the law laid down by the Division Bench in the case of the Industrial Syndicate Ltd. (supra).

21. In rebuttal, learned counsel for the petitioner has submitted that the petitioner is aggrieved because he apprehends that the proceedings that have attained finality during the consolidation operations would also be set at naught by the cancellation of the consolidation operations by the notification under Section 6(1) of the Act.

22. It, therefore, emerges from the submissions made that the petitioner is aggrieved by the impugned notification only because certain benefits, which have accrued to him during the currency of the consolidation operations and which are alleged to have attained finality, will stand reversed. This apprehension of the petitioner is entirely misconceived because all disputes that have attained finality prior to the cancellation of the consolidation operations stand protected by sub-section (2) of section 6. This writ petition has, therefore, been filed on a misconception of law and on mere apprehension. It, therefore, deserves to be dismissed.

23. In so far as the Writ Petition No. 27137 of 2010 is concerned, a writ of certiorari has been sought for quashing the order dated 15.1.2010 passed by the Consolidation Commissioner, as also for quashing the consolidation proceedings.

24. A perusal of the order impugned in this petition indicates that a representation made by the petitioner has been rejected on the ground that the petitioner is seeking cancellation of the consolidation operations which have been closed long back by issuance of notification under section 52(1) of the Act.

25. Learned counsel for the petitioner has not been able to point out anything from the record which would show that this reasoning is in any way vitiated, or is factually incorrect. This Court is, therefore, constrained to hold that this writ petition is entirely misconceived and merits dismissal.

26. Accordingly, and for the reasons given above, as also the reasons given in the judgement passed in Writ Petition (Consolidation) No. 535 of 2013, decided by me at Lucknow Bench, on 31.3.2014, all the writ petition in this bunch are dismissed.

27. Two writ petitions, namely, Writ - B No. 15297 of 2014 and Writ-B No. 48014 of 2014, have wrongly been shown as connected with this bunch of cases and, therefore, they are being de-tagged from this bunch. They will be decided along with the bunch of cases to which they relate.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2014

BEFORE
THE HON'BLE MANOJ KUMAR GUPTA, J.

Writ -A No. 34228 of 2014
Alongwith W.P. No. 34310 of 2014, W.P. No. 34325 of 2014, W.P. No. 34837 of 2014 and other connected cases.

Manish Kumar Dixit & Ors. ...PetitionerS
Versus
The State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri Vijay Gautam

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Service law-transfer of non gazetted officers in police force-on ground of mala fide challenging validity of G.O. 07.06.2014 by which earlier-G. O. 11.06.86 providing posting just adjacent to their native place withdrawn-under political revenge-facing defeat in Lok Sabha election-held-G. O. issued keeping in view of recommendation of D.G.P.-to maintain discipline-considering the fact most of police men during night hours-instead of duty place-used to take sound sleep in their home-as such decision of government can not be arbitrary or devoid of reasons-no laxity in maintenance of law and orderbe tolerated.

Held: Para-23
Indisputably, the Director General of Police is the head of the police force in the State. The recommendations contained in his letter dated 28.5.2014 discloses valid reasons for making suggestion to the State Government to withdraw the relaxation granted by Government Order dated 20.3.2012. The State Government, while issuing the impugned Government Order dated 7.6.2014, had rightly acted on the recommendations made by the Director General of Police. The action of the State Government taken in this regard, cannot be said to be illegal or arbitrary or devoid of reasons. Rather, the Court is of the opinion that the State Government was fully justified in acting on such recommendations, as maintenance of law and order should be its prime concern. No laxity, in this regard, has to be given. Consequently, the contention of the petitioners that the impugned Government Order has been issued for no justifiable reason or that it is a result of illegal and arbitrary exercise of power, cannot be accepted.

(B)Police Act, 1861-Section-2-read with Police regulation-Regulation 525-whether members of Armed police be kept exempt from bar imposed by G.O. I held-armed police being integral part of police force to tackle special situation during emergent situation-entire police force deemed to be one and same police force-can not claim exemption from bar-contained in G.O.-petition dismissed.

Held: Para-33
Thus, Armed Police is integral part of the police force and provides it with muscle power to tackle special situation. The members of the Armed Police, thus, have to perform important role in case of emergencies. The conclusions which impelled the Government to bring about the impugned Government Order, as discussed in previous paragraphs of this judgment, applies with much greater force to members of the Armed Police Force and they cannot claim any immunity from the ban imposed thereby.

(C)Constitution of India, Art.-226-Transfer policy-validity challenged by Inspectors and S.I.-bar on posting adjacent district of native place-about constable and Head constables relaxed by G.O. 20.03.2012 but so for inspectors and sub inspectors concern-never given such relaxation hence violation of Art. 14 of Constitution-held misconceived-individual hardship-can not be considered by Writ Court-but the Board is competent to take appropriate decision-petition dismissed.

Held: Para-42
So far as other non-gazetted officers of the police force are concerned, i.e. Inspectors and Sub Inspectors, similar restrictions on their posting in bordering districts is in place, vide paragraph 1 of the Government Order dated 11.7.1986. In case of constables and head constables, such restriction was relaxed by Government Order dated 20.3.2012, but it was never relaxed in case of Inspectors and Sub Inspectors. They were never permitted to be posted in districts bordering their home district. Thus, plea of discrimination and violation of Article 14 is also not tenable.

Case Law discussed:

2006 (8) SCC 1; 2010(7) ADJ 315; 2011 (2) ADJ 177; 2011; (2012) 6 SCC 502; (2008) 2 SCC 672; 2008 (2) ADJ 484; (2011) 5 SCC 435; (2001) 4 SCC 309; (1979) 2 SCC 150; 1991 Supp (2) SCC 659; (2005) 7 SCC 227; (2010) 13 SCC 306; AIR 1968 SC 81; (2010) 7 SCC 643.

(Delivered by Hon'ble Manoj Kumar Gupta, J.)

1. The head constables and constables are the lowest in the hierarchy of non gazetted officers of the Police Force. They play a vital role in maintaining law and order, preventing and detecting crime and in helping courts of law punish the guilty. This bunch of petitions is by such officers of the Police Force, aggrieved by Government Order dated 7.6.2014 imposing ban on their posting in districts adjoining their home district. The consequential transfer orders are also under challenge. As common questions of law and fact are involved in these cases, same are being decided by this common judgment.

2. Learned counsel appearing on behalf of the petitioners contended that the Government Order dated 7.6.2014 is wholly illegal and arbitrary, inasmuch as it does not contain any reason for cancellation of the previous Government Order dated 20.3.2012, whereby, relaxation was granted in posting of constables and head constables in districts bordering their home district, by amending Government Order dated 11.6.1986. It was further contended that the Government Order in question is a result of political vendetta, as the Government feels that its defeat in the Lok Sabha election is on account of non-extension of co-operation by the petitioners. In other words, the impugned Government Order has been issued to teach lesson to the petitioners. It was further submitted that the transfer policy is contained in the Police Regulations, which has statutory force and the Government Order in question being not referable to any of the provisions contained under Paragraph 520-526 thereof, is thus, contrary to the statutory provisions. The impugned transfer orders have not been issued on administrative grounds or in exigencies of service, thus, cannot be sustained in law. The personal hardship of the petitioners has not been considered. In various cases, transfer orders have been passed in mid session, entailing great hardship to the petitioners and members of their family. It was further urged that in any case, the impugned Government Order can only be applied prospectively and there is no mandate for transferring the incumbents posted in bordering districts forthwith. In some of the writ petitions, particularly in Writ Petition No.39723 of 2014, Sri B.C. Rai Advocate, appearing on behalf of the petitioners contended that the petitioners, therein, are members of Armed Police, who are not concerned with day-to-day maintenance of law and order in the State. Consequently, they cannot be brought within the purview of the impugned Government Order. It is further contended that the Government Order in question is not referable to Section 46 of the U.P. Police Act, 1861, which confers power in the State to make rules and thus, the impugned Government Order is wholly contrary to the provisions of Section 46. The impugned transfers have been made with the approval of the Regional Police Establishment Boards, the constitution of which is contrary to the directions contained in the judgment of the Apex Court in the case of Prakash Singh Vs. Union of India 2006 (8) SCC 1 and thus,

the transfers made on its recommendation, are wholly illegal.

3. On the other hand, learned standing counsel placing reliance on the letter dated 28.5.2014 written by Director General of Police to the Principal Secretary, Home, U.P. Government, Lucknow contended that past experience had shown that constables and head constables posted in districts bordering their home district were found missing from their place of posting during nights. They go to their home, being nearby their place of posting. They were thus not available in emergency, adversely affecting law and order. It was further found that on account of their posting in bordering districts, they were interfering in trivial matters, being connected with one party or the other. This impacts their impartiality and the image of the Police Force. Consequently, the Government, in order to improve law and order situation in the State and efficiency of the police force, issued the impugned Government Order dated 7.6.2014. The allegation of political vendetta in issuing the impugned Government Order is specifically denied. It was contended that the decision has been taken in public interest. It was further submitted that the police force is quite different and distinguishable from other State services. This is borne out from the fact that there is a separate entry relating to 'police' being Entry No.2 in the Seventh Schedule of the Constitution of India. The police force is regulated by the Police Act, 1861, the Rules framed thereunder, the Police Regulations and the executive instructions in the nature of Government Orders. It is contended that the impugned Government Order only supplements the existing provisions under the Police Regulations and is, in no manner, contrary to it. It was further submitted that the constitution of Police Establishment Board, without Director General of Police as its Chairman, has been found to be valid and legal by the Full Bench of this Court in the case of Vinod Kumar and another Vs. State of U.P. and others 2010 (7) ADJ 315 and the Division Bench in the case of State of U.P. and others Vs. C.P. Ravindra Singh and others 2011 (2) ADJ 177. It was further submitted that under Section 2 of the Police Act, the entire police establishment is deemed to be one Police Force, as such, the members of the Armed Police Force cannot be treated differently, as compared to those working under Civil Police, as contended by the petitioners posted in the Armed Police.

Validity of Regional Police Establishment Boards:-

4. The first question, therefore, for consideration is whether the constitution of Police Establishment Boards vide Government Order dated 8.4.2010 of which the Director General of Police is not the Chairman, is contrary to the dictum of the Apex Court in the case of Prakash Singh (supra). For the said purpose, the background in which the Apex Court directed for constitution of the Police Establishment Board in the case of Prakash Singh (supra), is to be noticed. The Apex Court issued various directions to the Central Government, State Governments and Union Territories to establish Police Establishment Boards with the object of insulating the police from political pressures and other extraneous considerations in the matter of their transfers, postings, promotions and other service related matters. Directions contained in this regard, in paragraph 31

of the judgment, relating to establishment to Police Establishment Board are as under:-

*"Police Establishment Board*

*(5). There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with the decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the postings and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotions/transfers/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State."*

*(Emphasis Supplied)*

5. In order to implement the directions given in the case of Prakash Singh (supra), the State Government issued Government Order dated 12.3.2008 for constitution of four different Police Establishment Boards for regulating the transfers and postings and others service matters of different ranks of the police force. The Police Establishment Board for Sub Inspectors and officials below such rank comprises of the Inspector General of Police (Establishment) as its Chairman instead of Director General of Police, as provided under the judgment of the Apex Court. The constitution of the Police Establishment Board as provided under Government Order dated 12.3.2008 became subject matter of consideration by a Full Bench of this Court in the case of Vinod Kumar (supra). The Full Bench, after noticing the conflict between the Division Bench Judgments of this Court, held as under:-

*"19. It is true that there may be no strict compliance in terms of the directions issued by the Supreme Court in Prakash Singh (supra) insofar as one of the Boards is concerned. The Government has attempted to contend that the notification has to be read with the exercise of power under Section 2 of the Police Act. There is a power in the State Government under Section 2 to have issued notification constituting the Boards. The section does not provide for the publication or laying of the Rules or Regulations made thereunder before the Legislature. In other words, the power conferred on the Government, as a delegate, to make Rules is not subject to any control by the Legislature. Rules as held by the judgment of the Supreme Court can be made under Section 2 of the Police Act. The Government, in the absence of legislation, in exercise of its power under Article 309 of the Constitution should have made rules governing the conditions of service. In the instant case, there is legislation governing transfers, but there is no provision for constitution of Boards. The Boards have been constituted by the State in exercise*

*of its executive powers. It is now well settled that in an area, where rule or existing law is silent in the matter of conditions of service, administrative instructions can be issued to fill in the void or gap, which the State has done. However, we have held that the notification for reasons given cannot be held to be an exercise of power under Section 2 of the Police Act.*

*20. In our opinion, therefore, considering the fact that the Rule 26 of the Rules, 2008 makes applicable the rules pertaining to the government servants, i.e. persons appointed to public services and posts in connection with the affairs of the State, and as Regulation 520 deals with the transfers of the police personnel, who are also a part of the public services of the State, therefore, insofar as the police are concerned, the Regulation pertaining to transfer would continue to apply to them. Therefore, though one of the Boards constituted is not strictly in terms of the directions issued by the Supreme Court in Prakash Singh (supra), nonetheless considering the exercise that has to be done and the provisions for transfer, as contained in the Police Regulations, there has been sufficient compliance.*

*21. In these circumstances, we are clearly of the opinion that, though we have found that the notification constituting the Board is not traceable to Section 2 of the Police Act, the same at the highest, amounts to an irregularity and not illegality and would not vitiate the transfers, if they have been done in terms of the Regulations and after the approval of the Board. (Emphasis Supplied)*

6. Later came another judgment by Division Bench of this Court in the case of State of U.P. and others Vs. C.P. Ravindra Singh and others 2011 (2) ADJ 177, wherein, similar plea was raised regarding invalidity in the constitution of the Police Establishment Board. However, the argument was repelled by holding as under:-

*"According to us, pluralistic view in the place and instead of singular view is one of the devices to maintain transparency. It avoids possibilities of motivated action, biasness or influence in the cases of transfer. To that extent, there is no conflict between Prakash Singh (supra) and the steps taken by the State. The only issue is whether the State has strictly complied with or sufficiently complied with the direction of the Supreme Court in Prakash Singh (supra). According to the Full Bench of this High Court in Vinod Kumar (supra), direction has been sufficiently complied with. Learned Chief Standing Counsel has given an explanation by saying that the position of the State of Uttar Pradesh as regards its vastness and population may not be similar with various other States. Therefore, if the Board is constituted strictly in compliance with the direction of the Supreme Court then the State will not get full time engagement of such officers to maintain the law and order situation of the State. To that, it is desirable that the State should explain such position before the Supreme Court. It is expected that by now it has been done by the State. But so far as the existing position is concerned, this Division Bench will be governed by both, Prakash Singh (supra) and Vinod Kumar (supra) and a conjoint reading of both the judgements speaks that a mode or mechanism of plurality has been adopted by the State, in spite of the existing law. Therefore, this Court does*

*not find any reason to negate the orders of transfer, as were impugned in the writ petition.*"

*(Emphasis Supplied)*

7. However, Sri Vijai Guatam, learned counsel appearing in some of the writ petitions tried to distinguish the aforesaid judgments by contending that the Full Bench in the case of Vinod Kumar (supra) and the Division Bench in the case of Ravindra Singh (supra) were considering the constitution of the Police Establishment Board under Government Order dated 12.3.2008, while the Regional Police Establishment Boards on whose recommendations, impugned transfers have been made, are constituted under Government Order dated 8.4.2010. It is submitted that the constitution of Regional Police Establishment Boards, in none of which, the Director General of Police is the Chairman, is contrary to the directives given by the Apex Court in the case of Prakash Singh (supra) and thus, the impugned transfers effected on basis of such recommendations, are not legally valid.

8. On the other hand, learned standing counsel contended that the Government Order dated 8.4.2010 was issued as a single Police Establishment Board constituted under the Government Order dated 12.3.2008 for police officials upto the rank of Sub Inspector, was creating administrative difficulties on account of large number of such officials in the police force of the State. It is submitted that care has been taken to ensure independence of the Regional Police Establishment Board, as per the objective laid down by the Apex Court in the case of Prakash Singh (supra).

9. The preface to the Government Order dated 8.4.2010 mentions that Police Establishment Board constituted under Government Order dated 12.3.2008 and 27.11.2008 for police officials upto the rank of Inspector resulted in administrative and practical problems in view of large number of police officials of such rank in the police force of the State. Consequently, for regulating the transfers and postings of police officials upto the rank of Inspector within the region, Regional Police Establishment Boards have been constituted as under:-

*"(a) Regional Inspector General of Police/Regional Deputy Inspector General of Police as its Chairman, apart from two senior most officers."*

10. Thus, for effecting transfers at the regional level, Police Establishment Boards at regional level were established with highest police officer at the regional level viz. Inspector General of Police/Regional Deputy Inspector General of Police as its Chairman. The other two senior most officers of the region are its members. The Full Bench in the case of Vinod Kumar (supra) and Division Bench in the case of Ravindra Singh (supra) have held that constitution of Police Establishment Board without Director General of Police as its chairman, can at best be an irregularity and not illegality, till its independence is ensured and the mechanism of plurality is maintained. It was concluded that constitution of Police Establishment Board for police officers below the rank of Inspectors, without Director General of Police as its Chairman, is substantially in keeping with the spirit of the directions issued by the Apex Court in the case of Prakash Singh (supra) and recommendations made by such Board, cannot vitiate the transfers. Applying these principles, I find that

Regional Police Establishment Boards constituted under Government Order dated 8.4.2010 for effecting transfer at the regional level fulfills both the criteria. These are headed by the highest police officials of the region and at the same time, retains the character of pluralism, being a multi member body. Thus, transfers and postings of members of the Police Force within the region remains under the control of an independent body comprising of highest police officials of the region, thereby achieving the principal object of insulating transfers and postings from political interference. Consequently, the transfers made on its recommendations cannot be held to be illegal as to warrant interference by this Court.

Whether Government Order dated 7.6.2014 is illegal and arbitrary:-

11. This takes the Court to the next question as to whether the impugned Government Order dated 7.6.2014 is illegal, irrational, arbitrary for non-disclosure of reasons for issuance thereof or is contrary to the Act, the Rules and the Police Regulations.

12. According to the State respondents, the impugned Government Order has been issued with the object of strengthening the law and order situation in the State. It has been issued in larger public interest. It is contended that question as to how law and order can be improved in the State, is in the exclusive domain of the executive and the administrative power of the State. The policy decision of the State, taken in this regard, cannot be subjected to judicial review. The impugned Government Order is neither illegal nor arbitrary nor contrary to the provisions of the Act, Rules or the Police Regulations.

13. The power of the Executive Government to frame policies to run day-to-day administration and to maintain law and order, cannot be doubted. Nay, it is the duty of the State to regulate its policies for common good of its people. Normally, Courts do not interfere in the framing of policies and their implementation but can it be said that policies framed by the State Government are beyond judicial review, if not, what is the scope of interference by Courts of law. There are line of decisions on the subject, some of which requires to be noted in brief, to test the argument made by the parties.

14. The Apex Court in the case of Brij Mohan Lal Vs. Union of India (2012) 6 SCC 502 was judging the challenge laid to the decisions of the Government to discontinue Fast Track Courts. After analysing several decisions on the subject, their Lordships of the Supreme Court summarised the test for judicial review of policy decisions as under:-

*"100. Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:*

*(I) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.*

*(II) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.*

*(III) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.*

*(IV) If the policy is found to be against any statute or the Constitution or*

*runs counter to the philosophy behind these provisions.*

*(V) It is dehors the provisions of the Act or legislations.*

*(VI) If the delegate has acted beyond its power of delegation."*

15. It was ultimately concluded by holding that no hard and fast rule can be laid down in absolute terms and it all depends on facts and circumstances of each case. Somewhat similar view was taken by the Apex Court in the case of Delhi Development Authority and another Vs. Joint Action Committee, Allottee of SFS Flats and others (2008) 2 SCC 672 by laying down as under:-

*"65. Broadly, a policy decision is subject to judicial review on the following grounds:*

*(a) if it is unconstitutional;*

*(b) if it is dehors the provisions of the Act and the regulations;*

*(c) if the delegatee has acted beyond its power of delegation;*

*(d) if the executive policy is contrary to the statutory or a larger policy."*

16. Applying these broad principles, I proceed to test the argument of the petitioners laying challenge to the Government Order in question.

17. For appreciating the issue, certain statutory provisions may be noted. Section 2 of the Police Act, 1861 provides for the constitution of the police force in the State and it reads as under:-

*"2. Constitution of the force:- The entire police-establishment under a [State Government] shall, for the purposes of this Act, be deemed to be one police-force and shall be formally enrolled; and shall consist of such number of officers and men, and shall be constituted in such manner, as shall from time to time be ordered by the State Government.*

*[Subject to the provisions of this Act, the pay and all other conditions of service of members of the subordinate ranks of any police-force shall be such as may be determined by the [State Government]]."*

18. Section 46 of the Police Act, 1861 confers power in the State to make rules consistent with the Act. The State Government, in exercise of such power, had framed U.P. Police Constables and Head Constables Service Rules, 2008 and Rule 26 thereof provides as under:-

*"26. Regulation of other matters.- In regard to the matters not specifically covered by these rules or special orders persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government Servants serving in connection with the affairs of the State."*

19. Paragraphs 520 to 525 of the Police Regulations framed under the Act lay down broad principles regarding transfer of the officials of the Police Force. Paragraph 520, which is relevant for the present controversy, is reproduced below:-

*"520. Transfer of Gazetted Officers are made by the Governor in Council.*

*The Inspector General may transfer Police Officers not above the rank of inspector throughout the province.*

*The Deputy Inspector General of Police of the range may transfer inspectors, sub-inspectors, head constables and constables, within his range; provided that the postings and*

*transfers of inspectors and reserve sub-inspectors in hill stations will be decided by the Deputy Inspector General of Police, Headquarters.*

*Transfers which result in officers being stationed far from their homes should be avoided as much as possible. Officers above the rank of constable should ordinarily not be allowed to serve in districts in which they reside or have landed property. In the case of constables the numbers must be restricted as far as possible.*

*Sub-inspectors and head constables should not be allowed to stay in a particular district for more than six years and ten years respectively and in a particular police station not more than three years and five years respectively. In the Tarai area (including the Tarai and Bhabar Estates) the period of sub-inspectors, head constables and constables should not exceed five years."*

20. It is contended by the petitioners that paragraph 520 of the Police Regulations does not place any restriction in the posting of constables and head constables in districts bordering their home district. Thus, the impugned Government Order is contrary to paragraph 520 of the Police Regulations. It is further contended that there is no rational for placing such restriction, that too by means of executive fiat in the shape of a Government order, when there is no such restriction under the Act, the Rules or the Police Regulations.

21. The Government Order dated 11.7.1986 was issued in supersession of earlier Government Order dated 27.6.1983. Clause (1) thereof places restriction on postings of Inspectors and Sub Inspectors in their home districts or districts bordering their home district. Clause (5) of the said Government Order places similar restrictions qua the constables and head constables. By Government Order dated 20.3.2012, restriction regarding posting of constables and head constables in districts bordering their home districts was done away with, as a result thereof, the petitioners herein came to be posted in various districts bordering their home district. Now, by impugned Government Order dated 7.6.2014, relaxation granted in this regard, has been withdrawn. In other words, the restriction placed in the posting of the constables and head constables vide paragraph 5 of the Government Order dated 11.7.1986 in districts bordering their home districts now stands revived.

22. In the counter affidavit filed on behalf of the State respondents, it is stated that the impugned Government Order has been issued on the basis of the recommendations made by the Director General of Police, Uttar Pradesh vide its letter dated 28.5.2014. A copy of the said letter has been brought on record as Annexure CA-3 to the counter affidavit filed in the writ petition No.34228 of 2014 Manish Kumar Dixit and others Vs. State of U.P. and others. The letter dated 28.5.2014 by Director General of Police, U.P. Lucknow is addressed to Principal Secretary, Home, U.P. Administration Lucknow. The subject matter of the letter is transfers and postings of constables and head constables in the State. It has been observed that after issuance of Government Order dated 20.3.2012, there is no restriction on posting of constables and head constables in districts bordering their home district. It has been noted that the past experience and information

received so far reveals that posting of constables and head constables in districts bordering their home district is resulting in serious practical difficulties. The constables and head constables leave their places of posting during night, as they go to their home in the adjoining district, and are thus not available in case of emergency. This is adversely impacting the law and order in the State. It has been further noted that because of their posting in districts bordering their home district, the members of the police force generally have their relations in the same district, impacting their impartiality. They are found interfering in trivial matters, adversely affecting the image of the police department. It was concluded that the present policy of transfer and posting is thus having adverse effect on maintenance of the law and order in the State and curbing the activities of the criminals. It was suggested that the relaxation granted by Government Order dated 20.3.2012 be reviewed. The State Government accepted the recommendations made by the Director General of Police vide its letter dated 28.5.2014 by issuing Government Order dated 7.6.2014, re-imposing ban on postings of constables and head constables in districts bordering their home district. Thus, clause (5) of the Government Order dated 11.6.1986 stands revived and now, constables and head constables cannot be posted in their home districts, in districts adjoining their home districts and in districts where they hold immovable properties.

23. Indisputably, the Director General of Police is the head of the police force in the State. The recommendations contained in his letter dated 28.5.2014 discloses valid reasons for making suggestion to the State Government to withdraw the relaxation granted by Government Order dated 20.3.2012. The State Government, while issuing the impugned Government Order dated 7.6.2014, had rightly acted on the recommendations made by the Director General of Police. The action of the State Government taken in this regard, cannot be said to be illegal or arbitrary or devoid of reasons. Rather, the Court is of the opinion that the State Government was fully justified in acting on such recommendations, as maintenance of law and order should be its prime concern. No laxity, in this regard, has to be given. Consequently, the contention of the petitioners that the impugned Government Order has been issued for no justifiable reason or that it is a result of illegal and arbitrary exercise of power, cannot be accepted.

Whether State competent to issue impugned Government Order:-

24. Undoubtedly, 'Police' is a State subject as it appears at Item No.2 of list II of Seventh Schedule, which reads as 'Police (including railway and village police) subject to provisions of Entry 2-A of List 1'. Thus, it is abundantly clear that State Government is competent to legislate and amend the existing provisions regulating service conditions of the Police Force. Under Article 162 of the Constitution, the executive power of the State extends to matters with regard to which it has power to legislate. Thus, the State is also competent to issue executive orders. In the instant case, the State having chosen to exercise its executive power under Article 162 by issuing the impugned Government Order, had committed no illegality. The judgment

cited by Sri B.C. Rai in the case of Jasveer Singh Vs. State of U.P. 2008 (2) ADJ 484 is distinguishable. There, the action of State in transferring police constables of more than 10 years service to Armed Police was held contrary to paragraph 525 of Police Regulations and was thus struck down. The power of State to issue executive orders under Article 162 of the Constitution was not at all under consideration, and would thus be of no help to the petitioners herein.

Whether impugned Government Order is contrary to Statutory Provisions particularly paragraph 520 of Police Regulations:-

25. Now, I proceed to examine the other limb of the argument of the petitioners as to whether the Government could have provided for such restriction by issuing impugned Government Order, though there is no such embargo under the Act, the Rules and the Police Regulations.

26. Paragraph 520 of the Police Regulations places restriction on posting of police officers above the rank of constables in their home district and districts in which they own immovable property. In case of constables, their number is to be restricted as far as possible. The aforesaid restriction was placed for obvious reason. A member of Police Force, being custodian of law and order, are ordained with several such powers, which have the potentiality of impinging upon the freedom and liberty of the citizens. Such powers are ordinarily not possessed by other Government servants. In order to prevent misuse of such power, restrictions, as mentioned above, were placed by the Police Regulations, which are an exercise in subordinate legislation.

27. It may be noted that Police Act, 1861 and the regulations framed thereunder, are pre-independence legislations. With the country attaining freedom, having its own Constitution and with the development of infrastructure in the country including better transport facilities, it become easier to commute between adjoining districts within short time. As per the respondents, the experience in the recent past showed that with the withdrawal of restriction of posting of head constables and constables in district bordering their home district, they were often found missing during night, as they go to their home. In order to do away with this malady which was having adverse impact on law and order situation in the State, it was felt necessary to place certain additional restrictions, in the nature of ban on posting of constables and head constables in districts bordering their home district.

28. This additional restriction initially placed by Government Order dated 11.6.1986 and revived by the impugned Government Order does not, in any manner, run contrary to the restrictions placed by Police Regulations, particularly paragraph 520 thereof. It only supplements the provisions under the existing legislation, which is permissible in law (Vide Joint Action Committee of Air Lines Pilots' Association of India Vs. D.G. of Civil Aviation, (2011) 5 SCC 435; Union of India Vs. Rakesh Kumar, (2001) 4 SCC 309; District Registrar Vs. M.B. Kayakutty, (1979) 2 SCC 150). Thus, neither the exercise of power in issuing the impugned Government Order, nor the manner or the reason for which it

has been exercised, can be said to be illegal, to justify interference by this Court.

Whether impugned Government Order has been issued on extraneous considerations:-

29. As regards the contention of the petitioners that the impugned Government Order has been issued as the State feels that it lost the general Lok Sabha elections held in the year 2014 because of non co-operation by the members of the police force and is thus, a result of political vendetta, the same cannot be accepted, as there is no material on record to support such plea. The imputation of motive in issuance of the impugned Government Order has been categorically denied by the State. The State had succeeded in defending its position in issuing the impugned Government Order by placing reliance on the recommendations made by the Director General of Police vide its letter dated 28.5.2014. There is no challenge in any of the writ petition to the facts stated in the said letter. Thus, it cannot be said that the impugned Government Order has its genesis in any extraneous consideration.

Effect of non-consideration of Government Order dated 25.3.1995, while issuing impugned Government Order:-

30. It is next contended that restriction on posting of police officials in districts bordering their home district placed by Government Order dated 11.6.1986, was partially withdrawn by Government Order dated 25.3.1995. A copy thereof has been filed as Annexure-4 to Writ Petition No.34228 of 2014. It relaxes restriction on posting of constables and head constables in districts bordering their home district by providing that the same will remain confined to police stations of the bordering areas and shall not apply to all police stations. It is submitted that vide letter of Director General of Police dated 27.5.2009 and 3.10.2009, directions were issued to strictly enforce the Government Order dated 25.3.1996. It is contended that while issuing impugned Government Order dated 7.6.2014, the Government Order dated 25.3.1995 has been ignored. This reflects non application of mind by the Government.

31. There is a serious challenge by the State to the authenticity of the Government Order dated 25.3.1995. It is contended that similar plea was subject matter of consideration before this Court in the case of Jagannath Prasad Gaur (supra) and it was repelled by observing as under:-

*"14. It is seen that the Government Order dated 11th July, 1986 was issued regarding appointments and transfers of Constables, Head Constables, Sub-Inspectors and Inspectors of Police. Paragraph-5 of the said Government Order provides that Head Constables and Constables shall not be posted in their home district or in districts nadjoining their home district. The Government Order dated 25th March, 1995, on which reliance has been placed by learned counsel for the petitioners, amends paragraph-5 of the Government Order dated 11th July, 1986 to the extent that the Constables and the Head Constables shall not be posted in their home district or in police stations adjoining their home district. The genuineness of the said Government Order dated 25th March,*

*1995 was doubted in the subsequent Government Order dated 28th October, 2009 and so an inquiry was set up. It was also noticed that a proposal for not posting the Head Constables/Constables in police stations adjoining the home district was submitted in 1992 but the State Government did not accept this proposal and this decision was intimated to the Inspector General of Police, Allahabad on 27th June, 1992. The Government Order dated 28th October, 2009 thereafter mentions that the Government Order dated 11th July, 1986 shall continue to operate. In such circumstances, when a decision had been taken for implementation of the Government Order dated 11th July, 1986 without the amendment said to have been made by the Government Order dated 25th March, 1995, it cannot be said that the decision taken by the Police Establishment Board for transfer of the Constables/Head Constables on the basis of the Government Order dated 11th July, 1986 is bad in law. This apart, no factual foundation has been laid in the writ petition as to whether the petitioners were posted in police stations adjoining the home districts or not. Thus, for this reason also, the contention of learned counsel for the petitioner cannot be accepted." (Emphasis supplied)*

32. In view of what has been held in the case of Jagannath Prasad Gaur (supra), I am of the opinion that no reliance can be placed on the alleged Government Order dated 25.3.1995. Further, the Government itself vide letter dated 28.10.2009, apart from expressing doubt about authenticity of Government Order dated 25.3.1995, clarified that the restriction placed by Government Order dated 11.7.1986, shall apply without any exception. For the aforesaid reasons, it was not necessary for the Government to refer to the Government Order dated 25.3.1995, while issuing the impugned Government Order dated 7.6.2014.

Whether members of the Armed Police should be kept exempt from the bar imposed by impugned Government Order:-

33. The question which remains to be answered is whether Government was justified in applying the restrictions placed by the impugned Government Orders to the members of the Armed Police, who are not concerned with day-to-day maintenance of law and order. It is to be noted that under Section 2 of the Police Act, 1861, the entire police force is deemed to be one police force. To the same effect is paragraph 396 of the Police Regulations. The members of Armed Police Force can be sent to other branches of the police force and vice-versa as provided under paragraph 525 of the Police Regulations. The Armed Police is meant for dealing with serious law and order situation requiring a higher level of armed expertise. Paragraph 65 of the Police Regulations delineate the duty of the members of the Armed Police Force as protection of treasuries, tahsils and lock-ups, for the escort of treasure, prisoners and Government property, for service on magazine and quarter guards, for the suppression and prevention of disorder and crimes of violence, and for the pursuit and apprehension of dangerous criminals. Apart from normal duties as described above, they are employed during public events like processions and religious ceremonies (Paragraph 69 of the Police Regulations) and civil unrest (Paragraph 68 of the Police Regulations).

Under Paragraph 71 of the Police Regulations, Armed Police can be pressed to service where civil police is unable to cope with a situation. This is in view of their specialized training in use of arms. Thus, Armed Police is integral part of the police force and provides it with muscle power to tackle special situation. The members of the Armed Police, thus, have to perform important role in case of emergencies. The conclusions which impelled the Government to bring about the impugned Government Order, as discussed in previous paragraphs of this judgment, applies with much greater force to members of the Armed Police Force and they cannot claim any immunity from the ban imposed thereby.

Whether transfers made on basis of impugned Government Order would amount to applying the Government Order retrospectively:-

34. It is to be noted that impugned Government Order was issued by way of a corrective step in the existing policy, which past experience demonstrated, was seriously flawed. Thus, it was to be implemented forthwith to achieve the object viz. strengthen the law and order situation in the State. It brook of no delay. Transferring the petitioners, who come within the ambit of the impugned Government Order, does not mean that it is being applied retrospectively. Merely because the petitioners have not completed a fixed duration at a particular place, as provided under certain Circulars/executive instructions, will not render the impugned transfers invalid. It cannot be gainsaid that members of the police force hold transferable post and they do not have any indefeasible right to be posted at a particular place for any particular duration. Provisions, in this regard, whether contained in executive instructions or Circulars, are only by way of broad guidelines, but departure therefrom will not confer any right in favour of the incumbents to get the same enforced through a court of law. If situation warrants, transfer can be made even if the period prescribed for posting at a particular place has not been completed, nor can such transfer amount to applying the impugned Government Order retrospectively. In this regard, reference may be made to the judgment of the Apex Court in the case of Mrs. Shilpi Bose and others vs State of Bihar and others 1991 Supp (2) SCC 659, wherein, it is held as under:-

*"In our opinion, the Courts should not interfere with a transfer Order which are made in public interest and for administrative reasons unless the transfer Orders are made in violation of any mandatory statutory Rule or on the ground of malafide. A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer Orders issued by the competent authority do not violate any of his legal rights. Even if a transfer Order is passed in violation of executive instructions or Orders, the Courts ordinarily should not interfere with the Order instead affected party should approach the higher authorities in the Department. If the Courts continue to interfere with day-to-day transfer Orders issued by the Government and its subordinate authorities, there will be complete chaos in the Administration which would not be conducive to public interest. The High Court over looked these aspects in interfering with the transfer Orders."*

35. The Apex Court in the case of Major General, J.K. Bansal Vs. Union of India (2005) 7 SCC 227 has cautioned the courts in interfering with transfer orders in case of members of the Armed Force. It has been held that the scope for judicial review is far more limited and narrow as compared to the civilian employees. A member of police force though not a member of Armed Force, but can also not be equated with other Government servants, as he holds a special position in the law enforcement machinery of the State. The authorities charged with duty to maintain law and order, have to be given much greater elbow space to frame polices and take decisions regarding transfers and postings of members of the police force. In State of Haryana Vs. Kashmir Singh (2010) 13 SCC 306, the Apex Court in reference to transfer of police officers observed as under:-

*"12.Transfer ordinarily is an incidence of service, and the Courts should be very reluctant to interfere in transfer orders as long as they are not clearly illegal. In particular, we are of the opinion that transfer and postings of policemen must be left in the discretion of the concerned State authorities which are in the best position to assess the necessities of the administrative requirements of the situation. The concerned administrative authorities may be of the opinion that more policemen are required in any particular district and/or another range than in another, depending upon their assessment of the law and order situation and/or other considerations. These are purely administrative matters, and it is well-settled that Courts must not ordinarily interfere in administrative matters and should maintain judicial restraint vide Tata Cellular vs. Union of India - AIR 1996 SC 11.*

*14. In our opinion, the High Court has taken a totally impractical view of the matter. If the view of the High Court is to prevail, great difficulties will be created for the State administration since it will not be able to transfer/deploy its police force from one place where there may be relative peace to another district or region/range in the State where there may be disturbed law and order situation and hence requirement of more police. Courts should not, in our opinion, interfere with purely administrative matters except where absolutely necessary on account of violation of any fundamental or other legal right of the citizen. After all, the State administration cannot function with its hands tied by judiciary behind its back. As Justice Holmes of the US Supreme Court pointed out, there must be some free-play of the joints provided to the executive authorities."*

36. Thus, challenge laid on these grounds also fails.

Whether impugned Government Order is hit by Article 14 of the Constitution:-

37. It is contended that restrictions placed by impugned Government Order are discriminatory, as such restrictions have not been made applicable to Sub Inspectors, Inspectors, Deputy Superintendent of Police and Superintendent of Police.

38. It is noticeable that Inspectors and Sub Inspectors are non gazetted officers of the police force like constables and head constables, while officers above Inspectors are gazetted officers governed

by different set of service rules. In the counter affidavit, the specific case is that Deputy Superintendent of Police and Additional Superintendent of Police are governed by the Uttar Pradesh Service Rules, 1942 made under Section 241 and Section 275 of the Government of India Act, 1935 and their appointments are made through Public Service Commission. The transfer and posting of I.P.S. officers are governed by different Rules. Group A officer viz. Superintendent of Police and Additional Superintendent of Police are not to be posted in their home range, whereas Group B officers are not to be posted in their home districts. The service condition of I.P.S. category, P.P.S. category and non-gazetted category are different to each other, thus, no claim for parity can be made under Article 14 of the Constitution.

39. It is now well settled that equals should be treated alike, while unequals should not be treated alike. While Article 14 forbids class legislation, it does not forbid classification. A three Judges Bench of the Apex Court in the case of Unikat Sankunni Menon vs. State of Rajasthan AIR 1968 SC 81, while repelling the claim of higher pay to the members of Rajasthan Secretariat Services in comparison to their counterparts in Rajasthan Administrative Services held as under :-

*"6. The methods of recruitment, qualifications, etc., of the two Services are not identical. In their ordinary time-scale, the two Services do not carry the same grades. Even the posts, for which recruitment in the two Services is made, are, to a major extent, different. The members of the R.S.S. are meant to be employed in the Secretariat only, while members of the R.A.S. are mostly meant for posts which are outside the Secretariat though some posts in the Secretariat can be filled by members of the R.A.S. In such a case, where appointment is made to the posts of Deputy Secretaries of government servants belonging to two different and separate Services, there can arise no question of a claim that all of them, when working as Deputy Secretaries, must receive identical salaries, or must necessarily both be given special pay. It is entirely wrong to think that every one, appointed to the same post, is entitled to claim that he must be paid identical emoluments as any other person appointed to the same post, disregarding the method of recruitment, or the source from which the Officer is drawn for appointment to that post. No such equality is required either by Art. 14 or Art. 16 of the Constitution."*

40. In a more recent judgement in case of Nagaland Senior Government Employees Welfare Association vs. State of Nagaland and others (2010) 7 SCC 643, the Apex Court turned down challenge to constitutional validity of the Nagaland Recruitment from Public Employees (Second Amendment) Act, 2009, in so far as it provided for retirement from public service on completion of 35 years of service or on attaining 60 years, which ever was earlier, by holding that it is not violative of Article 14 qua similar provisions in other States, where the employees are to be superannuated only on attaining the age of 60 years. It was held as under :-

*"57. Merely because some employees had to retire from public employment on completion of 35 years of service*

*although they have not completed 55 years of age does not lead to any conclusion that the impugned enactment is arbitrary, irrational, unfair and unconstitutional. The fact that the provision such as the impugned provision that allows the retirement from public employment at the age of 35 years' service is not to be found in other States is of no relevance. As a matter of fact, retirement policy concerning public employment differs from State to State. Kerala retires employees from the public employment at the age of 55 years. In any case there is nothing wrong if the legislation provides for retirement of the government employees based on maximum length of service or on attaining a particular age, wherever is earlier, if the prescribed length of service or age is not irrational."*

41. Thus, the petitioners cannot set up plea of discrimination qua the gazetted officers of the police force.

42. So far as other non-gazetted officers of the police force are concerned, i.e. Inspectors and Sub Inspectors, similar restrictions on their posting in bordering districts is in place, vide paragraph 1 of the Government Order dated 11.7.1986. In case of constables and head constables, such restriction was relaxed by Government Order dated 20.3.2012, but it was never relaxed in case of Inspectors and Sub Inspectors. They were never permitted to be posted in districts bordering their home district. Thus, plea of discrimination and violation of Article 14 is also not tenable.

Individual Hardship:-

43. As regards individual hardship to the petitioners and members of their families, it is now well settled that remedy for the same is to represent to the authorities. However, that cannot be a ground for the writ-court to interfere. Accordingly, in cases of hardship to the incumbent or members of his family, it shall be open to him to make representation to the Regional Police Establishment Board, on whose recommendations, transfer has been made. In the event, any such representation is made, the Board shall examine the same with all sympathy, as it is also its duty to mitigate the hardship of the members of the police force, which is necessary to strike a balance between public duty and personal interest. Such exercise shall be carried out within one month from the date representation is made. In case of demonstrated undue hardship, it shall be open to the Board to amend/modify the transfer order or pass such order which, it deems appropriate.

44. Subject to above liberty, writ petitions stand dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. (PIL) Writ Petition No. 43710 of 2014

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

Counsel for the Petitioners:
Sri Sunil Kumar

Counsel for the Respondents:

C.S.C., Sri Nisheeth Yadav, Sri Yatindra, Sri Amit Shukla

Constitution of India, Art.-226-Public Interest Litigation-challenging the validity of impugned sanction-granted by government for consideration of shops for commercial purposes-land where primary school running since 1907 under control of Basic Education Department-under Section 9-A (b)-such school stood transferred vested either with Gram Panchayat or with Municipality-even in accordance with section 13-A of municipalities Act 1916-such school, the board deemed to vested with such local bodies-such land owned by Basic Education can not be converted for commercial purpose-Right to primary education being fundamental right-enacted by Parliament Right to education children to free and compulsory education Act 2009-can not be underscored granting permission by the authority with collusion of upar Mukhya Adhikari of Zila Panchayat the G.O. Relied-ex facie no application-impugned order quashed-District Magistrate to ensure restoration of its original position-petition disposed of.

Held: Para-16, 17, 18

16. The manner in which permission was sought of the State Government and, for that matter, the manner in which the State Government has granted its permission shows that all the authorities have acted in a callous manner, oblivious of the impact which such a decision would have on the need to preserve land which was acquired for the purposes of basic education and for primary schools. The State Government has relied on a Government Order which ex facie has no application. We may note that the petitioners have made certain allegations against the ninth respondent who is the Apar Mukhya Adhikari of the Zila Panchayat. It has been alleged that the Central Bureau of Investigation is conducting an investigation. For the purposes of these proceedings, we clarify that it has not been necessary for the Court to enter upon this area since on a plain application of the legal standards to which we have referred in the earlier part of this judgment, the impugned decision is patently contrary to law and would have to be quashed and set aside.

17. We, accordingly, allow the petition and set aside the permission granted on 27 January 2014 by the Special Secretary to the State Government for the construction of shops on the land of the school.

18. We direct in consequence the District Magistrate, Bulandshahar to take all necessary administrative steps to ensure that following the setting aside the permission of the State Government by this Court, the land shall be restored to its original position.

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

1. These proceedings have been instituted in the public interest by three residents of Jhangirabad in the district of Bulandshahar. There is a land bearing Khasra Nos. 2427, 2430 and 2432, admeasuring 32 Bighas. The land was acquired in 1907 for the purposes of a school. The property register card (annexed at Annexure CA-2 of the Counter filed by the Zila Panchayat, Bulandshahar) clearly reflects that the land was acquired on 17 January 1907 against the payment of compensation "for school purposes". A primary school has been constructed and is in existence on the land for well over a hundred years. Initially, an advertisement was published on 25 January 2013 by the Zila Panchayat for auctioning the standing trees situated inside the school campus. The headmaster of the school filed an objection following which a report was called from the Education department. The Block

Education Officer, Jhangirabad in his report dated 9 February 2013 stated that the land of the school was not vested in the Zila Panchayat. The cause of action which led to the filing of the writ petition was that the Zila Panchayat, Bulandshahar moved the State Government and obtained its permission on 27 January 2014 for the construction of thirty shops on the land. The permission of the State was granted on the basis of a Government Order dated 27 December 1997. In these proceedings which have been instituted in the form of a PIL, the petitioners have called into question the legality of the permission granted on 27 January 2014 by the Special Secretary to the State Government and have sought consequential directions for immediate action to protect the land where the school is situated.

2. Having due regard to the importance of the issue which has been raised in these proceedings, this Court had furnished an opportunity to the respondents to file their counter affidavits. For the purposes of these proceedings and having due regard to the parameters of the jurisdiction under Article 226 of the Constitution, it would not be appropriate for this Court to enter upon any disputed question of fact or title and we shall proceed on the basis of the admitted facts as they stand, and determine whether the permission which has been granted is lawful.

3. The U.P. Basic Education Act 1972 was enacted to provide for establishment of a Board for Basic Education and for matters connected therewith. The Statement of objects and reasons indicate that the responsibility for primary education had thus far rested with the Zila Parishads in rural areas and with Municipal Boards and Mahapalikas in urban areas. The administration of education at the basic level by local bodies was not satisfactory, and was deteriorating. Hence, the legislation was enacted to reorganize, reform and expand elementary education. Consequently, the State Government decided to transfer the control of primary education from local bodies to the Board of Basic Education and it is in furtherance of that object that the legislation was enacted.

4. Section 9-A which was inserted by U.P. Act No. 18 of 2000 with effect from 21 June 1999 deals with control of teachers and properties of basic schools. Sub-section (1) of Section 9-A provides that notwithstanding anything contained to the contrary in any other provisions of this Act, on and from the date of commencement of the Uttar Pradesh Basic Education (Amendment) Act, 2000,--

"(a) every teacher of the basic school serving under the Board immediately before such commencement shall be under the administrative control of the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits the basic school, is situated;

(b) all buildings, properties and assets of the Board in respect of a basic school shall stand transferred to, and vest in, the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits the basic school is situated.

(c) where any building or part thereof is occupied by a tenant by the Board for the purpose of a basic school immediately before such commencement, the tenancy in respect of such building or part thereof shall,

notwithstanding anything contained in any contract, lease or other instrument, stand transferred in favour of the Gram Panchayat, or the Municipality, as the case may be;

(d) the Board shall cease to be the licensee in respect of the building or part thereof referred to in sub-section (2) of Section 18-A and the Gram Panchayat or the Municipality, as the case may be, within whose territorial limits such building is situated shall, if it is not already owner thereof, be deemed to have become licensee in respect of such building or part thereof on such terms and conditions as may be determined by the State Government"

Sub-section (2) of Section 9-A then provides as follows:

"(2) No Gram Panchayat or Municipality shall have the power to transfer by sale, gift, exchange, mortgage, lease or otherwise any building, property or assets transferred to, and vested in, such Gram Panchayat or Municipality, as the case may be, under sub-section (1)."

Section 10 defines the functions of Zila Panchayats in the following terms:

"Functions of Zila Panchayats.--Without prejudice to the powers and functions of Zila Panchayats under the Uttar Pradesh Kshettra Panchayats and Zila Panchayats Adhiniyam, 1961, every Zila Panchayat shall, subject to superintendence and directions of the Board or the State Government perform all or any of the following functions, namely:

(a) to prepare schemes for the development, expansion and improvement of basic schools in the rural areas of the district;

(b) to supervise generally in such manner as may be prescribed the activities of Gram Panchayats in the district with regard to basic education;

(c) to perform such other functions pertaining to basic education as may be entrusted to it by the State Government."

5. Under Section 10-A, a specific provision is made in regard to the functions of Municipalities for the establishment, administration, control and management of basic schools in municipal areas.

6. Section 10-A is to the following effect:

"Functions of Municipalities.--Without prejudice to the powers and functions of Municipalities under the Uttar Pradesh Municipal Corporations Act, 1959 or the Uttar Pradesh Municipalities Act, 1916, as the case may be, every Municipality shall, subject to superintendence and control of the Board or the State Government, perform all or any of the following functions, namely:

(a) to establish, administer, control and manage basic schools in the Municipal area;

(b) to take all such necessary steps as may be considered necessary to ensure punctuality and attendance of teachers and other employees of basic schools;

(c) to prepare schemes for the development, expansion and improvement of such basic schools;

(d) to promote and develop basic education, non-formal education and adult education in the Municipal area;

(e) to make recommendation for minor punishment in such manner as may be prescribed on a teacher or other employee of a basic school situate within the limits of the municipal area."

7. Section 13-A gives an overriding effect to the provisions of the Act notwithstanding anything contained in the United Provinces Panchayat Raj Act, 1947, the Uttar Pradesh Municipalities Act, 1916 and the Uttar Pradesh Municipal Corporation Act 1959.

8. Under sub-section (2) of Section 18-A where any building or part thereof belonging to a local body was on the appointed day occupied by it for the purposes of any basic school, the Board shall, with effect from the said day, be deemed to have become a licensee on behalf of the local body in respect of such building or part on such terms and conditions as the State Government may by general or special order determine.

9. These statutory provisions contain a comprehensive legislative scheme for the regulation and control of basic education. Section 10 confers upon the Zila Panchayat, subject to the superintendence and directions of the Board or the State Government several statutory functions. These include the preparation of schemes for development, expansion and improvement of basic education schools in rural areas of the district, supervision over the activities of Gram Panchayats in the district in respect of basic education and performance of other functions as may be entrusted by the State Government pertaining to basic education. Similar provisions are made in Section 10-A in regard to the functions of the Municipalities within municipal areas. Under Section 10, the Zila Panchayats are duty bound to act subject to superintendence and directions of the Board or the State Government and in furtherance of the basic objects, which are the development, expansion and improvement of basic schools in rural areas.

10. Valuable properties across the State have been acquired, as the present case indicates well over a century ago, to subserve the cause of basic education. Many of these properties may be a source of commercial exploitation and gain. Human avarice and greed unfortunately know of no limits. These properties have become a source of coveted gain for commercial exploitation to unscrupulous persons, often enough to public officials. But, if the rampant conversion of properties which have been acquired for the purposes of basic education is permitted to take place on the altar of commercial expediency that would defeat the object and purpose underlying the enactment of the legislation. With the right to primary education being a fundamental right and the enactment by Parliament of the Right to Children to Free and Compulsory Education Act, 2009, the importance of primary education cannot adequately be underscored.

11. The State Government in the submission which has been urged before the Court by the learned Additional Advocate General has essentially relied upon the provisions contained in Section 103 and Section 107 of the Uttar Pradesh Kshettra Panchayat and Zila Panchayat Adhiniyam, 1961.

12. Section 103 provides for the vesting of property in Zila Panchayat in the following terms:

"Property vested in Zila Panchayat.--Subject to any reservation made by the State Government, all property of the nature specified in this section and situated within the district, shall vest in and belong to the Zila Panchayat and shall with all other property which may become vested in the Zila Panchayat, be under its direction, management and control and shall be held and applied for the purpose of this Act, that is to say--

(a) all public buildings of every description which have been constructed or are maintained out of the Zila Nidhi;

(b) all public roads, which have been constructed or are maintained out of the Zila Nidhi and the stones and other materials thereof and also all trees, erections, materials, implements and things provided for such roads; and

(c) all land and other property transferred to the Zila Panchayat by Government, or by gift, sale or otherwise, for local public purposes."

Section 107 provides as follows:

"Power to transfer property.--(1) Subject to any restriction imposed by or under this Act, a Zila Panchayat or a Kshettra Panchayat may transfer by sale, mortgage, lease, gift, exchange or otherwise any property vested in it, not being property held by it in trust, the terms of which are inconsistent with the right so to transfer.

(2) Notwithstanding anything contained in sub-section (1), a Zila Panchayat or a Kshettra Panchayat may, with the sanction of the State Government, transfer to Government any property vested in it, but not so as to affect any trust or public rights to which the property is subject:

Provided that every transfer under sub-section (1), other than a lease for a term not exceeding one year, shall be made by instrument in writing sealed with the common seal of the Zila Panchayat or the Kshettra Panchayat, as the case may be, and otherwise complying with all conditions in respect of contracts imposed by or under this Act."

13. In granting permission or sanction for the construction of shops in the present case on the land which was acquired for the purposes of the school, the State Government has relied upon a Government Order dated 27 December 1997.

14. The Government Order dated 27 December 1997 merits a close scrutiny. The Government Order dated 27 December 1997 on its plain terms applies to those lands of the Zila Panchayats which were of the ownership of the Zila Panchayats and which are of a commercial nature. Ex facie, the land in the present case, does not meet the description of what is stated in the Government Order dated 27 December 1997. The land which has been acquired in 1907 for the purposes of a school cannot by any stretch of imagination be regarded as a land of commercial nature. The mere fact that an officer of the Zila Panchayat has cast an evil eye on the land in order to tap its commercial value would not lead to the land which is acquired for the purposes of a school being converted into or treated in law as being land of a commercial nature. The land which has been so acquired must continue to be impressed with the character for which it was acquired. Any attempt, as in the present case, to deal with the land for commercial purposes by allowing the construction of shops must be invalidated. Any such dealings would be fundamentally contrary to the underlying scheme, object and provisions of the Basic Education Act, 1972.

15. The provisions of Section 107 (1) of the U.P. Kshettra Panchayat and Zila Panchayat Adhinium, 1961 cannot be read in a manner that would negate the basic purpose underlying the vesting of such land. Even Section 10 of the U.P. Basic Education Act, 1972 makes the Zila Panchayats subject to the superintendence

and directions of the Board of Basic Education. Under Section 10, the Zila Panchayat is vested with the function inter alia to prepare schemes for the development, expansion and improvement of basic schools in the rural areas of the district, to supervise the activities of Gram Panchayats in the district with regard to basic education and to perform such other functions pertaining to basic education as may be entrusted to it by the State Government. This power cannot be misused to cut at the very foundation of basic education by authorizing the construction of commercial shops on land which was acquired for the purpose of a school.

16. The manner in which permission was sought of the State Government and, for that matter, the manner in which the State Government has granted its permission shows that all the authorities have acted in a callous manner, oblivious of the impact which such a decision would have on the need to preserve land which was acquired for the purposes of basic education and for primary schools. The State Government has relied on a Government Order which ex facie has no application. We may note that the petitioners have made certain allegations against the ninth respondent who is the Apar Mukhya Adhikari of the Zila Panchayat. It has been alleged that the Central Bureau of Investigation is conducting an investigation. For the purposes of these proceedings, we clarify that it has not been necessary for the Court to enter upon this area since on a plain application of the legal standards to which we have referred in the earlier part of this judgment, the impugned decision is patently contrary to law and would have to be quashed and set aside.

17. We, accordingly, allow the petition and set aside the permission granted on 27 January 2014 by the Special Secretary to the State Government for the construction of shops on the land of the school.

18. We direct in consequence the District Magistrate, Bulandshahar to take all necessary administrative steps to ensure that following the setting aside the permission of the State Government by this Court, the land shall be restored to its original position.

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

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.12.2014

BEFORE
THE HON'BLE ATTAU RAHMAN MASOODI, J.

Civil Misc. Writ Petition No. 45851 of 2014

Sri Girraj Sewak Samiti, Bara through Mantri & Anr. ...Petitioners

Versus

Sri Girraj Sewak Samiti, Bara through Secretary & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vashistha Tiwari, Sri Shashi Nandan, Sri Shivam Yadav

Counsel for the Respondents:
Sri H.N. Pandey, Sri Ashok Kumar Dwivedi, Sri M.D. Singh 'Shekhar', Sri Ashok Kumar Dwivedi, Sri P.N. Saxena, Sri H.N. Pandey

C.P.C. Order XXII Rule-10-Application being summery in nature-exercise of recording oral evidence and critical analysis of documentary evidence-not

required-Trail Court rightly allowed the application to brought assignee on record-Revisional Court exceeded its jurisdiction by interfering with order by Trail Court-petition allowed.

Held: Para-17

Now coming to the scope of writ petition under Art.226 of the Constitution of India as directed against the order passed by the revisional court, I am of the considered opinion that the revisional court ought not to have interfered with the matter on the mere ground that the trial court did not undertake an exercise of recording oral evidence or did not enter into a critical analysis of the documentary evidence. The proceedings in respect of application under Order 22 Rule 10 CPC are summary in nature and the trial court while adjudicating upon the same has clearly recorded that no other person except respondent no.1 has raised any dispute before the trial court and that finding of the trial court has not been found faulty on the strength of any material whatsoever by the revisional court, therefore, the revisional court while passing the impugned order has clearly exceeded the jurisdiction conferred under Section 115 of the Code of Civil Procedure.

Case Law discussed:

AIR 1987 Bombay 276; 1976 (2) ALR 758;AIR 1979 SC 14(para 29 & 30); 2008 (2) SC 585 (para 14 & 15)=(2008) 4 SCC 530; JT 2012 (10) SC 503.

(Delivered by Hon'ble Attau Rahman Masoodi, J.)

1. Heard Shri Shashi Nandan, learned Senior Counsel assisted by Shri Vashistha Tiwari and Shri Shivam Yadav, learned counsel for the petitioners; Shri M.D. Singh Sekhar, learned Senior Counsel assisted by Shri Ashok Kumar Dwivedi for respondent no.1 and Shri P.N. Saxena, learned Senior Counsel assisted by Shri H.N. Pandey, learned counsel for respondent no.2. None appears for respondent nos.3 to 7.

2. As the issue involved in the present writ petition is a matter of contest between the petitioners and respondent no.1, therefore, non-appearance of other respondents although one of them respondent no.2 is represented is not legally significant, as such notices to other respondents are hereby dispensed with.

3. This writ petition involves an important question of law as to the extent of enquiry in a matter involving the scope of Order 22 Rule 10 CPC and for this purpose arguments were heard at length so as to thrash out the issue and incidental issues, which relate to the management of a religious charitable society registered under the Societies Registration Act, 1860.

4. The factual matrix of the case in short is that a suit for permanent injunction was filed by the society known as Sri Girraj Sewak Samiti, Bara Bazar Goverdhan, Tehsil and District Mathura through its Mantri/ Pradhan Mantri Govind Prasad Purohit in the year 1999 against the respondent nos.2 to 7. During the pendency of civil suit, the original representative of the society viz. Govind Prasad Purohit died on 28.11.2006 and thereafter an application under Order 22 Rule 10 CPC was filed by one Shri Jitendra Prasad Purohit, which was allowed by the trial court on 31.5.2007 on the premise that Shri Jitendra Prasad Purohit on the basis of resolution dated 29.12.2006 was elected as Mantri/ Pradhan Mantri of Sri Girraj Sewak Samiti, Bara Bazar Goverdhan, Tehsil,

District Mathura. The suit continued to be pursued on behalf of the Samiti by Jitendra Prasad Purohit until the month of November, 2009, when another application under Order 22 Rule 10 CPC came to be filed by one Rama Kant Kaushik, who claimed to have been elected as Mantri/ Pradhan Mantri of the society on the basis of resolution dated 4.10.2009 replacing the outgoing Secretary Jitendra Prasad Purohit. The copy of the application is placed on record as Annexure No.4 to the writ petition.

5. The plain averments made in the application are to the effect that the petitioner's predecessor Shri Jitendra Prasad Purohit, who on being elected on 29.12.2006 as Mantri/ Pradhan Mantri came to represent the suit proceedings on the basis of an order passed by the trial court on 31st May, 2007. It was further stated in the application that the petitioner was elected as Mantri/ Pradhan Mantri on 4.10.2009 in the resolution passed by the Executive Body of the Samiti, as such, the petitioner had a legal right to represent on behalf of the society in the ongoing suit proceedings.

6. The application filed by the petitioner (Rama Kant Kaushik) was opposed by the respondent no.1-Shri Jitendra Purohit, the outgoing Mantri/ Pradhan Mantri. The copy of objections filed by respondent no.1 is also placed on record as Annexure No.6 to the writ petition. From the perusal of the objections it is gathered that two main objections were raised by respondent no.1. Firstly the convening of meeting on 4.10.2009 was disputed on the ground that the said meeting was not at all held on the said date and secondly the petitioner (Rama Kant Kaushik) was alleged to have been ousted from the Executive Body of the Samiti on 15.2.2009 and thereafter new elections were said to have taken place on 25th February, 2009, wherein the members of the Executive Body were elected, who subsequently constituted the Management Committee on 31st March, 2009. Both the person on the basis of being elected as Secretary claimed devolution of interest upon them exclusive of each other.

7. The trial court went into the contentions of rival parties and has recorded detailed findings not only on the passing of resolution dated 4.10.2009 but has also recorded findings as to the correctness of defence putforth by respondent no.1 regarding the ouster of petitioner (Rama Kant Kaushik) from the membership of the Executive Body of the Samiti. The trial court in its judgment found that the petitioner on the basis of resolution dated 4.10.2009 had a legal right to represent the Samiti, therefore, the application filed by the petitioner was allowed by means of order dated 4.3.2010. The opposite party no.1 on feeling aggrieved against the order passed by the trial court filed Civil Revision No.40 of 2010 assailing the findings and the judgment passed by the trial court as mentioned above. The judgment passed by the trial court was assailed under Section 115 of the Code of Civil Procedure and the revision on being allowed by means of the impugned order has given rise to the present writ petition. Section 115 CPC is reproduced below:-

"115. Revision.- (1) The High Court may call for the record of any case which has been decide by any court subordinate to such High Court and in which no

appeal lies thereto, and if such subordinate court appears--

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:--

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.

(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

(3) A revision shall not operate as a stay of suitor other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation .- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a Suit or other proceeding."

8. In view of Section 115 of the Code of Civil Procedure, learned counsel for the petitioner while assailing the impugned judgment passed by the revisional court argued that the judgment passed by the trial court was fully in consonance with law and ought not to have been interfered with by the revisional court. The revisional court judgment is attacked primarily on the ground that the court below has not appreciated the findings recorded by the trial court and none of the findings recorded by the trial court on being found faulty have been set aside and that being the position, the revisional court was clearly in error to have remanded the matter back to the trial court for fresh enquiry on the issue within the scope of Order 22 Rule 10 CPC, which by its very nature is a summary proceeding. Order 22 Rule 10 CPC for ready reference is reproduced hereunder:-

"10. Procedure in case of assignment before final order in suit.- (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

9. In the light of provisions of Order 22 Rule 10 CPC, learned counsel for the petitioner has laid emphasis on the trial court judgment to show that the trial court while allowing the application has duly considered the material placed on record i.e. agenda, list of members, who participated to elect Rama Kant Kaushik as Mantri/ Pradhan Mantri of the Samiti and the resolution dated 4.10.2009 on this premise according to the learned counsel stands in consonance with law. Learned counsel further submits that the convening of meeting on 4.10.2009 was sought to be disbelieved merely on the ground that the petitioner (Rama Kant Kaushik) was ousted from the membership of executive body of the Samiti but there was no evidence placed

on record to the effect that he was ousted from the membership of the executive body. The trial court has also recorded that no other member of the society has come forward to file any affidavit or evidence on the basis of which the convening of meeting on 4.10.2009 may be disbelieved. The trial court in absence of any dispute to the documents placed on record allowed the application.

10. Whether the trial court for allowing the application under Order 22 Rule 10 CPC was duty bound to record evidence on the issue of devolution in interest or it was enough for the Court to follow a summary procedure while deciding the application is the question that calls for an answer in these proceedings?

11. In support of his contentions, learned counsel for the petitioners has cited the decision of Bombay High Court in Jawahar Lal v. Smt. Saraswatibai Babulal Joshi & Ors., AIR 1987 Bombay 276 as well as the decision passed by this Court in Ram Kumar & Anr. v. Union of India, 1976 (2) ALR 758. While inviting attention of the Court to Paragraph 5 and 6 of Bombay High Court judgment, learned counsel for the petitioner states that Order 22 Rule 10 CPC is different from the category of cases, which fall under Order 22 Rule 1 to 9 CPC. Paragraph 12 of the judgment reported in AIR 1987 Bombay 276 is reproduced below:-

"12. Having regard to the provisions of O.22, R.10, Civil P.C. and the authorities to which I have referred, it is apparent that no detailed enquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution and the question about the existence and validity of the assignment or devolution can be considered at the trial of the suit on merits. this being the legal position the order passed by the learned trial Judge was correct and no interference with the discretion exercised by him is called for."

12. The same position of law is reiterated in the judgment passed by this Court reported in 1976 (2) ALR 758.

13. On the other hand learned counsel for respondent no.1 argued that the manner in which the trial court formed its opinion was faulty as the original record was not placed before the trial court and the proceedings were also conducted in a hasty manner.

14. The revisional court while deciding the revision according to learned counsel appearing for respondent no.1 has proceeded on the premise that the learned trial court had not only committed material irregularity as to the enquiry, which was necessary for deciding the application but had exceeded in its jurisdiction by rerecording the findings on the basis of documents of which the original copies were not placed on record.

15. In support of his contention learned counsel for respondent no.1 has referred to the judgments in State (Delhi Administration) v. Pali Ram, AIR 1979 SC 14 (para 29 & 30); Thiruvengada Pilla v. Navaneethammal & Anr., JT 2008 (2) SC 585 (para 14 & 15)=(2008) 4 SCC 530 and Ajay Kumar Parmar v. State of Rajasthan, JT 2012 (10) SC 503.

16. On the strength of aforesaid judgments it is canvassed by learned counsel that the signatures of documentary evidence placed on record could not be compared without seeking expert opinion and Section 73 of the Evidence Act did not enable the trial court to record a finding on the basis of mere comparison of the signatures on the documents, originals whereof were not produced before the court below. This, according to learned counsel for respondent no.1, is a material irregularity, which the trial court has committed while allowing the application. Learned counsel for respondent no.1 has also argued that despite there being an application filed by the respondent no.1 to call for oral evidence, the trial court proceeded in a hasty manner and decided the application on the same date, when the application for transfer was rejected by the learned District Judge. Rendering a detailed judgment on the same very day according to learned counsel shows that the trial court had predetermined the issue, which clearly amounts to a material irregularity in the process of adjudication.

17. Now coming to the scope of writ petition under Art.226 of the Constitution of India as directed against the order passed by the revisional court, I am of the considered opinion that the revisional court ought not to have interfered with the matter on the mere ground that the trial court did not undertake an exercise of recording oral evidence or did not enter into a critical analysis of the documentary evidence. The proceedings in respect of application under Order 22 Rule 10 CPC are summary in nature and the trial court while adjudicating upon the same has clearly recorded that no other person except respondent no.1 has raised any dispute before the trial court and that finding of the trial court has not been found faulty on the strength of any material whatsoever by the revisional court, therefore, the revisional court while passing the impugned order has clearly exceeded the jurisdiction conferred under Section 115 of the Code of Civil Procedure.

18. The other grounds raised by learned counsel for respondent no.1 before the revisional court to the effect that the trial court proceeded in a hasty manner and did not dispose of the application for allowing evidences to be led is also devoid of merit inasmuch as no such evidence was actually led before the trial court or is required to be examined after recording of oral evidence etc.

19. This Court is of the opinion that the trial court order allowing the application of Rama Kant Kaushik not being a conclusive judgment as to the rights of parties would not preclude respondent no.1 to participate in suit proceedings, once such a right is declared or based on the requirements under Section 25 of the Societies Registration Act, 1860 is laid as per the procedure prescribed under law. The trial court while adjudicating upon the issue of rival succession/devolution in interest, being bound to frame an inclusive issue is at liberty to transpose any of the contesting parties to be the plaintiff, but such a right of succession/devolution in interest, needless to say, is bound to be declared in accordance with the provisions of Societies Registration Act, 1860 and the byelaws of the society, which regulate the term of management and conduct of other affairs of the society and to which a registered society owes its existence as a juristic person.

20. The writ petition filed by the petitioner against the revisional court

order dated 14.08.2014 is hereby allowed and the impugned order is set aside.

21. No order as to costs.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2014

BEFORE
THE HON'BLE SATYENDRA SINGH CHAUHAN, J.

Criminal Misc. Application No. 50248 of 2014 (u/s 482 Cr.P.C.)

Mohit Kumar Kankar & Anr. ...Applicants
Versus
State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicants:
Sri Vikas Sharma, Sri Sanjay Singh

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

Cr.P.C. -Section-482-Chargesheet challenged-on ground-without following procedure contained u/s Section 244(1)-without opportunity of cross-examination to the accused applicant-order impugned framing charges-held-not sustainable-various reasons discussed.

Held: Para-12 & 19

12. The Apex Court further proceeded to hold that the evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not given to him, then he would be no more than an idle spectator in the entire process. The object of the whole process is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him.

19. On a consideration of the above case laws and the principles laid down therein, the order impugned does not appear to be correct order and the trial court has proceeded to commit illegality in framing the charge without recording evidence under Section 244 (1) Cr.P.C. The order framing charge, therefore, cannot be sustained in law.

Case Law discussed:
(2013) 9 SCC 209; (2009) 14 SCC 115; (2010) 11 SCC 520

(Delivered by Hon'ble Satyendra Singh Chauhan, J.)

1. Through this petition, the petitioners have challenged the order of framing of charge dated 11.11.2014 passed by the Addl. Chief Judicial Magistrate, Court No.4, Aligarh in Case No.579 of 2012 (Yatindra Kumar Vs. Mohit Kumar Kankar and another) under Section 246 of the Code of Criminal Procedure (for short "Cr.P.C.") in a warrant case instituted other than police report.

2. The fact in short giving rise to the present dispute are that an application under Section 156 (3) Cr.P.C. was moved by opposite party no.2 on 30.11.2012, which was treated as complaint by the trial court vide order dated 19.12.2012. In the said complaint, opposite party no.2 alleged that he and petitioner no.1 were the friends and one and a half years ago, petitioner no.1 borrowed Rupees one lakh from him and again after six months, he (petitioner no.1) borrowed Rupees one lakh from him (opposite party no.2), but when petitioner no.1 failed to return the money in cash, he gave a cheque of Rupees two lakh dated 8.11.2012 but the cheque was dishonoured as

the account was closed. On 25.11.2012, it is alleged that the petitioners came to the shop of the informant and they used abusive language and threatened him to kill. The application moved by opposite party no.2 under Section 156 (3) Cr.P.C. was treated as complaint and opposite party no.2 was examined under Section 200 Cr.P.C before the trial court and one Vishal Kumar was examined as witness under Section 202 Cr.P.C. Learned Addl. Chief Judicial Magistrate, Aligarh proceeded to summon the petitioners vide order dated 4.6.2013 on the basis of the aforesaid evidence. On 11.11.2014, the trial court proceeded to frame charge against the petitioners under Sections 323, 504, 506 & 379 IPC. It is this order, which is under challenge in this petition.

3. Submission of learned counsel for the petitioners is that without recording evidence as contemplated under Section 244 Cr.P.C., learned Magistrate has proceeded to frame the charge. Submission is that the charge could not have been framed without giving opportunity of cross-examination in respect of the evidence adduced under Section 244 (1) Cr.P.C. Learned counsel submits that non-examination of witnesses in the presence of the accused persons and further denying them right to cross-examine the witnesses will prejudice their case and the veracity of the allegations will not be established in a correct manner. Submission is that charge, which has been framed without recording evidence under Section 244 Cr.P.C. is wholly illegal and phrase occurring in Section 246 Cr.P.C. "or at any previous stage of the case" does not mean that any evidence which has been recorded at the time of summoning could be used for the purpose of framing of charge. Learned counsel submits that the evidence as required under Section 3 and Section 138 of the Indian Evidence Act is the proper evidence to be considered and a right to cross-examine cannot be foreclosed before framing the charge. If such right is foreclosed, then authenticity of the evidence cannot be judged by the trial court and the truth will not come to light. He has placed reliance upon the judgment rendered by the Apex Court in the case of Sunil Mehta and Anr. v. State of Gujarat and Anr., (2013) 9 SCC 209.

4. Learned AGA, on the other hand, has drawn the attention of the Court towards the phrase "or at any previous stage of the case" and has tried to justify the order of framing of charge on the reasoning that the evidence which has been recorded at the time of summoning can be used as evidence for framing of the charge and he has also submitted that as and when the charge is framed and the accused person adduces his evidence, he will have a right for cross-examination.

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

6. The question involved in the present petition is as to whether the charge can be framed without recording evidence under Section 244 (1) Cr.P.C. is not res integra and stands decided by the Apex Court in the case of Sunil Mehta (supra).

7. Learned Magistrate has not recorded any evidence as contemplated under Section 244 (1) Cr.P.C. and has proceeded to frame the charge as contemplated under Section 246 (1) Cr.P.C.

8. The question is as to when the accused persons will get opportunity to cross-examine the witness if they put their

appearance under Section 246 Cr.P.C. without recording any evidence as contemplated under Section 244 (1) Cr.P.C. In this regard, the Apex Court while considering the similar question held as under:-

"7. It is difficult to appreciate the logic underlying the above observations. It appears that the High Court considered the deposition of this complainant and his witnesses recorded before the appearance of the accused Under Section 202 of the Code of Criminal Procedure to be 'evidence' for purposes of framing of charges against the Appellants. Not only that, the High Court by some involved process of reasoning held that the accused persons had an opportunity to crossexamine the witnesses when the said depositions were recorded. The High Court was, in our opinion, in error on both counts. We say so for reasons that are not far to seek. Chapter XV of the Code of Criminal Procedure, 1973 deals with complaints made to Magistrates. Section 200 which appears in the said Chapter inter alia provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and signed by the complainant and the witnesses, as also the Magistrate. An exception to that general rule is, however, made in terms of the proviso to Section 200 in cases where the complaint is made by a public servant acting or purporting to act in the discharge of his official duties, or where a Court has made the complaint, or the Magistrate makes over the case for enquiry or trial by another Magistrate Under Section 192 of the Code of Criminal Procedure."

9. In paragraph-7 of the case of Sunil Mehta (supra), the Apex Court while elaborating the difference between the evidence recorded at the summoning stage under Section 200 Cr.P.C. and the evidence to be recorded after the accused has put in appearance by the prosecution has further considered in paragraphs-11 & 12.

10. The nature of evidence to be adduced by the prosecution has been found to be the evidence which is acceptable under Section 3 of the Indian Evidence Act and under Section 138 of the Evidence Act. Section 138 of the Evidence Act refers to cross-examination whereas Section 3 of the Indian Evidence Act refers to the evidence recorded before the court. Section 138 of the Evidence Act casts duty upon the court to allow the adverse party to cross-examine if he so desires. Examination and cross-examination have to be held in the presence of the parties.

11. In paragraphs 11 and 12 of the case of Sunil Mehta (supra), it was held as under:-

"11. A simple reading of the above would show that the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and adequately punish.

12. Sections 244 to 246 leave no manner of doubt that once the accused appears or is brought before the Magistrate the prosecution has to be heard and all such evidence as is brought in support of its case recorded. The power to

discharge is also Under Section 245 exercisable only upon taking all of the evidence that is referred to in Section 244, so also the power to frame charges in terms of Section 246 has to be exercised on the basis of the evidence recorded Under Section 244. The expression "when such evidence has been taken" appearing in Section 246 is significant and refers to the evidence that the prosecution is required to produce in terms of Section 244(1) of the Code. There is nothing either in the provisions of Sections 244, 245 and 246 or any other provision of the Code for that matter to even remotely suggest that evidence which the Magistrate may have recorded at the stage of taking of cognizance and issuing of process against the accused under Chapter XV tantamounts to evidence that can be used by the Magistrate for purposes of framing of charges against the accused persons Under Section 246 thereof without the same being produced Under Section 244 of the Code. The scheme of the two Chapters is totally different. While Chapter XV deals with the filing of complaints, examination of the complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. All that may be said is that evidence that was adduced before a Magistrate at the stage of taking cognizance and summoning of the accused may often be the same as is adduced before the Court once the accused appears pursuant to the summons. There is, however, a qualitative difference between the approach that the Court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution."

12. The Apex Court further proceeded to hold that the evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not given to him, then he would be no more than an idle spectator in the entire process. The object of the whole process is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him.

13. In paragraph-17 of the case of Sunil Mehta (supra), it was held as under:-

"17. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence Under Section 244

after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by crossexamining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge Under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box."

14. The Apex Court proceeded to rely upon the case of Ajoy Kumar Ghose v. State of Jharkhand and Anr., (2009) 14 SCC 115 and also placed reliance upon a judgment rendered in the case of Harinarayan G. Bajaj v. State of Maharashtra and Ors., (2010) 11 SCC 520, wherein the similar view was expressed.

15. In the case of Ajoy Kumar Ghose (supra), it was held as under:-

"The language of the Section clearly suggests that it is on the basis of the evidence offered by the complainant at the stage of Section 244(1) Code of Criminal Procedure, that the charge is to be framed, if the Magistrate is of the opinion that there is any ground for presuming that the accused has committed an offence triable under this Chapter. Therefore, ordinarily, when the evidence is offered Under Section 244 Code of Criminal Procedure by the prosecution, the Magistrate has to consider the same, and if he is convinced, the Magistrate can frame the charge."

16. The Apex Court in the case of Sunil Mehta (supra) has further held as under:-

"20. This Court further clarified that the expression "or at any previous stage of the case" appearing in Section 246(1) did not imply that a Magistrate can frame charges against an accused even before any evidence was led Under Section 24. This Court approved the decision of the High Court of Bombay in Sambhaji Nagu Koli v. State of Maharashtra, MANU/MH/0185/1978 : 1979 Cri. LJ 390 (Bom), where the High Court has explained the purport of the expression "at any previous stage of the case". The said expression, declared this Court, only meant that the Magistrate could frame a charge against the accused even before all the evidence which the prosecution proposed to adduce Under Section 244(1) was recorded and nothing more. This Court observed:

44. In Section 246 Code of Criminal Procedure also, the phraseology is "if, when such evidence has been taken",

meaning thereby, a clear reference is made to Section 244 Code of Criminal Procedure. The Bombay High Court came to the conclusion that the phraseology would, at the most, mean that the Magistrate may prefer to frame a charge, even before all the evidence is completed. The Bombay High Court, after considering the phraseology, came to the conclusion that the typical clause did not permit the Magistrate to frame a charge, unless there was some evidence on record. For this, the Learned Single Judge in that matter relied on the ruling in Abdul Nabi v. Gulam Murthuza Khan MANU/AP/0074/1968: 1968 Cri LJ 303 (AP)."

17. In the case of Harinarayan G. Bajaj (supra), the principles laid down in the case of Ajoy Kumar Ghose (supra) were held to be the correct principles and it was laid down that an accused has right to cross-examine the witness produced by the prosecution before framing of charge against him and has a valuable right.

18. Paragraph-22 of the case of Sunil Mehta (supra) is as follows:-

"22. In Harinarayan G. Bajaj v. State of Maharashtra and Ors. MANU/SC/0006/2010 : (2010) 11 SCC 520, this Court reiterated the legal position stated in Ajoy Kumar Ghose (supra) and held that the right of an accused to cross-examine witnesses produced by the prosecution before framing of a charge against him was a valuable right. It was only through cross-examination that the accused could show to the Court that there was no need for a trial against him and that the denial of the right of cross-examination Under Section 244 would amount to denial of an opportunity to the accused to show to the Magistrate that the allegations made against him were groundless and that there was no reason for framing a charge against him. The following passages are in this regard apposite:

18. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge Under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination Under Section 244, then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him.

xx xx xx

20. Therefore, the situation is clear that Under Section 244, Code of Criminal Procedure the accused has a right to cross-examine the witnesses and in the matter of Section 319, Code of Criminal Procedure when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be reheard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence.

23. In the light of what we have said above, we have no hesitation in holding that the High Court fell in palpable error in interfering with the order passed by the Revisional Court of Sessions Judge, Gandhi Nagar. The High Court was

particularly in error in holding that the Appellant had an opportunity to cross-examine the witnesses or that he had not availed of the said opportunity when the witnesses were examined at the stage of proceedings under Chapter XV of the Code. The High Court, it is obvious, has failed to approach the issue from the correct perspective while passing the impugned order.

24. In the result we allow this appeal with costs Assessed at Rs.50,000/-, set aside the order passed by the High Court and restore that passed by the Sessions Judge. The costs shall be deposited by Respondent No. 2-company in the SCBA Lawyers' Welfare Fund within two weeks of the pronouncement of this order."

19. On a consideration of the above case laws and the principles laid down therein, the order impugned does not appear to be correct order and the trial court has proceeded to commit illegality in framing the charge without recording evidence under Section 244 (1) Cr.P.C. The order framing charge, therefore, cannot be sustained in law.

20. The petition is accordingly allowed. The order dated 11.11.2014 is hereby set aside and the matter is remitted to the trial court to proceed considering the principles laid down hereinabove.

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ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.12.2014

BEFORE
THE HON'BLE HARSH KUMAR, J.

Criminal Misc. Application No. 50297 of 2014
(U/s 482 CR.P.C.)

Raj Kumar ...Applicant

Versus

State of U.P. & Anr. ...Opp. Parties

Counsel for the Applicant:
Sri Rajeev Trivedi

Counsel for the Respondents:
A.G.A.

Cr.P.C.-Section 482-Chargesheet challenged -on ground of process of court-as the applicant again married with prosecutist on achieving age of majority-admittedly when occurrence took place-she was only 15 ½ years old girl-subsequent marriage will not undue the offence-already committed-petitioner himself guilty for abusing the process of Court-application rejected.

Held: Para-12
In view of the discussions made above, I find that the applicant himself is committing abuse of process of Court and has failed to show that any abuse of process of Court has been caused by submission of charge sheet. There is no sufficient ground requiring exercise of inherent power by this Court under section 482 Cr.P.C. for quashing the charge sheet in order to prevent abuse of process of any Court or otherwise to secure the ends of justice. The application is devoid of merits and is liable to be dismissed.

Case Law discussed:
JT 2010 (6) SC 588:(2010) 6 SCALE 767:2010 Cr.L.J. 3844; (2008) 1 SCC 474; (2008) 8 SCC 781.

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

1. Heard Sri Rajeev Trivedi, learned counsel for the applicant and learned AGA for the State.

2. The application has been moved under section 482 Cr.P.C. for quashing the charge sheet in case crime no.193 of 2012, under sections 363, 366, 376, 120-B

IPC on the basis of which, S.T. No.167 of 2013 is pending before Additional Sessions Judge, Court No.5, Kanpur Nagar.

3. Learned counsel for the applicant contended that the incident is alleged to be dated 28.7.2011 of which F.I.R. has been lodged with inordinate delay on 13.6.2012 and charge sheet has been filed, upon which the case has been committed to sessions and S.T. No.167 of 2013 is pending against the applicant and other co-accused; that the prosecutrix/victim had gone with the applicant with her own sweet will and made marriage with him; that subsequently on attaining majority on 1.2.2014 the victim has again made marriage with the applicant; that the applicant has been granted bail and in the circumstances, the charge sheet is liable to be quashed, as no fruitful purpose is likely to be achieved by prosecuting the case when the victim/prosecutrix has made marriage with the applicant.

4. Learned AGA opposed and contended that undisputedly the prosecutrix was minor at the time of incident and the alleged marriage with minor is nullity and may not be considered to be a marriage in the eye of law; that applicant is guilty for committing rape with minor girl of 15 years; that the date of birth of prosecutrix is 1.2.1996 as stated by her and also mentioned in her High School Certificate; that by obtaining marriage certificate subsequent to 1.2.2014, (after attaining majority by the prosecutrix) the crime committed during her minority under section 376 IPC may not be undone; that the charge sheet was submitted long back upon which the cognizance was taken on 1.12.2012 and there is no justification for moving this application for quashing of charge sheet after a span of around two years; that delay in lodging of F.I.R. may not be material in cases under section 376 IPC; that the applicant accused is an influential person and F.I.R. could be lodged only through order of Magistrate upon application under section 156 (3) Cr.P.C.; that there is no deliberate delay in lodging F.I.R.;that the applicant and co-accused are habitual of moving one writ after dismissal of another and after refusal by this Court to quash the F.I.R., in Writ Petition No.9606 of 2012 filed by applicant, the applicant has moved this application for quashing the charge sheet and is committing abuse of process of Court; that the applicant has not come with clean hands and has moved this application with mala fide intention and false allegations; that there is no sufficient ground for quashing of charge sheet and exercising of inherent powers by this Court to prevent any abuse of process of court or to secure the ends of justice.

5. Upon hearing the learned counsel for the parties and perusal of record, I find that undisputedly the occurrence took place on 28.7.2011 when the prosecutrix was allegedly kidnapped by applicant and his associates. Undisputedly the date of birth of prosecutrix is 1.2.1996 as per High School Certificate annexed as annexure no.10 and so she was aged about 15 years at the time of incident. The applicant claimed to have obtained agreement from the minor prosecutrix on 1.9.2011 (Annexure No.2) mentioning therein of living as husband and wife since last one year and mentioning the age of prosecutrix as 19 years. The applicant has also filed copy of marriage certificate of Arya Samaj Chowk, Prayag dated 13.2.2014 between applicant and

prosecutrix while the marriage certificate issued by the Office of the Registrar of Hindu Marriage Chail, District Kaushambi (Annexure No.10) contains that marriage has been solemnized on 7.2.2014 and having been registered on 21.2.2014 which facts are self contradictory.Undisputedly, the prosecutrix attained the age of majority i.e. 18 years on 1.2.2014 and by solemnization marriage after attaining majority, the offence committed earlier may not be undone. The applicant has failed to disclose as to what abuse of process is likely to be caused by submission of charge sheet upon which cognizance has been taken and case has been committed to sessions about two years back.

6. Undisputedly the prayer made by applicant thourgh Writ Petition No.9606 of 2012 for quashing the F.I.R. of this case, has been turned down by Division Bench of this Court vide order dated 14.8.2012. Hence, present application with prayer for quashing the charge sheet is nothing but abuse of process of Court by the applicant as the applicant is obstructing the prosecution to proceed and committing abuse of process of Court.

7. It is settled principle of law that inherent powers under section 482 Cr.P.C. should be exercised very sparingly and carefully only to prevent commission of any abuse of Court.

8. In this respect following case laws are necessary to be referred:-

9. In the case of State of Andhra Pradesh V. Gourishetty Mahesh, JT 2010 (6) SC 588: (2010) 6 SCALE 767:2010 Cr.LJ 3844, the Hon'ble Apex Court has held that "while exercising jurisdiction under section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable apprehension of it accusation would not be sustained. That is the function of the trial Judge/Court".

10. In the case of Hamida V. Rashid, (2008) 1 SCC 474, the Hon'ble Apex Court has held that "ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under section 482 at an interlocutory stage which are often filed with some oblique motive in order to circumvent the prescribed procedure, or to delay the trial which enable to win over the witness or may disinterested in giving evidence, ultimately resulting in miscarriage of Justice."

11. In the case of Monica Kumar V. State of Uttar Pradesh, (2008) 8 SCC 781, the Hon'ble Apex Court has held that " inherent jurisdiction under section 482 has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself."

12. In view of the discussions made above, I find that the applicant himself is committing abuse of process of Court and has failed to show that any abuse of process of Court has been caused by submission of charge sheet. There is no sufficient ground requiring exercise of inherent power by this Court under section 482 Cr.P.C. for quashing the charge sheet in order to prevent abuse of

process of any Court or otherwise to secure the ends of justice. The application is devoid of merits and is liable to be dismissed.

13. The application is dismissed, accordingly.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2014

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

Civil Misc. Writ Petition No. 52933 of 2014

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

Counsel for the Petitioner:
Sri Kamlesh Shukla, Sri Prashant Shukla

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226- Compassionate Appointment-claim by married daughter of deceased employee-on allegations since 2002 she along with her husband residing with deceased employee-who had lost his job due to fire-without any supporting documents-husband being hale and hearty-petitioner can not be treated dependent of her deceased-certainly dependents married daughter can not be excluded-but every pleadings must be supported by documents-in absence thereof-appointment can not be claimed as a matter of right.

Held: Para-18 & 19

18. Thus, from the careful reading of these reports, it is found that the direction was given therein in the peculiar facts and circumstances of those cases and the Court was of the opinion that the dependent daughters cannot be excluded merely because of their marital status.

19. As has been discussed above, one dependent family member of the deceased employee is entitled for compassionate appointment. The petitioner has failed to establish that she was dependent upon the deceased employee, as admittedly her husband is alive and he is a hail and hearty person, it cannot be accepted that the petitioner was fully dependent upon the deceased employee at the time of his death.

Case Law discussed:
AIR 1979 SC 1868; LAWS(BOM)-2014-8-68; ILR 1992 KARNATAKA 3416; 2005 (104) FLR 271.

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Sri Kamlesh Shukla, learned counsel for the petitioner and learned Standing Counsel.

2. Short controversy raised in the present writ petition is as to whether the petitioner being a married daughter of the deceased employee has a right for consideration for appointment on compassionate ground. The petitioner is only daughter of her parents and her case is that she is unemployed and was fully dependent upon her father at the time of his death. Her mother i.e. wife of the deceased employee moved an application on 22.2.2012 before the Principal/Chief Superintendent, S.N. Medical College and Hospital, Agra for providing employment to her daughter i.e. petitioner. Reminders were sent by the petitioner and her mother but no decision has been taken and hence this writ petition.

3. In the supplementary affidavit filed on 17.10.2014, the petitioner sought to submit that she alongwith her husband

Bhupendra Sharma is residing at her parental residence and is looking after wife of the deceased(mother of the petitioner) and the entire family.

4. It is also indicated therein that the petitioner's husband was earlier working in a shoe factory at Agra but on account of fire in the factory in the year 2002, he lost his job and since thereafter her entire family including her husband were fully dependent upon the deceased employee.

5. Submission of learned counsel for the petitioner is that the petitioner being married daughter though is not included in the definition of "Family" under Dying-in-Harness Rules, is entitled for consideration for compassionate appointment as she was fully dependent upon her father. Merely because the petitioner is a married daughter, she cannot be refused appointment as it would be violative of Article 15 and 16 of the Constitution of India.

6. For awarding compassionate appointment, the 'dependency' should be the yardstick and not the marriage of family members of the deceased. Supreme Court has recognized right to employment in case of a married woman as early as in the year 1979 in the case of C.B. Muthamma vs. Union of India and others AIR 1979 SC 1868. In support of his submissions, learned counsel for the petitioner has relied upon the judgment of Bombay High Court in Ranjana Murlidhar Anerao vs. The State of Maharashtra LAWS(BOM)-2014-8-68 and Karnataka High Court in R. Jayamma vs. Karnataka Electricity Board and another ILR 1992 KARNATAKA 3416 and Manjula vs. State of Karnataka, by its Secretary, Department of Co-operation and Another 2005(104) FLR 271.

7. Learned Standing Counsel, on the other hand, submits that the petitioner has no right for consideration for appointment on compassionate ground as she is not eligible for such appointment being not a dependent family member of the deceased employee. A married daughter is not included in the expression "Family" of the deceased employee and hence there is no merit in the writ petition and the same deserves to be dismissed.

8. The dependent petitioner is the sole heir of the deceased employee. There are two family members of the deceased employee namely, the petitioner and her mother. Indisputably, the petitioner was married prior to death of her father in the year 2011. It is also apparent from the facts indicated in the writ petition that she was living with her husband till the year 2000 who was working in a shoe factory. The contention is that after the shoe factory was gutted in fire and closed, the entire family of the petitioner namely her husband and two children started living with the deceased employee and were financially dependent upon him. Thus, an effort has been made to carve out an exception to Rule 5 of the 1974 Rules to submit that the petitioner was a dependent daughter of the deceased employee and as she was financially dependent upon her father at the time of his death, she has a claim for consideration for compassionate appointment.

9. It is well settled that the compassionate appointment is granted to a dependent family member of the deceased employee. Even a son of the deceased employee is not eligible for compassionate appointment, if he is not dependent upon the employee at the time of his death. The offer of compassionate appointment is to be given to one of the

dependent family members of the deceased employee so as to help the family mitigate the financial crisis faced by it. It is not a source of employment and is in the nature of an exception to the General Rule that everyone is to come in a public employment solely on merits.

10. Thus, the "dependency" would be the first eligibility criteria for consideration of claim of a family member of the deceased employee for compassionate appointment. In case, this test is passed, only then the application for compassionate appointment is to be considered on other aspects.

11. So far as the present case is concerned, it appears that the petitioner has not disclosed the correct facts. Though it is stated in the supplementary affidavit that the petitioner and her family was living and dependent upon the deceased, however, there is no document to support the said submission. Moreover, no such statement has been made by the mother of the petitioner in the year 2012 when she has moved an application to consider the claim of the petitioner. A perusal of the application dated 22.2.2012 moved by the petitioner's mother indicates that only submission therein was that the petitioner was unemployed. The submission of the petitioner that her husband is unemployed and was fully dependent upon her father from the year 2002 till his death is not worthy of acceptance for absence of material on record. Vague assertions in the affidavit are not sufficient to prove the dependency of the petitioner on the deceased employee.

12. So far as another aspect of the matter i.e. exclusion of a married daughter in the expression "Family" is concerned, it appears that exclusion of a married daughter from the expression "Family" is based on logic that soon after the marriage, daughters leave the house of their parents and are financially dependent upon their husbands. Though it cannot be said that they cannot be treated as part of the family yet it is true that they are not financially dependent upon their parents, after marriage.

13. The cases relied upon by the learned counsel for the petitioner to submit that the petitioner was dependent upon her father at the time of his death and hence the claim for consideration of compassionate appointment, are distinguishable in the facts and circumstances of the present case.

14. In Ranjana Murlidhar Anerao(supra), the question was as to whether the exclusion of the married daughter from the expression "Family" for being entitled to be considered for grant of retail kerosene licence was legal and valid. It was held that exclusion of married daughter from the expression "Family" is not only violative of Article 15 of the Constitution of India but the same also infringes the right guaranteed by Article 19(1)(g) of the Constitution of India. So far as grant of licence for distribution of Kerosene oil is concerned, the legal heirs of the deceased retail licence holder are entitled to seek transfer of licence in their names after the death of the licensee. It was found that marriage of a daughter who is otherwise a legal representative of a licence holder cannot be held to her disadvantage in the matter of seeking transfer of licence in her name on the death of the licence holder.

15. Merely because a daughter is looking after her parents is not a criteria for

grant of compassionate appointment. The object with which a married daughter has been excluded from the expression "Family" is based on an intelligible differentia and the dependency should be a yardstick for consideration of compassionate appointment and is commensurate with the sole object of grant of compassionate appointment. It is in these circumstances, the married daughter has not been included in the expression "Family" under Dying-in-Harness Rules, 1974.

16. However for transfer of retail licence, the criteria is "inheritance" whereas in the matter of grant of compassionate appointment, it is "dependency" and hence ratio of judgment of Bombay High Court(supra) applies in the facts and circumstances of that particular case and is not applicable in the facts of the present case.

17. So far as the judgments in R. Jayamma(supra) and Manjula (supra) are concerned, it is found that in both the cases, the Karnataka High Court found that the married daughter was financially dependent upon her parents for the reason that in R. Jayamma(supra) the husband of the petitioner (who was a married daughter) has become mentally deranged. In Manjula(supra) the petitioner has become widow after filing of the petition. In paragraph 10 of the judgment in Manjula(supra) it was observed that no married daughter can be denied of an entry into the service on compassionate employment just because she is married. There may be cases whether the married woman may be living with her parents notwithstanding her marriage for various reasons and there may be cases where married women would be dependent on their parents on account of their individual circumstances. Thus, the Court in those cases, may read down the rule of dependency in the facts and circumstances of the case and issue a direction to provide employment to dependent married daughters subject to satisfaction of their dependency in the given circumstances.

18. Thus, from the careful reading of these reports, it is found that the direction was given therein in the peculiar facts and circumstances of those cases and the Court was of the opinion that the dependent daughters cannot be excluded merely because of their marital status.

19. As has been discussed above, one dependent family member of the deceased employee is entitled for compassionate appointment. The petitioner has failed to establish that she was dependent upon the deceased employee, as admittedly her husband is alive and he is a hail and hearty person, it cannot be accepted that the petitioner was fully dependent upon the deceased employee at the time of his death.

20. In view of above discussion, the petitioner is not entitled for any relief in the present writ petition. The writ petition is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2014

BEFORE
THE HON'BLE ANJANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 53920 of 2014

Bhagwat Prasad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:

Sri D.P. Singh, Sri S.S. Shukla

Counsel for the Respondents:
C.S.C., Sri A.P. Paul, Sri B.B. Paul

U.P. Consolidation of Holdings Act-Section 42-A-correction of map after notification under section 52-whether after final publication of consolidation operation such application maintainable ?-held defence of Section 52(2) presumptions of pendency-not available-in view of Section 27 of Land Revenue Act-Correction application not maintainable-petition dismissed.

Held: Para-13
Upon consideration of the submissions made by learned counsel for the parties and the judgments cited by them, I am constrained to hold that the Division Bench judgment relied upon by learned counsel for the petitioner has no application in the facts and circumstances of the instant case. In the case cited, it appears that the final orders passed by the consolidation authorities had not been implemented. This is not the situation in the case at hand. Here the orders were duly implemented and the case of the petitioner is only that the incorporation was not correct and required correction. In view of sub section 3 of section 27, any incorrect incorporation has to be corrected under the provisions of the U.P. Land Revenue Act, if the consolidation operations have come to a close.

Case Law discussed:
1993 RD 457; 2003(94) RD 90; 1979 RD 76; 1981 RD 77; 1989 RD 201; 1995 RD 264.

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

1. Heard Sri D.P. Singh, learned Senior Advocate assisted by Sri S.S. Shukla for the petitioner and Sri A.P. Paul for the contesting respondents.

2. The petition has been filed challenging the orders passed by the Consolidation Officer and the Additional District Magistrate (Kanoon Vyavastha), Mathura.

3. It has been submitted by learned counsel for the petitioner that in proceedings for allotment of chaks, three chaks were allotted to the petitioner. A corresponding map was also prepared. In this final consolidation map, the area of the petitioner's chak was shown to be less than the actual area.

4. Aggrieved by such reduction in area of this chak in the final consolidation map, the petitioner filed an application for correction of the same under section 42A of the U.P. Consolidation of Holdings Act.

5. An objection was filed by the respondent no. 3 alleging therein that the application under section 42A was not maintainable and that an application under section 28 of the U.P. Land Revenue Act had already been filed by the petitioner for the same relief.

6. Thereafter, the report was called for and was submitted by the Assistant Consolidation Officer stating therein that the shape of Plot No. 1826 was liable to be corrected.

7. The Consolidation Officer rejected the application of the petitioner by his order dated 20.12.2013. The order of the Consolidation Officer has been affirmed in revision vide order dated 9.9.2014. Hence this writ petition

challenging the orders dated 20.12.2013 and 9.9.2014.

8. At the stage, it would be relevant to note that although the order dated 9.9.2014 passed by the Additional District Magistrate (Kanoon Vyavastha), Mathura is under challenge, the said authority has not been impleaded as a respondent in the writ petition.

9. The only issue for consideration in the writ petition is as to whether the application filed by the petitioner under section 42A for correction of the final consolidation map after issuance of notification under section 52(1) of the U.P. Consolidation of Holdings Act, was maintainable or not.

10. Learned counsel for the petitioner has submitted that such an application was maintainable and he has placed reliance on the decision reported in 1993 RD 457, Mukhtar Vs. DDC, Azamgarh and others, more specifically paragraphs 11 and 12 of the said judgment. This judgment, after noticing the scheme of the U.P. Consolidation of Holdings Act and the Rules framed thereunder has held that the duty of revising the revenue records is cast on the consolidation authorities and it is for such authorities to implement the orders passed under the Act. It has further been held that there is no requirement in this scheme of the Act for a party to apply for execution within a specified period of limitation, as is the position under the Civil Procedure Code. It has therefore been held that till the order passed by the consolidation authorities are not implemented, as contemplated under the Act and the Rules, the proceedings under the Act would deemed to be pending. On the aforesaid reasoning, it has been held that such proceedings would be deemed to be pending on the date of denotification of the village and, therefore, the orders passed during consolidation operations can be implemented in view of section 52 (2) of the Act.

11. Learned counsel for the respondents on the other hand has relied upon the judgement reported in 2003 (94) RD 90, Ghamari Vs. D.D.C. Ballia.

12. Apart from the judgments cited by the parties, there are several Division Bench decisions reported in 1979 RD 76, Ghafoor Vs. Addl. Commissioner Lucknow and others, 1981 RD 77, Ali Khan Vs. Ram Prasad and others, and decisions by the Single Judge reported in 1989 RD 201, Ram Niwas and others Vs. Consolidation Officer and others, 1995 RD 264, Nanhki Vs. Deputy Director of Consolidation and others, which hold that the provisions of section 42A of the U.P. Consolidation of Holdings Act cannot be invoked once the consolidation operations in the village have come to a close by a notification under section 52 (1) of the Act.

13. Upon consideration of the submissions made by learned counsel for the parties and the judgments cited by them, I am constrained to hold that the Division Bench judgment relied upon by learned counsel for the petitioner has no application in the facts and circumstances of the instant case. In the case cited, it appears that the final orders passed by the consolidation authorities had not been implemented. This is not the situation in the case at hand. Here the orders were duly implemented and the case of the petitioner is only that the incorporation was not correct and required correction.

In view of sub section 3 of section 27, any incorrect incorporation has to be corrected under the provisions of the U.P. Land Revenue Act, if the consolidation operations have come to a close.

14. Accordingly and for the reasons given above, I find no illegality in the impugned orders.

15. The writ petition is devoid of merits and is accordingly dismissed.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2014

BEFORE
THE HON'BLE ASHWANI KUMAR MISHRA, J.

Civil Misc. Writ Petition No. 60338 of 2014 alongwith W.P. NO. 60738 of 2014

A. Pavitra ...Petitioner
Versus
Union of India & Ors. ...Respondents

Counsel for the Petitioner:
Mrs. Swati Agarwal

Counsel for the Respondents:
A.S.G.I., Sri Pratik J. Nagar

Right to Information Act-2005-Section-21(h)-Public authority-whether the council for Indian School certificate examination is public authority to provide information under R.T.I?-held-'No'.

Held: Para-17 & 25

17. In view of the aforesaid observations, this Court finds that the Board is not covered within the definition clause 2(h), and consequently, it is not under any obligation to provide the information, as sought by the petitioners, under the RTI Act.

25. Thus, in view of the discussions aforesaid, I am of the considered opinion that the respondent Board is under no obligation to provide the answer scripts to the petitioners, in respect of the examination conducted by the Board, and the relief prayed for is not liable to be granted to them. Consequently, the writ petition fails and is dismissed.

Case Law discussed:
[(2011) 8 SCC 497]; [1989 (2) SCC 691]; [2002 5 SCC 111]; [2013 (136) FLR 86]; [2013 (1) SCC 745]; [(2012) 13 SCC 61]; [(1984) 4 SCC 27]; 2008 (72) AIC 555.

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

1. The question requiring consideration of this Court, in the present writ petition, is as to whether "The Council for Indian School Certificate Examinations", (hereinafter referred to as the 'Board') is a public authority, in terms of Section 2(h) of the Right to Information Act, 2005, (hereinafter referred to as the 'Act') ?, and whether it is obliged, in law, to provide the information sought by the students, who have appeared in the examination conducted by the Board ?

2. The petitioners are students, who are dissatisfied with the marks awarded to them by the Board, in the examinations conducted by the said Board. Applications were, accordingly, moved under the Right to Information Act with the prayer that petitioners be supplied copies of the answer scripts, which was not bestowed any consideration, and consequently, the present writ petition has been filed for a direction upon the Board, to provide the information sought under the RTI Act.

3. I have heard Mrs. Swati Agrawal and Sri Atul Kumar Tiwari, learned counsel for the petitioners; Sri J. Nagar, learned

Senior Counsel, assisted by Sri Pratik J. Nagar, learned counsel for the respondent nos.2 and 3, and have also gone through the materials brought on record.

4. Learned counsel for the Board, at the very outset, raised an objection that the Board is not a 'public authority', in view of Section 2(h) of the Act, and consequently, it is not required to provide the information sought by the petitioners, under the Act. Substantiating the objection, Sri Nagar submits that the Board is a society registered under the provisions of the Societies Registration Act, 1860, and is not receiving any financial grant or aid from the Central or the State Government. He further submits that Board is not a creation of any Act of Legislature, and therefore, necessary ingredients to hold the Board as a 'public authority', under Section 2(h) of the Act, are lacking, and consequently, the prayer made in the writ petition is not liable to be granted.

5. Petitioners have come up with three fold submissions to counter the objection of the Board. Firstly, it is contended that the Parliament has enacted the Delhi School Education Board Act, 1973, (hereinafter referred to as the 'Act of 1973'), which refers to the Board as one of the bodies recognized for holding public examination, and therefore, the Board is covered under Section 2(h) of the Act. Secondly, it is urged that the Board since is conducting public examination, therefore, it is enjoined to provide information sought by virtue of the orders passed by the Apex Court in Central Board of Secondary Education and Another Vs. Aditya Bandopadhyay and others [(2011) 8 SCC 497]. Lastly, it is contended that the Board, otherwise, consists of a body of men performing public duty, and therefore, in view of the law laid down by the Supreme Court in Anandi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors Vs. V.R. Rudani [1989 (2) SCC 691], as reiterated in Pradeep Biswas Vs. Institute of Chemical Biology [2002 5 SCC 111], and in Ramesh Ahluwalia Vs. State of Punjab & Ors. [2013 (136) FLR 86], the Board is an authority within the meaning of Article 226 of the Constitution of India, and therefore, the directions sought can be issued against it.

6. The claim of the petitioners, raised herein, is for a direction upon the respondent Board to provide answer scripts of the Board examination to the petitioners under the RTI Act. A direction, as prayed for by the petitioners, can be issued only if the Board qualifies to be a public authority, in terms of Section 2(h) of the Act. Section 2(h) of the Right to Information Act, 2005, is reproduced:-

*"2.(h) "public authority" means any authority or body or institution of self-government established or constituted,--*

*(a) by or under the Constitution;*

*(b) by any other law made by Parliament;*

*(c) by any other law made by State Legislature;*

*(d) by notification issued or order made by the appropriate Government, and includes any--*

*(i) body owned, controlled or substantially financed;*

*ii) non-Government Organisation substantially financed, directly or indirectly by funds provided by the appropriate Government;"*

7. The purpose of the Act of 2005 was the subject matter of consideration by the Apex Court in Namit Sharma Vs. Union of India [2013 (1) SCC 745], wherein in Para 29, Apex Court was pleased to observe as under:-

*"29. In terms of the Statement of Objects and Reasons of the Act of 2002, it was stated that this law was enacted in order to make the Government more transparent and accountable to the public. It was felt that in the present democratic framework, free flow of information for citizens and non-government institutions suffers from several bottlenecks including the existing legal framework, lack of infrastructure at the grass-root level and an attitude of secrecy within the civil services as a result of the old framework of rules. The Act was to deal with all such aspects. The purpose and object was to make the Government more transparent and accountable to the public and to provide,*

*"freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto"."*

*(emphasis supplied)*

8. Scheme of the Act, as well as the definition of 'public authority' was again examined by the Apex Court in Bihar Public Service Commission Vs. Saiyed Hussain Abbas Rizwi and another [(2012) 13 SCC 61]. Paras 12 to 15 of the judgment are relevant and, thus, are reproduced:-

*"12. Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the Act, and secondly, the constitutional limitations emerging from Article 21 of the Constitution. Thus, wherever in response to an application for disclosure of information, the public authority takes shelter under the provisions relating to exemption, non-applicability or infringement of Article 21 of the Constitution, the State Information Commission has to apply its mind and form an opinion objectively if the exemption claimed for was sustainable on facts of the case.*

*13. Now, we have to examine whether the Commission is a public authority within the meaning of the Act. The expression "public authority" has been given an exhaustive definition under Section 2(h) of the Act as the legislature has used the word "means" which is an expression of wide connotation. Thus, "public authority" is defined as any authority or body or institution of the Government, established or constituted by the Government which falls in any of the stated categories under Section 2(h) of the Act. In terms of Section 2(h)(a), a body or an institution which is established or constituted by or under the Constitution would be a public authority. Public Service Commission is established under Article 315 of the Constitution of India and as such there cannot be any escape from the conclusion that the Commission shall be a public authority within the scope of this section.*

*14. Section 2(f) again is exhaustive in nature. The legislature has given meaning to the expression "information" and has stated that it shall mean any material in any form including papers, samples, data material held in electronic form, etc. Right to information under Section 2(j) means the "right to information" accessible under this Act which is held by or under the control of any public authority and includes the right to inspection of work, documents, records, taking notes, extracts, taking certified sample of materials, obtaining information in the form of diskettes, floppies and video cassettes, etc. The right sought to be exercised and information asked for should fall within the scope of "information" and "right to information" as defined under the Act.*

*15. Thus, what has to be seen is whether the information sought for in exercise of the right to information is one that is permissible within the framework of law as prescribed under the Act. If the information called for falls in any of the categories specified under Section 8 or relates to the organisations to which the Act itself does not apply in terms of Section 24 of the Act, the public authority can take such stand before the Commission and decline to furnish such information. Another aspect of exercise of this right is that where the information asked for relates to third-party information, the Commission is required to follow the procedure prescribed under Section 11 of the Act."*

9. A public authority has been defined in the Act to mean any authority or body or institution of self-government, established or constituted,- (i) by or under the constitution; (ii) by any other law made by Parliament; (iii) by any other law made by State Legislature; (iv) by notification issued or order made by appropriate Government, and includes a body owned, controlled or substantially financed and also a non-government organization, substantially financed, directly or indirectly by the funds provided by the appropriate Government.

10. This Court, thus, is required to determine as to whether the Board is covered under the definition of 'public authority', aforesaid. From the materials brought on record before this Court, it is apparent that the respondent Board does not fall in any of the first three contingencies, inasmuch as it has not been established or constituted by or under the constitution, by any other law made by Parliament, or by any other law made by State Legislature. There is further no notification or order of the appropriate Government, brought on record before this Court, bringing the Board under the Right to Information Act. The respondent Board has categorically stated that it receives no financial support, directly or indirectly, by Central or the State Government, and therefore, it is not financed by the appropriate Government, which fact has not been effectively denied. It is undisputed that the respondent Board is a society registered under the provisions of the Societies Registration Act, 1860, and its bye-laws provides that it functions as an independent, autonomous, juristic person.

11. The name of the society has been specified in Clause 1 of the Memorandum and Articles of Association of the Board, which reads as under:-

*"1. The name of the Society is: COUNCIL FOR THE INDIAN SCHOOL CERTIFICATE EXAMINATIONS (hereinafter called the "Society")."*

12. The society has its registered office at Pragati House, 3rd Floor, 47-48 Nehru Place, New Delhi-110019. The members of the society have also been specified in Clause 5 of the Memorandum and Articles of Association of the Board, which reads as under:-

*"5. (i) The members of the Society shall be as follows:-*

*(a) The Chairman who shall be appointed by the Society.*

*(b) Two members nominated by the Government or two Assessors (observers) of the Government of India, whichever is preferred by that Government.*

*(c) The Director of Education/Public Instruction (or his deputy) of the States in which there are schools affiliated for the examinations conducted by the Society.*

*(d) One representative of the Association of Indian Universities.*

*(e) Not more than six persons to be co-opted by the Executive Committee of the Council.*

*(f) Two representatives of the Inter-State Board for Anglo-Indian Education.*

*(g) Fourteen Principals of affiliated schools who shall be selected as follows:-*

*(i)Six, of whom two shall be ladies, elected by the Association of Heads of Anglo-Indian Schools in India.*

*(ii)Two, elected by the Indian Public Schools' Conference.*

*(iii)Six, elected by the Association of Schools for the Indian School Certificate Examination.*

*Provided that the maximum number of representatives of any one of the three organisations mentioned in (g) (i), (ii) and (iii) above shall not exceed six:*

*Provided further that if one or more of the categories mentioned in (i) (b) to (g) above are not represented on the Council this shall not prevent the Council from functioning.*

*5. (ii) The term of office of members specified under Clauses 5(i) (a), (d), (e), (f) and (g) sub clause (i) (ii) and (iii) shall be for three years:*

*Provided that when a member is appointed in place of another before expiry of the term of membership of the latter he shall hold office for the residue of the term of the original member,*

*Provided further that members whose term has expired shall be eligible for re-nomination/re-cooption.*

*5. (iii) A member shall cease to be a member of the Society:*

*(a) on his resignation to be signified in writing to the Secretary;*

*(b) on the passing of a resolution by the majority of the members of the Society at a General meeting present in person or by proxy, that he should cease to be a member;*

*(c) on a notification from the Government/organisation which has nominated/elected the member that the member has ceased to represent that Government/organisation.*

*(iv) Disqualified members shall not be entitled to vote.*

*(v) Persons, institutions and organisations in known sympathy with the objects of the Society may be admitted as Associate members with the approval of the Society on such terms as the Society may determine. As Associate members they shall have no right to vote at a General Body Meeting."*

13. Sri Nagar submits that only two observers have been appointed by the Government of India. Director of Education (or his deputy), of the States, in which there are schools affiliated, for the examinations conducted by the society, is merely a member. The association of governmental authorities does not change the nature of society itself, which remains a private juristic person. The society functions independently in accordance with its bye-laws. The nature of the Board, which is a society, therefore, does not change on account of the aforesaid constitution, and such association would not bring the Board within the definition of Clause 2(h), if it otherwise is not covered.

14. Learned counsel for the petitioners contend that Board qualifies to be a 'public authority, as it finds specific mention in the Delhi School Education Board Act, 1973, enacted by the Parliament. The definition of Clause 2(s) of the Act of 1973, defines public examination in the following words:-

"2.(s) "public examination" means an examination conducted by the Central Board of Secondary Education, Council for Indian School Certificate Examinations or any other Board which may hereafter be established for the purpose, and recognised by the

Administrator or any other officer authorised by him in this behalf;"

15. Apart from the definition clause, attention of the Court has not been invited to any other provision of the Act of 1973, which may support the petitioners' contention. The fact that the examination conducted by the Board is recognized as a public examination, would not be a determining factor. Mere recognition of the examination conducted by the Board, as a public examination, would not mean that Board becomes a 'public authority' within the meaning of Section 2(h) of the Act. It is just that the examination conducted by the Board is recognized by the Act of 1973, and nothing further can be added to it. Therefore, this Court is of the opinion that definition contained in Clause 2(g) of the Act of 1973, would not bring the 'Board' within the definition of Clause 2(h) of the Act.

16. The constitution of the Board has also been specified in the bye-laws, which have been brought on record. Sri Nagar has also placed reliance upon a Division Bench judgment of the Delhi High Court in LPA No. 617 of 2011, dated 24th July, 2012. Paras 2 and 3 of the said judgment is reproduced:-

*"2. Upon going through the impugned decision we find that the learned Single Judge has been persuaded to hold that the Council was a public authority merely on the basis of the constitution of the membership of the Council. It is an admitted position that the Council is a registered society under the Societies Registration Act, 1860. There is also a letter on record issued on 24.03.2006 by the Ministry of Human Resource Development L.P.A. 617/2011 Page 2 of 4 which indicates clearly that the Council is not owned or controlled by the Ministry of Human Resource Development. Therefore, according to the learned counsel for the petitioner since the Council is neither owned nor it is substantially financed and, because of the clear statement made in the said communication dated 24.03.2006, nor is it controlled by Central Government, the question of the Council being regarded as public authority does not arise at all.*

*3. There is yet another aspect of the matter. The definition clause contained in Section 2 (h) of the said Act has reference to 'appropriate government'. Appropriate Government could either mean the Central Government or the State Government. Clearly the Central Government has indicated that it does not control the Council. Insofar as State Governments are concerned, only one person, namely, the Director of Education of that particular State would be a Member of the Society. Therefore, no particular State would have control over the Council. Consequently, there is prima facie some merit in what the learned counsel for the petitioner has contended with regard to the Council not falling within the definition of public authority under Section 2 (h) of the said Act. "*

Although, the Division Bench judgment of the Delhi High Court does not answer the question as to whether the Board is a 'public authority' or not, under the Act of 2005, yet the facts throw light upon the nature of the constitution of the Society itself. In view of the discussions made above, I am of the considered opinion that the Board does not qualify to be a 'public authority', in view of Section 2(h) of the Act, on account of its recognition under Section 2 (g) of the Delhi School Education Board Act, 1973,

or on account of the nature of constitution of the Board itself.

17. In view of the aforesaid observations, this Court finds that the Board is not covered within the definition clause 2(h), and consequently, it is not under any obligation to provide the information, as sought by the petitioners, under the RTI Act.

18. Coming to the second limb of petitioners' submission that they are entitled to the relief prayed for, on account of the judgment in Central Board of Secondary Education and Another (supra), it is to be seen that the Apex Court had the occasion to examine the right of a student to obtain information/answer scripts, under the act, in the context of public examination conducted by the Central Board of Secondary Education, New Delhi. The Apex Court considered the definition of "information" in Section 2(f) of the RTI Act. The question raised therein was regarding the scope of Section 8 of the Act and protection claimed by the CBSE thereunder. Having considered the said aspect, Apex Court held as under in Paras 26 and 27 of the said judgment:-

*" 26. The examining bodies (universities, Examination Boards, CBSE, etc.) are neither intelligence nor security organisations and therefore the exemption under Section 24 will not apply to them. The disclosure of information with reference to answer books does not also involve infringement of any copyright and therefore Section 9 will not apply. Resultantly, unless the examining bodies are able to demonstrate that the evaluated answer books fall under any of the categories of exempted "information" enumerated in clauses (a) to (j) of sub-section (1) of Section 8, they will be bound to provide access to the information and any applicant can either inspect the document/record, take notes, extracts or obtain certified copies thereof.*

*27. The examining bodies contend that the evaluated answer books are exempted from disclosure under Section 8(1)(e) of the RTI Act, as they are "information" held in its fiduciary relationship. They fairly conceded that evaluated answer books will not fall under any other exemptions in sub-section (1) of Section 8. Every examinee will have the right to access his evaluated answer books, by either inspecting them or take certified copies thereof, unless the evaluated answer books are found to be exempted under Section 8(1)(e) of the RTI Act."*

*(emphasis supplied)*

19. Hon'ble Apex Court also held that the examining bodies do not hold the evaluated answer books in a fiduciary relationship, and therefore, the exemption claimed under Section 8(1)(e) of the Act is not available to the examining body, with reference to the evaluated answer books. Apex Court, however, held that the disclosure with regard to details of the examiner etc. is exempted from the disclosure under Section 8(1)(g) of the Act. Paras 52 to 55 of the judgment in Central Board of Secondary Education and Another (supra) are reproduced:-

*" 52. When an examining body engages the services of an examiner to evaluate the answer books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that*

*his name and particulars would not be disclosed to the candidates whose answer books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator and head examiner who deal with the answer book.*

*53. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore exempted from disclosure under Section 8(1)(g) of the RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer book which does not contain any information or signature of the examiners/co-ordinators/ scrutinisers/head examiners, exempted from disclosure under Section 8(1)(g) of the RTI Act. Those portions of the answer books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer books, under Section 10 of the RTI Act.*

*54. The right to access information does not extend beyond the period during which the examining body is expected to retain the answer books. In the case of CBSE, the answer books are required to be maintained for a period of three months and thereafter they are liable to be disposed of/destroyed. Some other examining bodies are required to keep the answer books for a period of six months. The fact that right to information is available in regard to answer books does not mean that answer books will have to be maintained for any longer period than required under the rules and regulations of the public authority. The obligation under the RTI Act is to make available or give access to existing information or information which is expected to be preserved or maintained.*

*55. If the rules and regulations governing the functioning of the respective public authority require preservation of the information for only a limited period, the applicant for information will be entitled to such information only if he seeks the information when it is available with the public authority. For example, with reference to answer books, if an examinee makes an application to CBSE for inspection or grant of certified copies beyond three months (or six months or such other period prescribed for preservation of the records in regard to other examining bodies) from the date of declaration of results, the application could be rejected on the ground that such information is not available. The power of the Information Commission under Section 19(8) of the RTI Act to require a*

*public authority to take any such steps as may be necessary to secure compliance with the provision of the Act, does not include a power to direct the public authority to preserve the information, for any period larger than what is provided under the rules and regulations of the public authority."*

*(emphasis supplied)*

20. In the judgment aforesaid of the Apex Court, the constitution of CBSE Board as being covered by under Section 2(h) of the Act was not in issue. Since CBSE Board functions under the control of the Ministry of Human Resource Development, therefore, on account of its constitution and functioning, it undisputedly was covered by the definition of 'public authority', under Section 2(h), and no occasion arose to consider as to whether the RTI Act itself is applicable upon the CBSE Board or not ? However, a word of caution was mentioned in Para 68 of the aforesaid judgment of the Apex Court to the following effect:-

*"68. In view of the foregoing, the order of the High Court directing the examining bodies to permit examinees to have inspection of their answer books is affirmed, subject to the clarifications regarding the scope of the RTI Act and the safeguards and conditions subject to which "information" should be furnished. The appeals are disposed of accordingly."*

*(emphasis supplied)*

21. Therefore, the question involved in the present case as to whether the Board herein is a public authority, under Section 2(h) of the Act, did not arise for consideration in the aforesaid judgment of the Apex Court and the petitioners, consequently, cannot derive any strength from the observations made therein.

22. Coming to the last submission of the petitioners that the Board is a body of men performing public duty, would be relevant, only when it is to be examined as to whether the Board is an authority, and is amenable to exercise of writ jurisdiction, under Article 226 of the Constitution of India. The considerations for an authority to be included in the definition of 'other authority', for the purposes of invoking jurisdiction under Article 226 of the Constitution of India, is entirely distinct, and has no relevance for the question, which has come up for consideration in the instant case. The petitioners herein are seeking relief under the Act, and therefore, what is relevant to be determined is as to whether the Board is included within the definition of the 'public authority' or not. Therefore, this Court is not required to answer the question as to whether the Board would qualify to be an authority within the meaning of Article 12 of the Constitution of India or to examine as to whether it is a body of men performing public duty, so as to make it subservient to the exercise of jurisdiction under Article 226 of the Constitution of India.

23. Even if the Board is amenable to exercise of writ jurisdiction under Article 226 of the Constitution of India, even then, a direction to produce the answer books or to re-evaluate it, cannot be issued, in view of law settled by the Apex Court in Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupesh Kumar Sheth etc. [(1984) 4 SCC 27]. There is no provision or rules and regulations of the Board, which permits the petitioners to

secure the information from it, and therefore, in absence of the applicability of the RTI Act, the judgment aforesaid of the Apex Court would be attracted. The said decision was extensively referred to by the Apex Court in Central Board of Secondary Education and Another Vs. Aditya Bandopadhyay and others (supra) in Paras 28 to 34, which is reproduced:-

*"28. In Maharashtra State Board1, this Court was considering whether denial of re-evaluation of answer books or denial of disclosure by way of inspection of answer books, to an examinee, under Rules 104(1) and (3) of the Maharashtra Secondary and Higher Secondary Board Rules, 1977 was violative of the principles of natural justice and violative of Articles 14 and 19 of the Constitution of India. Rule 104(1) provided that no re-evaluation of the answer books shall be done and on an application of any candidate verification will be restricted to checking whether all the answers have been examined and that there is no mistake in the totalling of marks for each question in that subject and transferring marks correctly on the first cover page of the answer book. Rule 104(3) provided that no candidate shall claim or be entitled to re-evaluation of his answer books or inspection of answer books as they were treated as confidential.*

*29. This Court while upholding the validity of Rule 104(3) held as under: (Maharashtra State Board case1, SCC pp. 38-39 & 42, paras 12, 14, 16 & 15)*

*"12. ... the "process of evaluation of answer papers or of subsequent verification of marks' under clause (3) of Regulation 104 does not attract the principles of natural justice since no decision-making process which brings about adverse civil consequences to the examinees is involved. The principles of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation made by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners. ...*

** * **

*14. ... So long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it, in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations....*

** * **

*16. ... The legislature and its delegate are the sole repositories of the power to decide what policy should be pursued in relation to matters covered by the Act and there is no scope for interference by the court unless the particular provision impugned before it can be said to suffer from any legal infirmity, in the sense of its being wholly beyond the scope of the regulation-making power or its being inconsistent with any of the provisions of the parent enactment or in violation of any of the limitations imposed by the Constitution."*

** * **

*"15. ... it was perfectly within the competence of the Board, rather it was its plain duty, to apply its mind and decide as a matter of policy relating to the conduct of the examination as to whether disclosure and inspection of the answer books should be allowed to the*

*candidates, whether and to what extent verification of the result should be permitted after the results have already been announced and whether any right to claim revaluation of the answer books should be recognised or provided for. All these are undoubtedly matters which have an intimate nexus with the objects and purposes of the enactment and are, therefore, within the ambit of the general power to make regulations...." (Maharashtra State Board case1, SCC p. 41, para 15)*

*30. This Court in Maharashtra State Board1 held that Regulation 104(3) cannot be held to be unreasonable merely because in certain stray instances, errors or irregularities had gone unnoticed even after verification of the answer books concerned according to the existing procedure and it was only after further scrutiny made either on orders of the court or in the wake of contentions raised in the petitions filed before a court, that such errors or irregularities were ultimately discovered. This Court reiterated the view that "the test of reasonableness is not applied in vacuum but in the context of life's realities" and concluded that realistically and practically, providing all the candidates inspection of their answer books or re-evaluation of the answer books in the presence of the candidates would not be feasible.*

*31. Dealing with the contention that every student is entitled to fair play in examination and receive marks matching his performance, this Court held: (Maharashtra State Board case1, SCC p. 31)*

*"What constitutes fair play depends upon the facts and circumstances relating to each particular given situation. If it is found that every possible precaution has been taken and all necessary safeguards provided to ensure that the answer books inclusive of supplements are kept in safe custody so as to eliminate the danger of their being tampered with, [and] that the evaluation is done by the examiners applying uniform standards with checks and cross-checks at different stages and that measures for detection of malpractice, etc. have also been effectively adopted, in such cases it will not be correct on the part of the courts to strike down the provision prohibiting revaluation on the ground that it violates the rules of fair play. It appears that the procedure evolved by the Board for ensuring fairness and accuracy in evaluation of the answer books has made the system as foolproof as can be possible and is entirely satisfactory. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in the regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when [we find that] all safeguards against errors and malpractices have been provided for, there cannot be [said to be] any denial of fair play to the examinees by reason of the prohibition against asking for revaluation."*

*32. This Court in Maharashtra State Board1 concluded that if inspection and verification in the presence of the candidates, or revaluation, have to be allowed as of right, it may lead to gross and indefinite uncertainty, particularly in regard to the relative ranking, etc. of the candidate, besides leading to utter confusion on account of the enormity of the labour and time involved in the process. This Court concluded: (Maharashtra State Board case1, SCC pp. 56-57, para 29)*

*"29. ... the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those*

*formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass-root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded."*

*33. The above principles laid down in Maharashtra State Board1 have been followed and reiterated in several decisions of this Court, some of which are referred to in para 9 above. But the principles laid down in the decisions such as Maharashtra State Board1 depend upon the provisions of the rules and regulations of the examining body. If the rules and regulations of the examining body provide for re-evaluation, inspection or disclosure of the answer books, then none of the principles in Maharashtra State Board1 or other decisions following it, will apply or be relevant. There has been a gradual change in trend with several examining bodies permitting inspection and disclosure of the answer books.*

*34. It is thus now well settled that a provision barring inspection or disclosure of the answer books or re-evaluation of the answer books and restricting the remedy of the candidates only to re-totalling is valid and binding on the examinee. In the case of CBSE, the provisions barring re-evaluation and inspection contained in Bye-law 61, are akin to Rule 104 considered in Maharashtra State Board1. As a consequence if an examination is governed only by the rules and regulations of the examining body which bar inspection, disclosure or re-evaluation, the examinee will be entitled only for re-totalling by checking whether all the answers have been evaluated and further checking whether there is no mistake in the totalling of marks for each question and marks have been transferred correctly to the title (abstract) page. The position may however be different, if there is a superior statutory right entitling the examinee, as a citizen to seek access to the answer books, as information."*

(emphasis supplied)

24. Learned counsel for the respondent has also placed reliance upon a judgment of the Division Bench of this Court reported in 2008(72) AIC 555 (Committee of Management, Ismail Girls National Inter College, Meerut through its Manager Vs. State of U.P. And others), which dealt with the definition of public authority in the context of institution receiving aid from the State, and therefore, the institution was held to be a public authority. In the facts of the present case, since the institution is not receiving aid from the Government, therefore, the judgment relied upon will have no applicability.

25. Thus, in view of the discussions aforesaid, I am of the considered opinion that the respondent Board is under no obligation to provide the answer scripts to the petitioners, in respect of the examination conducted by the Board, and the relief prayed for is not liable to be granted to them. Consequently, the writ petition fails and is dismissed.

26. No order, however, is passed as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2014

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE VIVEK KUMAR BIRLA, J.

Civil Misc. Writ Petition No. 62582 of 2014

Tajpur Krishi Utpad Vipran Sahkari Samiti Ltd., Moradabad ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri H.R. Mishra, Sri Neeraj Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Art.-226-Writ Jurisdiction-alternative remedy-by composite order winding up of cooperative society as well as cancellation of registration passed-certainly against cancellation-no statutory appeal provided hence except writ petition-no other remedy-but cancellation of registration based upon winding up-subject to appeal under section 98 (1)(i) of the Act 1965-petitioner to file appeal- the same be decided within 3 months-the cancellation be subject to outcome of appeal-petition disposed of.

Held: Para-13
In our opinion, if the order is composite and since no statutory appeal is provided for against the order of cancellation of the registration of a society under Section 76 of Act, 1965, writ is a remedy available to the cooperative society. However, we are also conscious of the fact that cancellation of registration of a society is a consequential action taken with reference to the order made under Section 72 of Act, 1965. Unless an order of winding up of the cooperative society stands on record, there cannot be any order of cancellation of the registration of cooperative society. Therefore, the order of cancellation of registration of the cooperative society is squarely dependent upon the fate of the order made under Section 72 of Act, 1965. In both the circumstances, contemplated by Section 76 of Act, 1965. Having arrived at the said conclusion, we are of the considered opinion that the petitioner may be asked to file an appeal against the order impugned, as there are reasons and facts recorded for coming to the conclusion that the cooperative society was liable to be wound up. However, specific orders for winding up may not have been recorded and only the consequential order has been made.

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

1. Heard Sri H.R. Mishra, learned Senior Advocate assisted by Sri Neeraj Pandey, learned counsel for the petitioner and Sri Chandra Shekhar Singh, learned Additional Chief Standing Counsel for the State-respondents.

2. Petitioner-Tajpur Krishi Utpad Virpan Sahkari Samiti Ltd., Tajpur Mafi, Vikash Khand and District Moradabad (hereinafter referred to as the petitioner's society) has filed this writ petition against the order of the Deputy Registrar, Cooperative Societies, U.P. Moradabad Division, Moradabad dated 31st October, 2014, where-under the registration of the petitioner's society has been cancelled in exercise of powers under Section 76 of the U.P. Cooperative Societies Act, 1965 (hereinafter referred as the "Act, 1965"). The order is challenged on the ground that the same was not preceded by any order under Section 72/73 of Act, 1965 for winding up of the cooperative society and therefore, in view of the judgement of this Court in the case of Krishi Upaj Evam Vipdan Samiti Ltd. vs. State of U.P. & Another (Civil Misc. Writ C No. 59668 of 2012) decided on 7th November, 2013, no order under Section 76 of Act, 1965 should have been made.

3. Sri Chandra Shekhar Singh, learned Additional Chief Standing Counsel for the State-respondents submits that it is not necessary, than an order under Section 72 of Act, 1965 for winding up of the cooperative society, to proceed for cancellation of registration of the

society under Section 76 of Act, 1965. He explains that both the orders can be simultaneous and can be part of one common order. He further submits that against the order of winding up of the cooperative society made under Section 72, an appeal under Section 98 (1) (i) of Act, 1965 has been provided for. Therefore, this Court may insist upon the petitioner to avail the statutory alternative remedy in the facts of the case.

4. Sri H.R. Mishra, learned Senior Advocate on behalf of the petitioner submits that against the order of winding up of a society made in exercise of powers under Section 72 of Act, 1965, an appeal is provided for under Section 98 of Act, 1965 but no appeal is provided against the order of cancellation of the registration of a society under Section 76 of Act, 1965. He refers to Section 73 (3) Act, 1965 for the purpose that once an appeal is filed under Section 98 of Act, 1965, against an order of winding up made in exercise of powers under Section 72 of Act, 1965, further proceedings of winding up of a society are stayed automatically. He submits that in the facts of the case since there is no order in so many words directing winding up of the society under Section 72 of Act, 1965, and there are only passing references for the society being wound up, in the order of cancellation of registration of the society under Section 76 of Act, 1965, no alternative remedy is available to the petitioner in the facts of the case.

5. We have considered the submissions made by the learned counsel for the parties and have examined the records of the present writ petition.

6. It is settled law that right of an appeal is an statutory right and if the appeal against a particular order has not been provided for under the Statute, the High Court in exercise of powers under Article 226 of the Constitution of India cannot create a forum of appeal.

7. From reading of Section 76 of Act, 1965, it is apparent that it contemplates cancellation of registration of a cooperative society in two circumstances, (a) when an order of winding up has been made under Section 72 of Act, 1965, and the Deputy Registrar is of the opinion that it is not necessary to appoint a liquidator, (b) when the affairs of cooperative society in respect of which the liquidator has been appointed under Section 73 have been wound up, the Deputy Registrar may direct cancellation of the registration of the society.

8. For ready reference Section 76 of Act, 1965 is being quoted herein below:

*"76. Cancellation of registration of a co-operative society.- Where in respect of a co-operative society which has been ordered to be wound up under Section 72, the Registrar is of opinion that it is not necessary to appoint a liquidator, or where the affairs of a co-operative society in respect of which a liquidator has been appointed under Section 73, have been wound up, the Registrar shall make an order cancelling the registration of the society and the society shall be deemed to be dissolved and shall cease to exist as a corporate body from the date of such order of cancellation."*

9. From simple reading of aforesaid provision, it is apparent that Registrar can direct cancellation of registration of a society while making an order under Section 72 of Act, 1965 for winding up of the society after being satisfied that no liquidator is to be appointed in the facts of

the case. In other case where winding up order has been made and liquidator has been appointed, such cancellation of the registration can be directed after the winding up proceedings are over.

10. Appeal against the order of registration is provided under Section 98 of Act, 1965. Section 98 (1) (i) of Act, 1965 reads as follows:

*"98. Appeal against the awards, orders and decisions.---(1) An appeal against---------*

*.....*

*(i)an order made by the Registrar under Section 72 directing the winding up of a co-operative society ; ....."*

11. From simple reading of Section 98 (1) (i) of Act, 1965, an appeal has been provided for against the order made under Section 72 of Act, 1965 i.e. winding up of a cooperative society only. No appeal has been provided against an order of cancellation of the registration of the cooperative society. An order under Section 72 of Act, 1965 and an order under Section 76 lead to difference consequences and in the case of cancellation of registration of the society, the cooperative society ceases to exist in the eyes of law.

12. It is no doubt true that from reading of Section 76 of 1965, it can be said that an order under Sections 72 and 76 of Act, 1965 for winding up and for cancellation of the registration of a society under Section 76 of Act, 1965 can be made simultaneously in a given set of facts but the moot question is as to what happens to right of appeal and what happens to the statutory provisions contained under Section 73 (3) of Act, 1965 in such a situation. Section 73 (3) of Act, 1965 reads as follows:

*"73. Liquidator. ---(1) .....*

*(3) Where an appeal is preferred under Section 98 against an order of winding up of a co-operative society passed under Section 72, the further winding up proceedings shall be stayed by the liquidator until the order is confirmed in appeal. :*

*Provided that the liquidator shall continue to have custody or control of the property, effects and actionable claims mentioned in sub-section (2) and have authority to take the steps referred to in that sub-section."*

13. In our opinion, if the order is composite and since no statutory appeal is provided for against the order of cancellation of the registration of a society under Section 76 of Act, 1965, writ is a remedy available to the cooperative society. However, we are also conscious of the fact that cancellation of registration of a society is a consequential action taken with reference to the order made under Section 72 of Act, 1965. Unless an order of winding up of the cooperative society stands on record, there cannot be any order of cancellation of the registration of cooperative society. Therefore, the order of cancellation of registration of the cooperative society is squarely dependent upon the fate of the order made under Section 72 of Act, 1965. In both the circumstances, contemplated by Section 76 of Act, 1965. Having arrived at the said conclusion, we are of the considered opinion that the petitioner may be asked to file an appeal against the order impugned, as there are reasons and facts recorded for coming to the conclusion that the cooperative society was liable to be wound up. However, specific orders for winding up may not have been recorded and only the consequential order has been made.

14. Sri C.S. Singh, learned Additional Chief Standing Counsel has

admitted that if the winding up order is set aside in an appeal, order of cancellation of the registration of the cooperative society would fall automatically and in that circumstance, registration of cooperative society shall stands restored.

15. For the aforesaid reasons, we feel that interest of substantial justice would be served in the facts of the case by providing that the petitioner may file an appeal under Section 98 (1) (i) of Act, 1965 against the order impugned in the present writ petition, insofar as it directs winding up of the cooperative society within four weeks from today, along with a certified copy of this order.

16. The Tribunal under the Act, 1965 may consider and decide the appeal filed by the petitioner within eight weeks from the date the appeal is so filed after affording opportunity of hearing to the parties concerned. Fate of the order of cancellation of the registration of petitioner's society shall be dependent upon the orders to be passed on the appeal. If the appeal is allowed, the order of the cancellation of registration of the society shall fall automatically. It is ordered accordingly.

17. With the aforesaid directions/observations, the present writ petition is disposed of.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.12.2014

BEFORE
THE HON'BLE SURYA PRAKASH KESARWANI, J.

Civil Misc. Writ Petition No. 63170 of 2014

Smt. Isharat & Anr. ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioners:
Sri M.P. Tiwari

Counsel for the Respondents:
C.S.C., Sri S.K. Pundir

Constitution of India, Art.-226-Protection of persons and property-marriage took place in accordance with Muslim rites on impleadment application of legally wedded wife having pries issued under bed lock of petitioner no. 2-the petitioner being minor girl, in presence of parents of both petitioners-marriage not proved-petitioner guilty of fraud-with forged ID-source of income only agricultural land also found false-as per provision of Ayat 3 of Sura 4 of Holy Quran-bigamy not sanctified unless can do justice with orphans-second marriage can not be performed-religious mandate-binding upon all Muslims men-petition dismissed with cost of Rs. 50,000/- payable to respondent-5.

Held: Para-11 & 19

11. Thus, it is apparent on record that the present writ petition supported by an affidavit of petitioner no. 2 has been filed concealing material facts of the case and making false averments. Fake papers have also been filed along with the writ petitions. Thus, the petitioners have approached this Court with unclean hands, unclean mind and unclean heart. They deserve no sympathy or leniency.

19. In view of mandate in the Holy Quran it is amply clear that bigamy is not sanctified unless a man can do justice to orphans, who in the present set of facts are the respondent nos. 5 to 8. As per mandate of the Holy Quran as noted above all Muslims men have to deal justly with the orphans. A married Muslim man having his wife alive cannot marry with another muslim women, if he cannot deal justly with the orphan. A mandate has been given that in such circumstances a Muslim man has to prevent himself to perform second marriage, if he is not capable of fostering his wife and

children. The religious mandate of Sura 4 Ayat 3 is binding on all muslim men which specifically mandates all Mulim men to deal justly with orphans and then they can marry women of their choice two or three or four but if a Muslim man fears he will not be able to deal justly with them then only one. If a muslim man is not capable of fostering his wife and children then as per above mandate of Holy Quran, he cannot marry the other woman.

Case Law discussed:
JT 2000 (3) SC 151; 2004 (6) SCC 325; 2003 (8) SCC 319; AIR 1994 SC 853; 2012 (8) SCC 748; 2010 (69) ACC 997.

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

Heard Sri M.P. Tiwari, learned counsel for the petitioners, Sri S.S. Srinet, learned Standing Counsel for the respondent nos. 1, 2 and 3 and Sri S.K. Pundir, learned counsel for the respondent nos. 5,6,7 and 8.

2. It is stated in paragraph no. 3 and 4 that both the petitioners are major. It is stated in paragraph 6 that petitioners have solemnized their marriage on 2nd October, 2014 as per Muslim rites and customs. In support a copy of alleged "Nikahnama' dated 2nd October, 2014 has been filed.

3. An application for impleadment has been filed by the respondent nos. 5 to 8, which has been allowed today.

4. In paragraph 2 of the affidavit to the impleadment application it is stated that the respondent no. 5 was married with the petitioner no. 2 on 9th October, 2003 and out of their wedlock there are two sons and one daughter namely respondent no. 6 to 8, who all are minor. It is also stated that the respondent no. 5 is pregnant. A copy of the said "Nikahnama' dated 9th October, 2003 has been filed as annexure no. 1 of the affidavit. It is stated in paragraph no. 3 of the affidavit that the petitioner no. 1 is a minor girl. It is stated in paragraph no. 4 of the affidavit that the alleged "Nikahnama' dated 2nd October, 2014 of the petitioner is a manufactured one and no marriage was solemnized. In support, an affidavit of the alleged signatory (Vakeel) of the alleged "Nikahnama' dated 2nd October, 2014 has been filed as annexure no. 2. It is stated in paragraph no. 7 that the petitioner no. 2 has filed a fake Voter I.D. Card bearing No. HTB 2085504. From internet enquiry the said voter ID card has been found to be issued in the name of one Sri Pahal Singh, S/O Karam Singh, R/o Village Bandukhedi, Pargana & Tehsil Nakur, District-Saharanpur. In support, copy of the internet enquiry report of the aforesaid Voter I.D. card has been filed as annexure -3 to the affidavit. A copy of family register and some photographs have also been filed along with the affidavit to demonstrate that the respondent no. 5 is a legally wedded wife of the petitioner no. 2 and she still continues to be his wife.

5. Respondent no 5. along with her children i.e. respondent nos. 6, 7 and 8 and Sri Riaz Ahmad, who is father-in-law of respondent no. 5 and father of the petitioner no. 2 are present. Sri Riaz Ahmad, father of the petitioner no. 2 states that respondent no. 5 is legally wedded wife of petitioner no. 2 and she has three minor children and she has pregnancy of about 8 months. He states that by no means he can justify the action of petitioner no. 2, who allegedly solemnized "Nikah' with a minor girl i.e. petitioner no. 1. He states that as per Holy " Quran' he cannot perform second marriage with the petitioner no. 1 which would result in injustice to his first wife and three minor children. Sri Riaz Ahmad states that he owns about 5-6 bighahas agricultural land which is the only

source of livelihood of the family which consist of him, his wife and respondent nos. 5 to 8. He states that he and his wife shall take full care of respondent nos. 5 to 8. He states that he has serious threat to his life and property from the family of petitioner no. 1 and as such in case of any inconvenience the police of the concerned police station may be directed to give protection.

6. Learned counsel for the petitioners does not dispute the facts stated in the impleadment application of respondent nos. 5 to 8 and also the facts stated by the father of the petitioner no. 2 before this Court, as briefly noted above.

7. Learned counsel for the respondent nos. 5 to 8 submits that the writ petition has been filed concealing material facts of the case, making false averments and annexing fake papers and as such the writ petition deserves to be dismissed with heavy cost, which may be paid by the petitioner no. 2 to the respondent no. 5.

8. Learned Standing Counsel submits that it is wholly undisputed that the writ petition has been filed concealing material facts and making false averments and as such it deserves to be dismissed with cost.

9. I have carefully considered the submissions of counsel for the parties.

10. It is not disputed that this writ petition has been filed by the petitioner no. 2 concealing material facts of the case namely ; that the petitioner no. 2 is already married with the respondent no. 5 and respondent nos. 6, 7 and 8 are their sons and daughter. It has also been concealed by the petitioner no. 2 that the respondent no. 5 is his legally wedded wife and she has pregnancy of about 8 months. A false averment has been made by the petitioner no. 2 in paragraph no. 7 that his father has 20 bighas of land in which he is working as farmer and earns about 2 lakhs in a year. Father of the petitioner no. 2 has stated before this Court that he owns merely 5-6 bighas agricultural land, which is the only source of livelihood for himself, his wife and also for respondent nos. 5 to 8. A copy of fake Voter I.D. has been filed by the petitioner no. 2 along with writ petition. The alleged "Nikahnama' of the petitioners filed by the petitioner no.2 as annexure no. 3 to the writ petition also appears to be not genuine in view of the notary affidavit of Sri Mohamad Kazim, S/o Sri Kasmi, R/o Dhobi Vala , District- Saharanpur filed along with affidavit to the impleadment application in which he denied the 'Nikah' of the petitioners and stated to be forged. The facts so stated are not disputed by the petitioners.

11. Thus, it is apparent on record that the present writ petition supported by an affidavit of petitioner no. 2 has been filed concealing material facts of the case and making false averments. Fake papers have also been filed along with the writ petitions. Thus, the petitioners have approached this Court with unclean hands, unclean mind and unclean heart. They deserve no sympathy or leniency.

12. In the case of United India Insurance Company Ltd. Vs. B. Rajendra Singh and others, JT 2000 (3) SC 151, considering the fact of fraud, Hon'ble Supreme Court held in paragraph 3 as under:

*"Fraud and justice never dwell together." (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper overall these centuries. Lord Denning observed in a language without equivocation that" no*

*judgement of a Court, no order of a Minister can be allowed to stand if it has been obrtained by fraud, for fraud unravels everythin " (Lazarus Estate Ltd. V. Beasley 1956 (1) QB 702).*

13. In the case of Vice Chairman, Kendriya Vidyalaya Sangathan and Another Vs. Girdhari Lal Yadav, 2004 (6) SCC 325, Hon'ble Supreme Court considered the applicability of principles of natural justice in cases involving fraud and held in paragraph 12 as under :

*"12. Furthermore, the respondent herein has been found guilty of an act of fraud. In opinion, no further opportunity of hearing is necessary to be afforded to him. It is not necessary to dwell into the matter any further as recently in the case of Ram chandra Singh v. Savitri devi this Court has noticed :*

*"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.*

*16.Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.*

*It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.*

*18.A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad."*

*19. In Derry V. Peek (1889) 14 AC 337 it was held: "In an action of deceit the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.*

*A false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person make it liable to an action of deceit."*

14. In the case of Ram Chandra Singh Vs. Savitri Devi and others, 2003(8) SCC 319, Hon'ble Supreme Court held in paragraphs 15, 16, 17, 18, 25 and 37 as under :

*"15. Commission of fraud on court and suppression of material facts are the core issues involved in these matters. Fraud as is well-known vitiates every solemn act. Fraud and justice never dwells together.*

*16. Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by word or letter.*

*17. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud.*

*18.A fraudulent misrepresentation is called deceit and consists in leading a*

*man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad.*

*25. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res-judicata.*

*37. It will bear repetition to state that any order obtained by practising fraud on court is also non-est in the eyes of law."*

15. In the case of S.P. ChengalVaraya Naidu (dead) by L.Rs Vs. Jagannath (dead) by L.Rs and others, AIR 1994 SC 853, the Hon'ble Supreme Court held in para 7 as under :

*"7. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."*

16. In the case of Jainendra Singh Vs. State of U.P., 2012 (8) SCC 748, Hon'ble Supreme Court considered the fact of appointment obtained by fraud and held in para 29.1 to 29.10 as under :

*"29.1 Fraudulently obtained orders of appointment could be legitimately treated as voidable at the option of the employer or could be recalled by the employer and in such cases merely because the respondent employee has continued in service for a number of years, on the basis of such fraudulently obtained employment, cannot get any equity in his favour or any estoppel against the employer.*

*29.2 Verification of the character and antecedents is one of the important criteria to test whether the selected candidate is suitable to the post under the State and on account of his antecedents the appointing authority if find not desirable to appoint a person to a disciplined force can it be said to be unwarranted.*

*29.3 When appointment was procured by a person on the basis of forged documents, it would amount to misrepresentation and fraud on the employer and, therefore, it would create no equity in his favour or any estoppel*

*against the employer while resorting to termination without holding any inquiry.*

*29.4 A candidate having suppressed material information and/or giving false information cannot claim right to continue in service and the employer, having regard to the nature of employment as well as other aspects, has the discretion to terminate his services.*

*29.5 Purpose of calling for information regarding involvement in any criminal case or detention or conviction is for the purpose of verification of the character/antecedents at the time of recruitment and suppression of such material information will have clear bearing on the character and antecedents of the candidate in relation to his continuity in service.*

*29.6 The person who suppressed the material information and/or gives false information cannot claim any right for appointment or continuity in service.*

*29.7 The standard expected of a person intended to serve in uniformed service is quite distinct from other services and, therefore, any deliberate statement or omission regarding a vital information can be seriously viewed and the ultimate decision of the appointing authority cannot be faulted.*

*29.8 An employee on probation can be discharged from service or may be refused employment on the ground of suppression of material information or making false statement relating to his involvement in the criminal case, conviction or detention, even if ultimately he was acquitted of the said case, inasmuch as such a situation would make a person undesirable or unsuitable for the post.*

*29.9 An employee in the uniformed service pre-supposes a higher level of integrity as such a person is expected to uphold the law and on the contrary such a service born in deceit and subterfuge cannot be tolerated.*

*29.10The authorities entrusted with the responsibility of appointing Constables, are under duty to verify the antecedents of a candidate to find out whether he is suitable for the post of a Constable and so long as the candidate has not been acquitted in the criminal case, he cannot be held to be suitable for appointment to the post of Constable."*

17. Lastly learned counsel for the petitioners submits that as per Muslim Law the petitioner no. 1 can have four wives and since the respondent no. 5 is stated to be first and the only wife and as such there is nothing wrong to marry with the petitioner no. 1, who shall be his second wife. Submission is wholly misconceived. The only source of livelihood disclosed by the petitioner no. 2 in paragraph 7 of the petition is the 5-6 Bighas agricultural land of his father. The petitioner no. 2 has legally wedded surviving wife i.e. respondent no. 5 and from their wedlock they have three children namely respondent nos. 6, 7 and 8. The respondent no. 5 is said to have pregnancy of about 8 months. On these facts the alleged second Nikah by petitioner no. 2 with the petitioner no. 1 would cause injustice to the respondent nos. 5 to 8 and the child in womb of the respondent no. 5.

18. Under the circumstances the alleged action of the petitioner no. 2 is against the verses of Holy "Quran" i.e. Sura 4 Ayat 3 english translation of which is reproduced below:-

"If ye fear that ye shall not
Be able to deal justly

With the orphans,
Marry women of your choice,
Two, or three, or four;
But if ye fear that ye shall not
Be able to do justly (with them),
Then only one, or (a captive)
That your right hands posses.
That will be more suitable,
To prevent you
From doing injustice."

19. In view of mandate in the Holy Quran it is amply clear that bigamy is not sanctified unless a man can do justice to orphans, who in the present set of facts are the respondent nos. 5 to 8. As per mandate of the Holy Quran as noted above all Muslims men have to deal justly with the orphans. A married Muslim man having his wife alive cannot marry with another muslim women, if he cannot deal justly with the orphan. A mandate has been given that in such circumstances a Muslim man has to prevent himself to perform second marriage, if he is not capable of fostering his wife and children. The religious mandate of Sura 4 Ayat 3 is binding on all muslim men which specifically mandates all Mulim men to deal justly with orphans and then they can marry women of their choice two or three or four but if a Muslim man fears he will not be able to deal justly with them then only one. If a muslim man is not capable of fostering his wife and children then as per above mandate of Holy Quran, he cannot marry the other woman.

20. In case of Dilbar Habib Siddiqui Vs. State of U.P. and Others 2010 (69) ACC 997 a Division Bench of this Court held in paragraph 8 as under:

*" Thus for a valid muslim marriage both the spouses have to be muslim. In the present writ petition this condition is not satisfied as the writ petition lacks credible and accountable material in this respect on which reliance can be placed.*

*Coming to another limb of argument raised by counsel for the petitioner that a muslim man is entitled to marry four time, we once again revert back to recognised treatises. We find that Sura 4 Ayat 3 of The Holy Quran provides for giving due care and provisions for a Muslim women. The said Ayat, as is referred to in the treatise by I.Mulla, is referred to below:-*

*"(vi) Number of wives- If ye fear that ye shall not be able to deal justly with the orphans ( orphan wives and their property); marry woman of your choice, two or three or four; But if you fear that ye shall not be able to deal justly (with them), then only one.....that would be more suitable to prevent you from doing injustice."*

*From the perusal of above Ayats it is abundantly clear that bigamy is not sanctified unless a man can do justice to orphans. The said Ayat mandates all Muslims men to 'deal justly with orphans and then they can marry women of their choice two or three or four but if they fear that they will not be able to deal justly with them then only one. We are of the view, that such a religious mandate has been given to all the Muslims for a greater social purpose. If a Muslim man is not capable of fostering his wife and children then he cannot be allowed the liberty to marry other women as that will be against the said Sura 4 -Ayat-3.This aspect of the matter should not vex our mind further as the same came up before the apex court as well in Javed And Others versus State of Haryana: AIR 2003 SC 3057 and therefore we conclude this aspect of the submission by referring to the words of the apex court in that decision, which are as follows:-*

*"The Muslim Law permits marrying four women. The personal law nowhere mandates or dictates it as a duty to perform four marriages. No religious scripture or authority provides that marrying less than four women or abstaining from procreating a child from each and every wife in case of permitted bigamy or polygamy would be irreligious or offensive to the dictates of the religion. The question of the impugned provision of Haryana Act being violative of Art. 25 does not arise."*

21. The law laid down by the Division Bench of this Court in case of Dilbar Habad Siddiqui's Case (Supra) is clearly attracted on the facts and circumstances of the present case. In the present set of facts the first wife of petitioner no. 2 is surviving and from their wedlock there are three children namely respondent nos. 6, 7 and 8 and the wife (respondent no. 5) is said to have pregnancy of about 8 months.

22. Apart from this the writ petition is based on concealment of facts and false averments. Fake paper have also been filed with the writ petition.

23. Under the circumstances and facts of the case this writ petition deserves to be dismissed with heavy costs.

24. In result, the writ petition fails and is, hereby, dismissed with costs or Rs. 50,000/- on the petitioner no. 2, which shall be paid by him to the respondent no. 5 within two months.

25. The father of the petitioner no. 2 i.e. Riaz Ahmad is the person, who along with his wife is presently looking after the well being of the respondent nos. 5 to 8. He expressed serious apprehension of threat to his life and property by the petitioner no. 1 and respondent no. 4. Under the circumstances it is provided that if Sri Riaz Ahmad (father of the petitioner no. 2) or respondent no. 5 approaches to the respondent no. 2 or respondent no 3 in case of any threat to their life or property then they shall take effective steps in accordance with law.

26. The writ petition is dismissed with costs of Rs. 50,000/- as aforementioned.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2014

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE SHASHI KANT, J.

Civil Misc. Writ Petition No. 64246 of 2014

Lal Ji Saroj ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Vijay Kumar Sharma, Sri Ram Sheel Sharma

Counsel for the Respondents:
C.S.C., Sri Manoj Kumar Yadav

Constitution of India, Art.-226- Settlement of license to run the fair price shop-denial by mis-interpreting G.O. Dated 10.07.14-held-misconceived- G.O. Relied in impugned order applicable where Appeal pending-not where appeal already dismissed-pendency of writ petition without interim order -not be ground for refusal-petition dismissed.

Held: Para-7
We find that the Government Order dated 10.07.2014 was only applicable in

a case where the appeal was pending. In the present case, the appeal has already been decided and, therefore, this Government Order is not applicable in the present case. Further the Division Bench of this Court, in the case of Vinod Kumar Vs. State of U.P. and others (Supra), has held that it is open to the State, pending disposal of an appeal, to make suitable alternate arrangements, either by attaching the card holders to an existing fair price shop or by allotting the fair price shop to a new licencee, subject to the result of the appeal. Therefore, there is no impediment now in settling the fair price shop in favour of the petitioner in pursuance of the resolution passed by the Gram Panchayat on 07.08.2013.

Case Law discussed:
2014 (8) ADJ, 1.

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

1. Heard Sri Ram Sheel Sharma, learned counsel for the petitioner, learned Standing Counsel appearing on behalf of the respondent nos.1 to 3 and Sri Manoj Kumar Yadav, learned counsel appearing on behalf of the respondent no.4.

2. By means of the present writ petition, the petitioner is challenging the order dated 29.10.2014 passed by the respondent no.3, Sub Divisional Magistrate, Tehsil Machhali Shahar, district Jaunpur, whereby the claim of the petitioner for the settlement of the fair price shop, in his favour, has been declined.

3. It appears that for the Gram Sabha Kharuawan, one Sri Vimal Kumar was the licencee of fair price shop. His licence has been cancelled, against which appeal has been filed, which has been dismissed. Against the appellate order, Vimal Kumar filed Writ Petition No.43701 of 2014, Vimal Kumar Vs. State of U.P., which has been entertained and the respondents were directed to file counter affidavit. No interim order has been passed. When, in pursuance of the resolution, no step has been taken by the respondent no.3 to settle the fair price shop in his favour, the petitioner filed Writ Petition No.46772 of 2014, which has been disposed of on 03.09.2014 with the observation that in view of the aforesaid development that has taken place, it shall be open to the petitioner to approach the Sub Divisional Magistrate for disposal of the approval, which is pending but any orders passed by the Sub Divisional Magistrate shall be subject to the orders under Government Order dated 10.07.2014 or further order being passed by this Court in the aforesaid writ petition. After the order of this Court, the petitioner approached Sub Divisional Magistrate, Tehsil Machhali Shahar, district Jaunpur for consideration of his claim for the settlement of fair price shop. By the impugned order, the claim of the petitioner has been rejected by the respondent no.3 relying upon the Government Order dated 10.07.2014 with the observation that during the pendency of the appeal, to avoid multiplicity of the disputes, new fair price shop could not be settled and, therefore, it would not be appropriate to settle the fair price shop in favour of the petitioner in pursuance of the resolution dated 07.08.2013.

4. Learned counsel for the petitioner submitted that the Government Order dated 10.07.2014 is applicable only till the disposal of the appeal before the Divisional Commissioner. It is not applicable after the disposal of the appeal. In the present case, the appeal of Vimal Kumar has been dismissed. Therefore, the aforesaid Government Order is not applicable in the present case. He further submitted that recently a Government

Order has been issued by the Principal Secretary on 18.11.2014 asking the Divisional Commissioners to settle the vacant shop as early as possible. He further submitted that Division Bench of this Court in the case of Vinod Kumar Vs. State of U.P. and others, reported in 2014 (8) ADJ, 1 has observed that it is open to the State, pending disposal of an appeal, to make suitable alternate arrangements either by attaching the card holders to an existing fair price shop or by allotting the fair price shop to a new licencee subject to the result of the appeal. Therefore, in view of the aforesaid decision of the Division Bench of this Court, the order of Sub Divisional Magistrate is not sustainable and is liable to be set aside.

5. Learned Standing Counsel submitted that let the respondent no.3, Sub Divisional Magistrate, Tehsil Machhali Shahar, district Jaunpur be directed to pass a fresh order in the light of the Government Order dated 18.11.2014 and the Division Bench decision of this Court in the case of Vinod Kumar Vs. State of U.P. and others (Supra).

6. We have considered the submissions and perused the record.

7. We find that the Government Order dated 10.07.2014 was only applicable in a case where the appeal was pending. In the present case, the appeal has already been decided and, therefore, this Government Order is not applicable in the present case. Further the Division Bench of this Court, in the case of Vinod Kumar Vs. State of U.P. and others (Supra), has held that it is open to the State, pending disposal of an appeal, to make suitable alternate arrangements, either by attaching the card holders to an existing fair price shop or by allotting the fair price shop to a new licencee, subject to the result of the appeal. Therefore, there is no impediment now in settling the fair price shop in favour of the petitioner in pursuance of the resolution passed by the Gram Panchayat on 07.08.2013.

8. In view of the above, the writ petition is allowed. Order dated 29.10.2014 passed by the respondent no.3, Sub Divisional Magistrate, Tehsil Machhali Shahar, district Jaunpur is set aside and the matter is relegated to the respondent no.3 to consider the claim of the petitioner, expeditiously, preferably within a period of two weeks from the date of presentation of the certified copy of this order, in the light of the observation and direction given above, in accordance to law.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2014

BEFORE
THE HON'BLE DR. DHANANJAYA YESHWANT CHANDRACHUD, C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 68168 of 2006

Ali Shad Usmani & Ors. ...Petitioners
Versus
Ali Isteba & Ors. ...Respondents

Counsel for the Petitioner:
Sri Jamil Ahmad Azmi

Counsel for the Respondents:
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Constitution of India, Art.-226/227- Direction for expeditious disposal of suit-should be issued with very care and circumspection-other wise Civil Court will

be over burdened -with such cases- exception for Senior Citizen-people suffering from particular disability-such consideration should be left to the concern Court itself-petition dismissed.

Held: Para-3
Ultimately, it must be left to the judicious exercise of discretion of the concerned Court to determine whether a ground for urgency has been made out. We emphasize that there may be other cases such as involving senior citizens, those who are differently abled or people suffering from a particular disablilty socio-economic or otherwise which may prime cause of urgent disposal. It is for the learned Trial Judge in each case to apply his or her mind and decide whether the hearing of the suit to be expedited.

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

1. The only relief which is sought in this proceeding is in the following terms:

"i) a writ, order or direction in the nature of mandamus directing the respondent no.6 to expedite the hearing of the Suit No. 271 of 2005 Ali Shad and others Vs. Ali Isteba and others.

ii) a writ, order or direction in the nature of mandamus commanding the respondent no.6 to decide the suit within the stipulated period granted by this Hon'ble Court."

2. We are not inclined to issue a direction for the expeditious hearing of a Civil Suit which is pending before the Civil Judge (Junior Division), District-Azamgarh. It would be most inappropriate to Court to entertain a writ petition under Article 226 and/or under Article 227 of the Constitution simply for the purpose of expediting the hearing of a suit. Such orders, if granted, place a class of litigants, who move the court in a separate and preferential category whereas other cases which may be of similar or greater antiquity and urgency are left to be decided in the normal channel. Hence, any such direction may be issued with the greatest care and circumspection by the High Court otherwise the Civil Courts will be overburdened only with requests for expeditious disposal of suits, which have been expedited by the High Court. Most of the litigants cannot afford the expense of moving the High court and would not, therefore, be in a position to have the benefit of such an order.

3. Ultimately, it must be left to the judicious exercise of discretion of the concerned Court to determine whether a ground for urgency has been made out. We emphasize that there may be other cases such as involving senior citizens, those who are differently abled or people suffering from a particular disablilty socio-economic or otherwise which may prime cause of urgent disposal. It is for the learned Trial Judge in each case to apply his or her mind and decide whether the hearing of the suit to be expedited.

4. For these reasons, we are not inclined to entertain the petition. The petition is, accordingly, dismissed. There shall be no order as to cost.

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