

Brij Kishore Verma Vs. State of Uttar Pradesh

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Court : Allahabad

Decided On : Sep-21-2012

Judge : D.K. ARORA, DEVI PRASAD SINGH & SHABIHUL HASNAIN

Appeal No. : Misc. Bench No. 10159 of 2010

Appellant : Brij Kishore Verma

Respondent : State of Uttar Pradesh

Judgement :

Devi Prasad Singh, J.

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

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

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

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

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

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

I- BRIEF FACTS

4. Csm Nagar was created by the Notification dated 21.5.2003, issued under Section 11 of the U.P. Land Revenue Act, 1901 (in short the Act) read with Section 21 of the U.P. General Clauses Act, 1904 (in short General Clauses Act), by His Excellency, the Governor of the State of U.P. The Notification was challenged in this Court by preferring Writ Petition No.5027 (M/B) of 2003 [Nagarjun Prasad Gupta. Vs. State of U.P. and

others]. A Division Bench of this Court by an interim order dated 9.10.2003, stayed the operation of notification keeping in view the earlier Division Bench judgment of Allahabad High Court reported in 1999 (17) LCD 323 [Ram Milan Shukla and others. Vs. State of U.P. and others].

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

HINDI

6. On account of census operation undertaken by the Government of India, by Notification dated 22.9.2009, the State Government was required not to change the boundaries of Nagar Paikas, Revenue villages, Tahsils, police stations, Vikas Khands, Taluqas, Parganas, districts etc., from 1.1.2010 to 31.3.2011. In consequence thereof, the State Government by Notification dated 22.12.2009, issued under Rule 8 (4) of Census Rules, 1991, directed not to change the administrative boundaries of districts, Tahsils in the State of U.P.

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

HINDI

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

"Government of India

Ministry of Home Affairs

2A, Mansingh Road, New Delhi 110 011

No.9/66/09-CD (CEN)

Dated : 22.9.09

CENSUS OF INDIA 2011-CIRCULAR NO. 6

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

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

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

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

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

Sd/-

(D.K. Sikri)

Registrar General and Census Commissioner, India

To

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

True copy

|| TYPED COPY ||

HINDI

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

"Case:- MISC. BENCH No. - 6077 of 2003

Petitioner:- Uma Shanker Pandey (P.I.L.)

Respondent:- State Of U.P. Thru Principal Secretary And 2 Ors

Petitioner Counsel:- S.B Pandey,R.K.Pandey

Respondent Counsel:- C.S.C

Hon'ble Amitava Lala,Acting Chief Justice

Hon'ble Shabihul Hasnain,J.

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

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

Though such creation was made by the subsequent notification, but according to the petitioner he cannot be thrown out from his right to get an appropriate consideration by the State. Hence in disposing of the writ petition, we direct the writ petitioner to make a representation to the authority concerned within a period of one week from obtaining a certified copy of this order and if it is made, the authority concerned will consider the same upon giving the fullest opportunity of hearing and by passing a reasoned order thereon within a period of three months from the date of making such application. For the purpose of effective adjudication, a copy of the writ petition along with its annexures, affidavits and relevant judgments can also be treated as part and parcel of the representation for due consideration.

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

Order Date:- 26.3.2010 "

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

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

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

"Court No. 27

Case:- MISC. BENCH No. - 10159 of 2010

Petitioner:- Brij Kishore Verma (P.I.L.Civil)

Respondent:- State Of U.P., Thru. Prin. Secy., Deptt. Of Revenue and Others

Petitioner Counsel:- Birendra Narain Shukla

Respondent Counsel:- C.S.C.

Hon'ble Devi Prasad Singh,J.

Hon'ble Shabihul Hasnain,J.

Hon'ble Devendra Kumar Arora,J.

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

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

"HINDI"

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

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

"HINDI"

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

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

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

"HINDI"

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

Division Bench.

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

Judgement reserved.

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

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

Order Date:- 12.9.2012"

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

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

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

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

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

"We, therefore, being prima facie, satisfied that in view of the specific embargo placed in the notification dated 22.12.2009, no district could be created, including Chhatrapati Shahuji Maharaj Nagar and even if any such notification is issued, such notification cannot be given effect to, on or before 31.3.2011, stay the

operation, implementation and execution of the notification dated 1.7.2010 till further orders of the Court or till the aforesaid date i.e. 31.3.2011, whichever is earlier.

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

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

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

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

18. It appears that a Special Leave Petition was filed in the Hon'ble Supreme Court against the interim order dated 18.8.2010 and the main plank of argument before the Hon'ble Supreme Court against the interim order passed in the case of Nagarjun Prasad (supra), was the conflicting judgment delivered by the Division Bench in the case of Hari Bhajan Singh (supra). Hon'ble Supreme Court set aside the interim order (supra) and remitted the matter back to decide the controversy afresh after taking into account the judgment of Hari Bhajan Singh (supra). The Division Bench ceased with the PIL in the case of Nagarjun Prasad (supra), recorded the statement of factual situation and framed the questions (supra) while referring the matter for constitution of larger Bench.

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

1957 SC 676: Kamla Prasad Khetan Vs. Union of India; (2011) 2 SCC 591: State of Jharkhand. Vs. Pakur Jagran Manch; AIR 1976 Delhi 166: Jai Narain. Vs. The Land Acquisition Collector and 2002 5 AWC 4321: Rakesh Chandra Srivastava. Vs. Sri Santosh Kumar Mishra and ors.

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

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

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

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

DICTIONARY MEANING and INTERPRETATION

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

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

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

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

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

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

"LEGISLATION. A national regulation on social security matters whose effects extended to persons carrying out or who had carried out activities partially or wholly outside the Community was to be regarded as "legislation" within the meaning of Art.2 of EEC Regulation No.1408/71 (Van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid, The Times, October 29, 1986).

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

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

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

"legislation n. laws collectively, the action of legislating --Origin C17. from late L. legis lativ(n.), lit. 'proposing of a law'.

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

--DERIVATIVES. legislatively adv."

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

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

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

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

C.A.D.C. 1992, "Legislative" or "substantive rule" is one that does more than simply clarify or explain statutory term or confirm regulatory requirement or maintain consistent agency policy, for purpose of determining whether notice and comment rule making is required under the Administrative Procedure Act (APA), 5 U.S.C.A. § 553--National Family Planning and Reproductive Health Ass'n. INc. v. Sullivan, 979 F.2d 227, 298 U.S. App. D.C. 288.--Admn. Law 382.1. C.A. 9 (Hawai'i) 2003. A court determines whether an action is "legislative," for purposes of legislative immunity under §1983, by considering each of four non-mutually exclusive factors; (a) whether the act involves ad hoc decision making, or the formulation of policy, (2) whether the act applies to a few individuals, or to the public at large, (3) whether the act is formally legislative in character, and (4) whether it bears all the hallmarks of traditional legislation. 42 U.S.C.A. §1983.---Kaahumanu v. County of Maui. 315. F. 3d 1215.---Civil R 1376 (1).

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

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

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

Nev. 2002. Acts constituting a declaration of public purpose, and making provisions for ways and means of its accomplishment, may be generally classified as calling for the exercise of "legislative" power, whereas, acts which are to be deemed as acts of "administration," and classed among those governmental powers properly assigned to the executive department, are those which must be done to carry out legislative policies and purposes already declared by the legislative body, or which are inherent in its existence.--- Citizens for Public

Train Trench Vote v. City of Reno, 53 P.3d 387, 118 Nev. 574, rehearing denied.---Mun Corp 108.2.

IND. 1912. The words "legislative power", as used in Const. Art. 4 § 1, conferring legislative power on the General assembly, mean the power or authority, under the Constitution or form of government, to make, alter, and repeal laws and to pass any law within the ordinary function of legislation not delegated to the federal government or prohibited by the state Constitution, not transferring, however, from the people fundamental legislative power.--Ellingham v. Dye, 99 N.E. 1, 178 IND 336, Am. Ann. Cas. 1915C,200, appeal dismissed Marshal v. Dye, 34 Sct. 92, 231 U.S. 250, 58 L.Ed. 206.

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

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

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

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

33. In AIR 1979 SC 1415: Union of India and others. Vs. Valluri Basavaiah Choudhary and others, Hon'ble Supreme Court held that the Governor is the component part of Legislature but cannot participate in the procedure of State Legislature.

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

35. Administrative or executive functions are different than the legislative functions. According to Halsbury's Laws of England 4th Edn. Vol.8, no comprehensive definition can be given to administrative or executive

functions but they may be said to entail the formulation or application of general policy in relation to particular situations or cases, to quote from Halsbury's Laws of England, as under:

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

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

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

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

ADMINISTRATIVE FUNCTION

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

Kan. 1940. The State Corporation Commission's stay order, in the nature of a temporary injunction prohibiting the commission from enforcing a basic gas proration order, designed by the commission to form the basis standard, or guide, pursuant to which it proposed to fix the allowable production for various gas wells in certain gas field, was prematurely and improvidently issued, since it was solely the "administrative function" of the commission to hold the hearing to receive and consider evidence to determine the schedule of allowable and not that of the district court or of the Supreme Court. Gen. St. 1935, 55--701 et seq.--Hayward v. State Corporation Commission, 101 P 2d 1041, 151 Kan. 1008.-- Mines 92.63.

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

N.Y. Sup. 1950. The state rent administrator in fixing and enforcing maximum rents exercised purely "legislative" and "administrative functions" as distinguished from "judicial or quasi judicial functions" and hence prohibition would not lie to restrain administrator from enforcing maximum rent established by him pursuant to Emergency Housing Rent Control Law, particularly where regulation as to maximum rent had already been adopted and promulgated. McK. Unconsol. Laws, §§ 8581 et seq., 8584; Civil Practice Act, §§

1283 et seq., 1284, subd. 4.-- Baldwin Gardens v. Mc.Goldrick, 100 N.Y.S. 2D 548, 198 Misc. 743.-- Prohib 6 (2).

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

STATUTORY AND EXECUTIVE FUNCTION

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

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

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

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

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

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

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

41. IN view of Article 372 of the Constitution, the Act continues to deal with the matter regulating the land

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

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

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

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

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

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

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

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

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

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

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

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

46. Taxes on agricultural income.

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

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

"4 (42B) 'statutory instrument' shall mean any notification, order, scheme, rule, or bye-law issued under any

enactment and having the force of law ;"

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

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

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

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

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

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

49. In pursuance of Entry 18 and 45 of the List-II of Schedule-VII, the State Legislature has been conferred exclusive power to legislate the law with regard to land and land revenue. Accordingly, different provision of the Act has been amended from time to time by the State Legislature to keep pace with time. Being not relevant, need not to refer those provisions and may be noticed by bare reading of the statutory provisions contained in the Act. However, it may be noted that the amendment in the Act has been done by the State Legislature like U.P. Act No.37 of 1958, U.P. Act No.1 of 1951, U.P. Act No.10 of 1961 etc.

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

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

"154. Executive power of State.-

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

(2) Nothing in this article shall-

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

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

162. Extent of executive power of State.-

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

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

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

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

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

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

51. The provisions contained in Article 154, 162 and 166 of the Constitution of India, deal with executive power of the State and conduct of business of the State Government. The word, 'executive power', has got very wide expression. It connotes the residue of governmental functions and includes acts necessary for carrying on or supervision of general administration of the State Government which include a decision as to action and the carrying out of the decision so taken. Some of the executive power may partake of legislative or judicial character, vide AIR 1955 SC 549: Rai Sahib Ram Jawaya Kapur and others. V. The State of Punjab; (1996) 2 SCC 305; State of M.P. Vs. Yashvant Trimbak (Dr.); AIR 1961 SC 221: State of Bihar Vs. Sonabati Kumari and AIE 1974 SC 2192: Samsher Singh Vs. State of Punjab.

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

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

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

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

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

"The UTTAR PRADESH RULES OF BUSInESS, 1975

In exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution of India, the Governor of Uttar Pradesh is pleased to make the following Rules, namely:

1. Short title--These Rules may be called the Uttar Pradesh Rules of Business, 1975.
2. Definition--In these Rules "Department" means any of the Departments specified in the Business of Uttrar Pradesh (Allocation) rules, 1975.
3. Disposal of Business-- Subject to the provisions of these Rules in regard to conclusion with other departments and submission of cases to the Chief Minister, the Cabinet and the Governor, all business allotted, to a department under the Business of U.P. (Allocation) Rules, 1975, shall be disposed of by or under the general or special direction of the Minister-in- charge.
4. Inter-departmental Consultations--(1) When the subject of a case concerns more than one department, no order shall be issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

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

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

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

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

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

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

Provided that no orders of the nature specified in clause ((TheLAW)) shall be issued in respect of the Finance

Department without the previous concurrence of the Department of Personnel.

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

(a) proposals for legislation;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(7) Submission of cases to the Cabinet-- All cases specified in the First Schedule to these Rules shall be

brought before the Cabinet :

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

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

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

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

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

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

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

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

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

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

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

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

55. APART from the above, the First Schedule contains 32 items which are to be brought before the Cabinet for decision which includes annual audit review of finances of State, proposal with regard to change of policy

or contracts, change in the administrative system of State, change in the condition of service of members of any State service or in the method of recruitment to service or post to which appointment is made by the Government, proposal for legislation, issuance of ordinance, amendment of rules, framing of rules, cases involving financial implication, decision by Finance Minister, major policy, winding up amalgamation or creation of new corporation, companies owned by the Government or by public sector, summing or prorogue House of Legislature, appointment or renewal of Advocate General, etc.

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

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

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

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

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

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

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

nature, may have legislative trapping. It is residual power exercised by the State Government, in terms of Government order of 1992.

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

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

61. SECTION 11 of the Act does not require a decision by the State Legislature but it confers power on the State Government. It is well settled law that executive power of the State is co-extensive with that of the State Legislature. The State may make rules regulating any matter within the legislative competence of the State Legislature without prior legislative authority except where a law is required. It is further trite law that where statutory rules govern the field, the executive instructions shall cease to apply and they cannot be in derogation of statutory rules, vide AIR 1971 SC 2560: *State Of Andhra Pradesh and Ors vs Lavu Narendranath and Ors.*; AIR 1971 SC 2045 : *State of Madhya Pradesh Vs. Jain.*; AIR 2006 SC 2138, *K.P. Sudhakaran. Vs. State of Kerala*; AIR 2008 SC 3: *Union of India Vs. Central Electoral Mechanical Engineering Group A (Direct Recruit) Association*).

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

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

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

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

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

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

LEGISLATIVE PROVISIONS

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

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

"243. Definitions.-

In this Part, unless the context otherwise requires,-

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

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

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

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

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

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

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

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

70. THE legislative procedure for the State Legislature has been given from Article 196 to Article 212 of the Constitution.

THE introduction of bill has been dealt with under Article 196 of the Constitution. Special procedure has been provided with regard to money bill under Article 198 and 199 of the Constitution of India.

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

"202. Annual financial statement.-

(1) The Governor shall in respect of every financial year cause to be laid before the House or Houses of the Legislature of the State a statement of the estimated receipts and expenditure of the State for that year, in this Part referred to as the "annual financial statement".

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

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

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

and shall distinguish expenditure on revenue account from other expenditure.

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

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

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

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

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

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

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

204. Appropriation Bills.-

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

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

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

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

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

205. Supplementary additional or excess grants.-

(1) The Governor shall-

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

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

that service and for that year,

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

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

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

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

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

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

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

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

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

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

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

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

74. ARTICLE 266 and 267 of the Constitution deal with consolidated fund and public accounts of India as well as State. It provides that all revenue received by the Government of a State, shall form consolidated fund. Clause (2) and (3) of ARTICLE 266 further provides that all public moneys received by or on behalf of the Government of India or the Government of a State shall be credited to the public account of India or the

public account of the State and no money out of the Consolidated Fund of India or the Consolidated Fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. For convenience, ARTICLE 266 of the Constitution of India, is reproduced as under:-

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

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

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

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

75. The restriction imposed by Article 266 of the Constitution, makes it obligatory on the part of the State Government to follow the constitutional procedure to generate money for the purpose of creation of new districts and to meet out the requirements in terms of the constitutional mandates, vide *Rai Sahib Ram Jawaya Kapur v. The State of Punjab*, 1955-2 SCR 225.

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

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

77. ACCORDING to Wharton, the exercise of sovereign law making power, the act of making or giving enacting laws, is called legislation.

ACCORDING to Supreme Court of India, in fact a legislation is not confined to statute enacted by parliament or legislature of a State which would include the delegated legislation and subordinate legislation and executive order made by Union of India, State or any order statutory authority, vide (2004) 6 SCC 254 - *Kusum Ingots and Alloys Ltd. Union of India and another*.

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

79. In the case reported in *Kusum Ingots (supra)*, it has been held by Hon'ble Supreme Court that legislation is not confined to statute but it includes delegated legislation, subordinate legislation or an executive order.

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

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

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

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

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

"PROVISIONS AS TO [STATUTORY INSTRUMENTS] MADE UNDER ENACTMENTS

20. Construction of notifications, issued under enactments.

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

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

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

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

add, to amend, vary or rescind statutory instruments.

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

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

"14. In our opinion, before any notification under Section 11 of the U. P. Land Revenue Act is issued, an appropriation bill under Article 204 of the Constitution or a bill for supplementary or additional expenditure under Article 205 or a vote on account under Article 206 must be introduced in the Legislature and passed. This is necessary because Section 11 cannot be read in isolation, but it must be read along with the constitutional provisions. After all, creation of a new district involves heavy expenditure, and for this, the constitutional provisions must be followed. These constitutional provisions relating to financial matters have been made to ensure strict fiscal discipline and accountability. In our opinion, a district, cannot be created by a simple executive fiat at the whims and fancies of a particular individual or individuals. As already observed above, creation of a new district has serious administrative and financial implications, and it is an exercise which has an impact on the future also. Article 204(3) of the Constitution states : "Subject to the provisions of the Articles 205 and 206, no money shall be withdrawn from the Consolidated Fund of the State except under appropriation made by law passed in accordance with the provisions of this Article."

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

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

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

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

to pass the following order:-

"Judgment

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

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

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

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

89. The finding in Ram Milan Shukla's case (supra) is supported by the Constitution bench of Hon'ble Supreme Court in the case of Rai Sahib Ram Jawaya Kapur (supra) in which the dispute before the Hon'ble Supreme Court was with regard to decision taken by the Government to enter into the trade or business. Their lordships held that there must be specific legislation legalizing such trade activities before they could be embarked upon and for that purpose certain sum is required to carry out the business and should be entered into the annual financial statement and should be laid before the House or the Houses of Legislature. After the grant is sanctioned, an Appropriation Bill should be introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the Assembly under Article 204. Relevant paras of Rai Sahib Ram Jawaya Kapur (supra) are reproduced as under:-

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

16. It may be, as Mr. Pathak contends, that the Appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided

in this Constitution. The expression "law" here obviously includes the Appropriation Acts. It is true that the Appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the Appropriation Acts would afford complete answer.

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

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

BINDING PRECEDENT AND ARTICLE 141

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

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

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

JUDGMENT AND RATIONALITY

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

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

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

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

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

"8.4. According to Mr. Mishra, the first judgment to Samvidhan Bahali Andolan. v. Union of India and others, was binding on the subsequent Division Bench as well as on us in view of the doctrine of precedent enunciated by the Apex Court and the submission of Mr. Agrawal that in view of the conflict between first and second Division Bench, the second Division Bench judgment is binding on us and that if we intend to take a view different from the second Division Bench, the only option for us is to refer this case to a larger Bench, is of no substance."

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

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

99. It is well settled proposition of law that judgment should be considered in its totality as well as in

reference to the context vide, 2002 (4) SCC 297 *Grasim Industries Limited v. Collector of Customs*; 2003 SCC (1) 410 *Easland Combines v. CCE*; 2006 (5) SCC 745 *A. N. Roy v. Suresh Sham Singh* and 2007 (10) SCC 528 *Deewan Singh v. Rajendra Prasad Ardevi*.

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

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

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

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

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

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

interpreting its provisions, bear these considerations in mind".

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

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

31. Recently, in *I.R. Coelho (AIR 2007 SC 861: 2007 AIR SCW 611)* (supra), noticing the principles relevant for the interpretation of Constitutional provisions, Y.K. Sabharwal, C.J., speaking for the Bench of nine Judges of this Court, observed as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

107. In view of the above, there appears to be no occasion to hold that the judgment in *Ram Milan Shukla's* case (*supra*) is not a binding precedent that too, when the finding recorded, is conclusive and specific to the

effect that the State should not exercise power under Section 11 of the Act in an arbitrary manner merely for political consideration without looking into the financial viability and the public interest.

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

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

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

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

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

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

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

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

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

110. IN the case of Rakesh Kumar Sharma (supra), the Division Bench noted that in pursuance of the

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

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

"7. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a specific direction or the application of a general rule to a particular case in accordance with the requirements of policy'. 'Legislation is the process of formulating a general rule of conduct without reference to particular cases and usually operating in future; administration is the process of performing particular acts, of issuing particular orders or of making decisions which apply general rules to particular cases.' It has also been said "Rule making is normally directed toward the formulation of requirements having a general application to all members of a broadly identifiable class" while, "an adjudication, on the other hand, applies to specific individuals or situations". But, this is only a broad distinction, not necessarily always true. Administration and administrative adjudication may also be of general application and there may be legislation of particular application only. That is not ruled out. Again, adjudication determines past and present facts and declares rights and liabilities while legislation indicates the future course of action. Adjudication is determinative of the past and the present while legislation is indicative of the future. The object of the rule, the reach of its application, the rights and obligations arising out of it, its intended effect on past, present and future events, its form, the manner of its promulgation are some factors which may help in drawing the line between legislative and non- legislative acts. A price fixation measure does not concern itself with the interests of an individual manufacturer or producer. It is generally in relation to a particular commodity or class of commodities or transactions. It is a direction of a general character, not directed against a particular situation. It is intended to operate in the future. It is conceived in the interests of the general consumer public. The right of the citizen to obtain essential articles at fair prices and the duty of the State to so provide them are transformed into the power of the State to fix prices and the obligation of the producer to charge no more than the price fixed. Viewed from whatever angle, the angle of general application the prospectivity of its effect, the public interest served, and the rights and obligations flowing therefrom, there can be no question that price fixation is ordinarily a legislative activity. Price-fixation may occasionally assume an administrative or quasi-judicial character when it relates to acquisition or requisition of goods or property from individuals and it becomes necessary to fix the price separately in relation to such individuals. Such situations may arise when the owner of property or goods is compelled to sell his property or goods to the Government or its nominee and the price to be paid is directed by the

legislature to be determined according to the statutory guidelines laid down by it. In such situations the determination of price may acquire a quasi-judicial character. Otherwise, price fixation is generally a legislative activity. We also wish to clear a misapprehension which appears to prevail in certain circles that price-fixation affects the manufacturer or producer primarily and therefore fairness requires that he be given an opportunity and that fair opportunity to the manufacturer or producer must be read into the procedure for price-fixation. We do not agree with the basic premise that price fixation primarily affects manufacturers and producers. Those who are most vitally affected are the consumer public. It is for their protection that price-fixation is resorted to and any increase in price affects them as seriously as any decrease does a manufacturer, if not more."

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

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

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

In the present case, the creation or division of a district into two or formation of one district by amalgamating part of two or more districts, is based on a decision taken by the State Government keeping in view the particular facts and circumstances of the case. It is not a decision based on some general principle evolved by the Government for whole of the State. Hence it seems to be administrative in nature.

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

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

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

Further down the learned Chief Justice said:

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

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

AIR):

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

"..., the two kinds of acts have many common features. Thus a person entrusted to do an administrative act has often to determine questions of fact to enable him to exercise his power. He has to consider facts and circumstances and to weigh pros and cons in his mind before he makes up his mind to exercise his power just as a person exercising a judicial or quasi-judicial function has to do. Both have to act in good faith. A good and valid administrative or executive act binds the subject and affects his rights or imposes liability on him just as effectively as a quasi-judicial act does. The exercise of an administrative or executive act may well be and is frequently made dependent by the Legislature upon a condition or contingency which may involve a question of fact, but the question of fulfilment of which may, nevertheless, be left to the subjective opinion or satisfaction of the executive authority, as was done in the several Ordinances, regulations and enactments considered and construed in the several cases referred to above. The first two items of the definition given by Atkin L. J., may be equally applicable to an administrative act. The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L. J.'s definition, namely, the duty to act judicially.

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

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

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

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

35. ...The decision of this Court in *Province of Bombay vs. Kusaldas Advani* (supra) has been dealt with by us in the foregoing paragraph and is of no help to the case of the respondent. In the case of *Radhey Shyam Khare vs. State of M.P.*(supra), the State government issued an order on the ground of expediency and policy and, therefore, it was held that the impugned order is administrative in nature. In *T.N. Seshan vs. Union of India* (supra), it was held that the Election Commission besides administrative function is required to perform quasi-judicial duties and undertakes subordinate legislation making functions as well.

This decision also is of no help to the case of the respondent. In the case of *State of H.P. vs. Raja Mahendra Pal* (supra), this Court found that Price Committee appointed by the government was not constituted under any statutory or plenary administrative power and, therefore, did not discharge any quasi-judicial function. This decision again is of no assistance to the case of the respondent."

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

115. THE case reported in AIR 1964 SC 648: *Jayantilal Amrit Lal Shodhan vs F.N. Rana And Others*, deals with different facts and circumstances. Hon'ble Supreme court ruled that executive has also been empowered by

the statutes to exercise functions which are legislative in nature and appear to partake at the same moment of legislative, executive and judicial characteristics. THE case of Jayantilal Amrit Lal Shodhan (supra) applied to a decision of the State Government with regard to creation of district and make it legislative in nature, is neither borne out nor the Division Bench has dealt with.

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

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

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

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

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

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

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

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

It cannot however be assumed that the legislative functions are exclusively performed by the Legislature, executive functions by the executive and judicial functions by the judiciary alone. The Constitution has not made an absolute or rigid division of functions between the three agencies of the State. To the executive, exercise of functions legislative or judicial are often entrusted. For instance power to frame rules, regulations and notifications which are essentially legislative in character is frequently entrusted to the executive. Similarly judicial authority is also entrusted by legislation to the executive authority: Harinagar Sugar Mills Ltd. v. Shyamsundar (1962) 2 SCR 339: (AIR 1961 SC 1969). In the performance of the executive functions, public authorities issue orders which are not far removed from legislation and make decisions affecting the personal and proprietary rights of individuals which are quasi-judicial in character. In addition to these quasi-judicial, and quasi-legislative functions, the executive has also been empowered by statute to exercise functions which are legislative and judicial in character, and in certain instances, powers are exercised which appear to partake at the same moment of legislative, executive and judicial characteristics. In the complexity of

problems which modern governments have to face and the plethora of parliamentary business to which it inevitably leads, it becomes necessary that the executive should often exercise powers of subordinate legislation: Halsbury's Laws of England, Vol. 7, Art. 409. It is indeed possible to characterise with precision that an agency of the State is executive, legislative or judicial, but it cannot be predicted that a particular function exercised by any individual agency is necessarily of the character which the agency bears."

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

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

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

"Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement".

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

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

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

18. We are, therefore, of the view that a notification issued under section 3 of the Act which has the effect of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7. The principles of law that emerge from the aforesaid decisions are-

(1) where provisions of a statute provide for the legislative activity, i.e. making of a legislative instrument or promulgation of general rule of conduct or a declaration by a notification by the Government that certain place or area shall be part of a Gram Sabha and on issue of such a declaration certain other statutory provisions come into an action forthwith which provide for certain consequences;

(2) where the power to be exercised by the Government under provisions of a statute does not concern with the interest of an individual and it relates to public in general or concerns with a general direction of a general character and not direct against an individual or to a particular situation and

(3) lay down future course of actions, the same is generally held to be legislative in character."

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

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

quasi-legislative and the quasi-judicial functions. Relying upon the aforesaid judgments, learned author held that executive function in modern Government carry with them the quasi-legislative and quasi-judicial functions, to quote a passage from the "Constitutional Law of India [Fourth Edition Vol. 2 (1993)] " by H.K. Seervai as under:-

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

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

"The power to promulgate Ordinances under Art. 123; to suspend the provisions of Arts. 268 to 279 during an emergency; to declare failure of the Constitutional machinery in States under Art. 356; to declare a financial emergency under Art. 360; to make rules regulating the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Art. 309 -- to enumerate a few out of the various powers-- are not powers of the Union Govt.; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Art. 258 (1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Art. 258 (1) to the State or officer of the State, and, therefore, that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under Art. 258 (1) because they are not the powers of the Union, and not because of their special character. There is a vast array of other powers exercisable by the President --to mention only a few--appointment of Judges: Art. 124 and 217, appointment of Committees of Official Languages Act: Art. 344, appointment of Commissions to investigate conditions of backward classes: Art. 340, appointment of Special Officer for Scheduled Castes and Tribes: Art. 338 exercise of his pleasure to terminate employment: Art. 310, declaration that in the interest of the security of the State it is not expedient to give to a public servant sought to be dismissed an opportunity contemplated by Art. 311 (2)--these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Art. 258."....

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

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

in pursuance of executive power, then it shall be quasi-judicial function. To say that notification by the State Government, may be issued under Section 11 of the Act is purely legislative in nature, seems to be not correct.

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

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

128. ADMITTEDLY, impugned notification has been issued conferring power on the Chairman (under Section 221 of the U.P. Land Revenue Act), directing to be abide by certain conditions while processing a matter for creation of new districts. Thus, the 1992 Government order has got binding effect.

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

REPUGNANCY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State".

Now, it is settled proposition of law that the Union law shall prevail over the law made by the State and any law made by the Parliament at later stage to the extent of repugnancy will override the State law and will have

binding effect vide AIR 1959 SC 648 Deep Chand versus State of U.P., AIR 1959 SC 749 Premnath Kaul versus State of J. and K, AIR 1954 SC 752 Zaverbhai Amaldas versus State of Bombay.

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

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

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

1. That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.
2. That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.
3. That where the two statutes occupy a particular field, there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.
4. That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

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

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

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

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

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

EXERCISE OF DISCRETION

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

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

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

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

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

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

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

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

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

In 1993(3) SCC 634, *Hansraj H. Jain Vs. State of Maharashtra and others*, it has been held that the Authorities have to pass the test of reasonableness and action should not lack bonafide and made a colourable exercise of power. In AIR 1991 SC 1902: *Bangalore Medical Trust Vs. B.S. Muddappa and others*, it is held by Hon'ble Supreme Court that where statutes are silent and only power is conferred the authorities can not be permitted to act whimsically or arbitrarily. It should be guided by reasonableness and fairness.

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

therefore whoever had power to act at discretion is bound by the rule of reason and law.

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

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

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

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

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

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

148. To sum up:-

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

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

(3) The impugned notification has been issued while deciding representation in compliance of the judgment and order passed by the Division Bench of this Court based on factual matrix of past and present hence

administrative in nature, but it has legislative trapping. However, in case, the State Government took a decision in compliance of different constitutional provisions dealt with (supra) followed by notification under Section 11 of the Act and the Rules of Business, then in such a situation, decision may be of legislative character.

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

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

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

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

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

149. IT shall be appropriate to reproduce what Justice Holmes had said, to quote:-

"The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at the end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." ["The Common Law, Oliver Wendell Holmes P.36 (1881).

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

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

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

(iii) There is apparent inconsistency in two Acts namely, Census Act 1948 and the Rules framed thereunder, and the U.P. Land Revenue Act a State enactment in the reference to Section 11 with regard to creation of

district. Both are irreconcilable and in any case, the conflict cannot be reconciled, hence during census operation notification under Section 11 of U.P. Land Revenue Act cannot be issued and if issued shall be invalid and void.

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

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