

(2011) 03 AHC CK 0282

In the Allahabad High Court

Case No : Writ Petition No's. 10159 (MB) of 2010 and 2037 (MB) of 2011

Brij Kishore Verma

APPELLANT

Vs

State of Uttar Pradesh and Others
Nagarjun Prasad
Gupt Vs U.P. Sarkar and Another

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Allahabad High Court Rules, 1952 — Rule 1
Census Act, 1948 — Section 18(1)
Census Rules, 1990 — Rule 6, 8, 8
Constitution Act — Section 100(1), 100(3), 109, 80
Constitution of India, 1950 — Article 162, 163, 164, 168, 174
Government of India Act, 1935 — Section 100
Uttar Pradesh General Clauses Act, 1904 — Section 21, 24
Uttar Pradesh Land Revenue Act, 1901 — Section 11

Citation : (2011) 03 AHC CK 0282

Hon'ble Judges : Ritu Raj Awasthi, J;Pradeep Kant, J

Bench : Division Bench

Judgement

1. These are four writ petitions which raise common question of facts and law and, therefore, are being decided by a common order.
2. To understand the controversy involved, it would be of some advantage to have a brief history of the facts.
3. The issue relates to creation of a new district known as Chhatrapati Shahuji Maharaj Nagar (hereinafter referred to as CSM Nagar), which is said to be carved out from the existing district of Sultanpur.
4. To begin with, the new district CSM Nagar was created by notification issued u/s 11 of Uttar Pradesh Land Revenue Act, 1901 read with Section 21 of Uttar Pradesh General Clauses Act, 1904, by His Excellency the Governor on 21.05.03. This notification was challenged before Allahabad High Court at Lucknow Bench in Nagarjun Prasad Gupta v. Uttar Pradesh Sarkar and Ors. Writ Petition No. 5027 (MB) of 2003, wherein a Division Bench of this Court passed an interim order

dated 09.10.03 staying the operation of the said notification. The interim order was passed keeping in mind the view expressed by a Division Bench of this Court at Allahabad in the case of Ram Milan Shukla and Ors. v. State of Uttar Pradesh and Ors. reported in 1999 (17) LCD 323.

5. During pendency of the aforesaid writ petition of Nagarjun Prasad Gupta, the Government decided to abolish the new district and thus, by notification dated 13.11.03 issued u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act, abolished the district CSM Nagar.

6. Since census operations were to be undertaken in the country, therefore, the Central Government by notification dated 22.09.2000 required the State Governments to freeze the administrative boundaries of Nagar Palikas, Revenue Villages, Tehsils, Police Stations, Vikas Khands, Taluqas, Parganas, Districts etc. with effect from 01.01.2010 to 31.03.2011. In view of the directives of the Central Government, the Governor vide notification dated 22.12.09 issued under Rule 8(iv) of Census Rules, 1991 froze the administrative boundaries of districts, tehsils etc. in the State of Uttar Pradesh

7. However, while the said notification issued by the Governor on 22.12.09 was in force, the impugned notification dated 01.07.2010 was issued by the Governor u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act, rescinding the earlier notification dated 13.11.03 (by means of which the district of CSM Nagar was abolished) and the district CSM Nagar was described to be restored.

8. A Division Bench of this Court on challenge being made to the notification dated 01.07.2010, passed an interim order of stay on 18.08.2010 in Writ Petitions No. 7265 (MB) of 2010 and 7711 (MB) of 2010, staying the operation and implementation of the notification dated 01.07.2010 till 31.03.2011 on taking into consideration the notification dated 22.12.09 issued by the Governor. So far the plea regarding infrastructure being made available and the funds having been arranged for the purpose of establishing a new district and for providing necessary paraphernalia including the residences of the judicial officers, court buildings, hospitals, colleges and residences of government officers and other government offices etc. was concerned, it was left to be considered on filing of the counter affidavit by the Respondents.

10. The operative portion of the interim order dated 18.8.2010 for convenience sake is quoted below:

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.

11. Incidentally another writ petition bearing Writ Petition No. 7749 (MB) of 2010 Hari Bhajan Singh and Anr. v. State of Uttar Pradesh and Ors., was filed on 09.08.2010 and was placed before the Bench dealing with Miscellaneous Bench matters on 11.08.2010 and there the said writ petition was dismissed summarily on that very date.

12. The State preferred a SLP before the apex court against the interim order passed by us referred to above, wherein it was brought to the notice of the apex court that interim order was passed by this Court in the teeth of the Division Bench Judgment passed on the same issue, namely, challenge to the same very notification of restoring the district CSM Nagar but without taking into consideration the said Judgment of the coordinate Bench. The apex court set aside the interim order passed by this Court and has remitted the matter for deciding afresh, after making an observation that in case the Division Bench was not in agreement with the order passed by the Division Bench in the case of Hari Bhajan Singh (supra), the matter could have been referred to a larger Bench.

13. Since affidavits have been exchanged and all the parties agreed that the matter may be decided finally, we have proceeded with hearing of the cases.

14. At the outset before proceeding with the matter further, we find it our singular duty to put on record that under what circumstances, the Judgment passed in the case of Hari Bhajan Singh (supra) could not be considered by us while passing the interim order.

15. The writ petitions before us were filed in the nature of Public Interest Litigation on 02.08.2010. The order sheet reveals that on that date the Court passed an order requiring the learned Advocate General to produce the entire record regarding creation of district on 11.08.2010. On 11.08.2010, the case was adjourned for the next date i.e. 12.08.2010 and on 12.08.2010 when the case was being heard, Sri D.K. Upadhyaya, learned Chief Standing Counsel informed the Court that another writ petition by some individuals in their individual capacity was filed before the Miscellaneous Bench, which was dismissed on 11.08.2010. The Judgment and order delivered in the said case was never cited before us nor we were informed about the contents of the Judgment.

16. Since the learned Chief Standing Counsel gave the statement that it was a writ petition filed by some individuals in their individual capacity before Miscellaneous Bench whereas the present writ petitions were filed as Public Interest Litigation, which was summarily dismissed on that very date and the

order having not been placed before us, the matter proceeded in the absence of the aforesaid Judgment passed in the case of Hari Bhajan Singh. The order in the present writ petitions was reserved by us on 12.08.2010. It was pronounced on 18.8.2010.

17. During all this period also, when the order remained reserved, no effort was made by the State to provide the Judgment and order which was passed in the case of Hari Bhajan Singh (supra).

18. Learned Counsel for the Petitioners before arguing on the merits of the case, have raised the following pleas, namely, (i) the Judgment and order in the case of Hari Bhajan Singh was not available and was never cited before this Court and, therefore, that was not taken into consideration while passing the interim order and; (ii) the writ petition of Hari Bhajan Singh was though filed as Miscellaneous Bench petition before the Bench having jurisdiction of Miscellaneous Bench cases but, in fact, it was a petition which could be nothing, but in the nature of Public Interest Litigation and, therefore, the said Bench was having no jurisdiction to entertain or decide the writ petition and the orders passed thereon are, therefore, nullity and not binding.

19. On the pleas aforesaid, during the course of hearing of the present petitions, we enquired from the computer Section of the High Court about the date of uploading of the Judgment and order passed in the case of Hari Bhajan Singh, on which a report has been submitted that it was uploaded on 19.08.2010 at 9:02:44 p.m.

20. Thus, it is obvious that though the Judgment in the case of Hari Bhajan Singh appears to have been pronounced on 11.08.2010 in the Court but the same was not available to either parties till 18.08.2010 i.e. when the interim orders were pronounced by this Bench on 18.08.2010.

21. The learned Counsel for the State could not dispute the aforesaid facts that the Judgment in the case of Hari Bhajan Singh was uploaded on 19.08.2011 and that the same was never cited before this Bench either during arguments or thereafter when the orders remained reserved and were pronounced on 18.08.2010.

22. By giving the aforesaid facts, we do not in any way make any attempt to justify the interim order passed by us without considering the Judgment of the Bench of equal strength but we only put on record the reason, as to why the said Judgment could not be taken note of by us, while passing the order.

23. On the plea of jurisdiction of the Miscellaneous Bench to entertain the petition of Hari Bhajan Singh, it has been urged that the creation or abolition of a district would never give a personal cause of grievance or would never effect the personal right of an individual, so as to treat it as a writ pertaining to Miscellaneous Bench jurisdiction.

24. Submission is that such a challenge to the notification for creation of district

or abolition thereof, would always be a public cause and the petition which challenges such notification would be nothing but a Public Interest Litigation. The jurisdiction to entertain such a petition would, therefore, be exclusively with the Bench who has been conferred PIL jurisdiction under the orders of the Chief Justice and no other Bench.

25. Further submission is that the Petitioners Hari Bhajan Singh and another in their writ petition never pleaded nor proved that they had filed the writ petition to foster any personal disputes or vendetta.

26. To buttress the aforesaid submission, reliance has been placed upon the case of Rakesh Kumar Sharma and Others Vs. State of U.P. and Another, , wherein a plea was raised by Sri S.P. Gupta, Senior Advocate appearing on behalf of the Respondents regarding maintainability of the writ petition as Public Interest Litigation at the instance of the writ Petitioners. It was contended on behalf of the State that the writ Petitioners cannot be said to have any locus standi to maintain the writ petition as the question of creation, alteration or abolition of a district does not effect any kind of right of the public at large. It was the further argument of Sri Gupta on behalf of the State that in order to prove locus of the writ Petitioners to maintain the writ petitions, it was necessary for them to plead and prove the public injury in the matter of challenge of the impugned notifications and that the writ Petitioners ought to have sufficient interest in the challenge of the aforesaid notifications.

27. The preliminary objection raised was rejected and it was held that the writ Petitioners particularly the members of the different Bar Associations have sufficient interest in the matter of challenge of the impugned notifications and that the writ petition was maintainable as PIL.

28. Learned Counsel for the State, in response, did not make any serious challenge to the effect that the writ petition challenging the creation, alteration or abolition of a district would not be a matter of Public Interest Litigation.

29. If a district is created, altered or abolished, no person or a group of persons can have any individual interest nor any of the personal rights would stand infringed nor writ petition can be filed for redressal of any personal dispute with respect to creation, alternation or abolition of a district.

30. Creation of a district is the decision of the government, sometimes to meet the political exigencies and may be many a times for the just cause of removing the congestion or facilitating the administration by dividing the district into two or by abolishing a district and merging it with another district. Such a decision, whether it is politically guided or it is for administrative exigency, would never fall upon any individual right or any individual person for any purpose. If any person or group of persons feel aggrieved by any such decision and, of course, by issuance of notification thereafter, if they are having sufficient interest in the matter, they have a right to challenge the said action of the State Government by approaching the High Court but the writ petition so filed would only be classified

as PIL. It can never be an individual grievance or a petition to be titled under the head of Miscellaneous Bench petition, unless some specific injury to the individual concerned has been pleaded and proved. The petition may be framed in any manner and the relief may be couched in any language but it will be the pith and substance of the grievance raised and the basic essential relief which can be granted on the basis of cause of action on which such claim is based, would determine the nature of litigation.

31. Creation of a district, as already observed, thus, can be challenged in public interest which is a public cause and, therefore, the writ petition so filed would be in the nature of PIL jurisdiction of the High Court.

32. Thus, the writ petition which was filed as Miscellaneous Bench petition by Hari Bhajan Singh and another was, in fact, a writ petition falling under the category of PIL and ought to have been presented before the Bench dealing with PIL jurisdiction.

33. Needless to burden the Judgment with the decisions on the plea that jurisdiction of the High Court for dealing with variety of cases, namely, writ petitions of civil nature, criminal nature, first appeals, second appeals, bails, contempt etc. are allocated by Hon'ble the Chief Justice.

34. Rule 1 of Chapter v. of the Allahabad High Court Rules, 1952 provides that Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted by order of the Chief Justice or in accordance with his directions.

35. The decision of the apex court in Rajiv Ranjan Singh "Lalan" (V) v. Union of India (2005) 11 SCC 312 may be referred, wherein the Court held that undoubtedly the prerogative to constitute a Bench lies solely with the Chief Justice. It is imperative to note that the Chief Justice is supreme in the matter of framing of roster and allocation of jurisdiction to different Benches of the High Court with respect to nature of cases, which a Bench can entertain and hear. The writ petition so filed does not permit a Bench to entertain or decide the case, which does not fall within the category of jurisdiction, which has been allocated to him, even if such a case comes before the Court.

36. Normally the courts are conscious when they take up any matter listed or presented before them about the jurisdiction to entertain the petition but some times may be that, by oversight, if the said plea is not raised, the Court may decide a case for which it has no jurisdiction. It is the first and foremost duty of the counsel who files the petition, to correctly classify the head while presenting it in the registry. Duty also lies upon the parties and their counsel who appear in the Court, to bring to the notice of the Court the factum of jurisdiction where the Court does not have jurisdiction to hear the matter. In the instant case, the State very well knew that a petition raising the same challenge was already being heard in PIL jurisdiction, in which on 02.08.2010 the Court passed an order in the presence of the Advocate General to produce the record on 11.08.2010. On

11.08.2010 the case was adjourned for 12.08.2010 but on 11.08.2010, the State did not find it appropriate to bring it to the notice of the Court dealing with Hari Bhajan Singh's case, that a similar controversy is already engaging attention of another Division Bench, where the matter was listed on 11.08.2010 and was posted to the next day i.e. 12.08.2010, nor did the State inform the Bench that it was a PIL jurisdiction matter and, therefore, the matter be sent to that Bench.

37. In regard to the non-binding nature of the Judgment passed in the case of Hari Bhajan Singh, reliance has been placed upon the case of Sumac International Limited v. PNB Capital Services Limited and the Official Liquidator, High Court of Allahabad and Uttranchal 2006 (10) ADJ 86, wherein a Division Bench of this Court made the following observations:

There is never any *res judicata* in regard to a point of jurisdiction. Numerous cases have laid down several rules in this regard, e.g., (i) parties cannot confer jurisdiction on a Court by consent; (ii) a point as to jurisdiction of a Court passing a decree can be taken by the judgment debtor for the first time even at the very last stage of execution (iii) an order of Court passed without jurisdiction can be disregarded (of course by courageous citizens only) since there is no contempt possible of any order passed without jurisdiction.

On this basis it appears that an order without jurisdiction is valid only for parties, who choose to treat it as valid, but otherwise the order can be disregarded by parties and therefore even more so by Courts, before which such orders come to be considered and applied at later times.

38. In the case of Rakesh Chandra Srivastava v. Santosh Kumar Mishra 2003 All. L. J. 838, a Division Bench of this Court considering the plea of jurisdiction of a Bench to hear a matter which is not allocated to it, concluded as follows:

Considering all the aforesaid decisions, the Division Bench of this Court in Prof. Y.C. Simbadri and Ors. v. Deen Bandhu Pathak (*supra*) *inter alia* held as follows:

(1) The administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative.

(2) The Chief Justice alone has the right and power to decide how the Benches of the High Court are to be constituted which Judge is to sit alone and which cases he can and is required to hear as also which Judges shall constitute a Division Bench and what work those Benches shall do.

(3) The puisne Judges can only do such work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice.

(4) Any order which a Bench or a single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with

his direction is an order without jurisdiction and void.

(5) Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempts of Courts Act or under Article 215 of the Constitution of India.

(6) For exercising the jurisdiction under Article 215 of the Constitution of India the procedure prescribed by law has to be followed.

39. After making the aforesaid observations, the Division Bench set aside the order passed by the learned Single Judge and allowed the special appeal.

40. In view of the aforesaid judgment, the learned Counsel for the Petitioners submitted that the judgment passed in the case of Hari Bhajan Singh is not binding upon the court.

41. We, however, do not find it expedient to enter into the aforesaid question any further, for the reason that matters are being heard finally and the Judgment of the case of Hari Bhajan Singh (supra) cannot be overlooked by us, when it decides the same issue and more so, when the matter has been remitted to this Court by the apex court for considering the said Judgment.

42. Now we proceed to deal with the merits of the claim of either parties.

43. Sri Akhilesh Kalra leading the arguments by raising challenge to the aforesaid notification dated 01.07.2010, mainly raised the following pleas:

(i) The notification issued u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act by the Governor is an administrative act and not legislative.

Corollary to the aforesaid argument is that the view expressed in the case of Hari Bhajan Singh, to the contrary, does not flow from the scheme of the aforesaid provision of Section 11 of the Uttar Pradesh Land Revenue Act, nor from the constitutional provisions, which define legislative and executive power of the Governor;

(ii) In the alternative, the Petitioners argued that assuming the exercise of power u/s 11 is a Legislative Act, even then it being inconsistent with the Central Act, it would not be saved in view of Article 246 and 254 of the Constitution;

(iii) In the presence of the notification issued by the Governor on 22.12.09 under Rule 8 of the Census Rules, 1990 framed by the Central Government u/s 18(1) of the Census Act, 1848 on the directives issued by the Central Government, the subsequent notification dated 01.07.2010 could not have been issued and if issued, it will supersede the earlier notification and, therefore, the latter notification cannot be given effect to;

(iv) In fact, the impugned notification dated 01.07.2010 cannot be taken or treated to be notification for creation of district CSM Nagar nor does it create any district but only restores the district said to have been created by notification

dated 21.05.03 but later abolished by notification dated 13.11.03, therefore, there being no power or provision u/s 11 of the Uttar Pradesh Land Revenue Act or u/s 21 of the Uttar Pradesh General Clauses Act, to issue notification for restoration of a district, therefore, the said notification is per se bad in law, which does not create any district;

(v) Section 21 of the Uttar Pradesh General Clauses Act cannot at all be attracted nor made use of, in view of Section 11 of the Uttar Pradesh Land Revenue Act, which is a complete code in itself with respect to creation, alteration or abolition of any district and, therefore, the application thereof is per se without any legal sanction nor would confer any power upon the Governor to issue any notification for restoration of a district, which is no more in existence.

Corollary to the aforesaid argument is, that Section 21 of the Uttar Pradesh General Clauses Act only provides that where by any State Act or Rule, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to like sanction and conditions, if any, to add to amend, vary or rescind any notification, orders, rules or bye-laws so issued, which means that the power implied from the said provision of the General Clauses Act would be available only to add, amend, vary or rescind a notification issued in exercise of power conferred by a State Act or Rule, which does not specifically confer the power to add, amend, vary or rescind such notification and, therefore, u/s 21 of the Uttar Pradesh General Clauses Act, power to restore a district cannot be found; and

(vi) Whether in view the observations made in Ram Milan Shukla case (supra), districts could have been created without providing necessary infrastructure and the necessary budgetary allocation.

44. In view of the Supreme Court's order passed in civil appeals, the main question that arises for consideration is, whether the view taken by the Court in the case of Hari Bhajan Singh (supra) is correct or requires reconsideration and, therefore, whether the impugned act of the Governor done in exercise of statutory power or authority is a legislative act; if so, then whether such exercise of power and authority can be held to be inconsistent with the central enactment.

45. The State vehemently contended that exercise of statutory power u/s 11 of the Uttar Pradesh Land Revenue Act is not an executive power. Learned Chief Standing Counsel argued at length that exercise of power u/s 11 of the Uttar Pradesh Land Revenue Act is legislative in character. Sri D.K. Upadhyaye placed reliance on the cases of Rakesh Kumar Sharma (supra) and Hari Bhajan Singh (supra) wherein this Court held that power of the State Government in issuing the notification u/s 11 of the Uttar Pradesh Land Revenue Act is legislative in character and is not merely an executive or administrative power of the State Government.

46. There are two enactments, (1) Census Act, 1948, wherein u/s 18(1) the rules known as Census Rules, 1990 have been framed and (2) the Uttar Pradesh

Land Revenue Act, 1901. Both these enactments were made before the commencement of the Constitution and therefore, have force and validity under the Constitution by virtue of Article 372, being an existing law within the meaning of Article 366 sub Clause (10).

47. The Census Act was enacted by the Central Legislature and is referable to Entry 69 of the Union List - List I of Schedule VII. The Uttar Pradesh Land Revenue Act, 1901 was enacted by the Lt. Governor of Uttar Pradesh and received the assent of Governor General and is referable to Entry 45 of the State List - List II of Schedule VII of the Constitution. Entry 18 of State List - List II also refers to land etc.

48. Article 254 deals with inconsistency between laws made by Parliament and laws made by the Legislatures of States and reads as under:

254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States - (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 matter 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.

49. Census Act, 1948 enacted by the Central Legislature and the Uttar Pradesh Land Revenue Act, 1901 are referable to Section 100 of the Government of India Act, 1935, corresponding to Article 246 of the Constitution.

50. The aforesaid two enactments thus, are valid existing laws. Under Article 254, the issue regarding repugnancy of the Act of State Legislature as against the Act of the Parliament or for that matter against the existing law with respect to the subject, which falls in Concurrent List has been dealt with. There is no provision with respect to an issue like the present one, where two enactments being valid in themselves and there being no repugnancy between them in terms of Section 107 of the Government of India Act, 1935 corresponding to Article 254 of the Constitution, the issue before us being about the exercise of statutory

power under the two legislations by the Government, therefore, in our opinion Article 254 may not be attracted or applied strictly for resolving the question involved, but one will have to see the effect of such exercise of power by the executive authority under the State Act, vis-a-vis., the Central Act.

51. In other words, had there been a case of repugnancy between the Act framed by the State Legislature as against the law made by the Parliament, which the Parliament is competent to enact or had it been a case of repugnancy between the existing law with respect to one of the matters enumerated in the Concurrent List, Article 254 would have been straightaway attracted but even if there is no direct inconsistency between the provision of a State Act and a Central Act, the effect will be the same in case inconsistency arises on account of exercise of power under the State Act, so as to give rise to a conflict with the provisions of the Central Act and to give effect to a thing which is forbidden by Central Act.

52. The alternate plea that Article 246 also makes Governor's action of issuing notification dated 01.07.2010 as invalid would be considered later on. However, before we proceed to discuss the aforesaid alternate plea of applicability of Article 246, it is expedient to first delve into the nature of the powers exercised by the Governor, while issuing notification u/s 11 of the Uttar Pradesh Land Revenue Act i.e. whether exercise of such statutory power is a legislative or administrative act.

53. In the case of Ram Milan Shukla (supra), a Division Bench of this Court has held the said powers to be administrative and has observed as under:

We are of the opinion that although creation of a new district is an administrative act u/s 11 of the U.P. Land Revenue Act yet such administrative powers must be exercised on relevant considerations and not arbitrarily. In this connection, reference may be made to the White Paper issued recently by the U. P. Government regarding income and expenditure of the State Government for the year 1998-99. In page 11 of the White Paper, it has been stated that the annual income of the U. P. Government is Rs. 7,000 crores while the annual expenditure on salary, pension, etc. of the employees is about Rs. 11,000 crores. Thus, the expenditure of the U. P. Government is far in excess of its income. This means that the deficit has to be covered by taking loans from some source and such loans carry liability for payment of interest. This practice of taking loans has been continued for several decades both by the Central and State Government and the result is that now they have to take loans simply to pay the interest on the previous loans. Thus, the U. P. Government is paying Rs. 6,000 crores annually as interest on its Rs. 50,000 crores debt (vide Northern India Patrika dated 14.1.1999). This is leading to debt trap such as in the countries of South America. In our opinion, the time has now come for strict financial discipline by the Central and State Governments and by public authorities. It must be remembered that every entity runs on finance, whether that entity is a household, a business concern or a Government. Unless strict financial discipline

is now imposed, our country will be in very serious difficulty.

54. In the case of Rakesh Kumar Sharma (supra), it has been held that the State Government while issuing a notification u/s 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.

55. The case of Hari Bhajan Singh (supra) has proceeded on the aforesaid premise and has held that legislative power of the Governor would supersede the notification issued under the Census Rules.

56. Hari Bhajan Singh and another challenged the validity of the notification dated 01.07.2010 on the ground that it was in violation of notification dated 22.12.09 said to have been issued under Rule 6 (though it should be Rule 8) of the Census Rules, 1990.

57. The Court relying upon the case of Rakesh Kumar Sharma (supra) dismissed the writ petition holding that the power of the State Government in issuing the notification u/s 11 of the Uttar Pradesh Land Revenue Act is legislative in character and is not merely an executive or administrative power of the State Government. The Court further observed that the notification dated 01.06.2010 (should be 01.07.2010) issued by the State Government is a legislative instrument of general rule of conduct and further the power of the State Government in issuing such notification is legislative in character.

58. The Division Bench in the aforesaid case of Rakesh Kumar Sharma (supra) relying upon Tulsipur Sugar Co. Ltd. Vs. The Notified Area Committee, Tulsipur, and applying the test laid down by the apex court in State of Punjab Vs. Tehal Singh and Others, , held that State Government while issuing a notification u/s 11 exercises power which is legislative in nature and it is not purely an executive or administrative power of the State Government.

59. The decision rendered in Tulsipur Sugar Co. Ltd. is not applicable in the present case. Their Lordships in that matter considered the nature of power exercised by the State Government u/s 3 of the Town Area Planning Act, 1914 to be legislative in nature with respect to conditional legislation.

60. Tehal Singh was a case where the Supreme Court considered the nature of power exercised by the State Government u/s 3 of the Punjab Panchayati Raj Act, 1994. The aforesaid Judgment, in our opinion, does not touch the issue regarding the nature of power to be exercised by the Governor u/s 11 of the Uttar Pradesh Land Revenue Act i.e. for creation, alteration or abolition of districts.

61. It is also pertinent to mention that Ram Milan Shukla (supra) was a case rendered by the Division Bench prior in time than the Judgment of Rakesh Kumar Sharma and, therefore, the said Judgment of co-equal strength of judges ought to have been followed by the subsequent Division Bench in Rakesh Kumar Sharma (supra) and also in the case of Hari Bhajan Singh (supra).

62. It is settled that bench of co-equal strength of High Court is bound by decision of an earlier bench of co-equal strength and that as a matter of judicial discipline that later bench must follow the precedent or refer the matter to a larger bench. The Supreme Court in *State of Tripura Vs. Tripura Bar Association and Others*, held:

The Division Bench of the High Court which delivered the impugned judgment being a coordinate Bench could not have taken a view different from that taken by the earlier Bench of the High Court. If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course would have been to refer the matter to a larger Bench.

63. The aforesaid position has been consistently maintained by the apex court in *Ram Jivan Vs. Smt. Phoola (Dead) by Lrs. and Others*, , *State of Andhra Pradesh Vs. v.C. Subbarayudu and Others*, , *Lily Thomas, Vs. Union of India and Others*, , *Jawahar Lal Sazawal and Others Vs. State of Jammu and Kashmir and Others*, . The civil appeal remitting the present matter to be considered in light of *Hari Bhajan Singh (supra)* also took similar view.

64. The Court in *Ram Milan Shukla (supra)* had observed that power to create, alter or abolish a district is administrative in nature.

65. It has been held and recognized consistently since the *Delhi Laws Act*, In re AIR 1951 SC 332 that the essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct. Normally, legislation or Act of Legislature is considered to be that which is enacted by a duly constituted legislature according to the prescribed legislative procedure. However, it is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy (see also *Ajoy Kumar Banerjee v. Union of India (1984) 1 SCC 127* . The legislative work which is so done by a subordinate authority may be either conditional legislation or delegated legislation. When an appropriate legislature enacts law and authorizes an outside authority to bring it into force, in such area or at such time as it may decide, that is conditional legislation. This power extends to existing as well as future laws, enacted by Parliament or State Legislature and to extend these laws with such restrictions or modifications as it thinks fit (*Delhi Laws Act (supra)*); but the subordinate authority cannot modify the law in any essential features. Such legislation is conditional legislation. On the other hand, when the legislative policy and guidelines to implement it are adequately laid down and the delegate is only empowered to carry out the policy within the guidelines laid down by the legislature and what is permitted is the delegation of ancillary or subordinate legislative functions or a power to fill up the details it is called delegated legislation (*Delhi Laws Act (supra)*; *Kunj Behari Lal Butail and Others Vs. State of H.P. and Others*, .

66. Legislation has two essentials. First, there should be formulation of a policy and (2) provisions for its execution and implementation. It should also lay down a general rule of conduct. "Policy" in this context means principles of general aggregation that may be formulated and "general rule of conduct" means providing for the implementation of the policy. The impugned notification does not lay down any policy nor prescribes any formulation of general rule of conduct. It is merely a medium through which the statutory provision of Section 11 of the Uttar Pradesh Land Revenue Act has been given effect to and, therefore, it can only have legislative force but cannot be considered legislative instrument laying down general rule of conduct per se, nor can be a legislative act.

67. The executive power of the State is co-extensive with its legislative powers. Article 162 of the Constitution provides the extent of executive power of the State which shall be exercised "subject to the provisions of the Constitution". The field of operation of executive and the legislature is thus, co-extensive and co-terminus.

68. Article 246 defines the legislative power of the State and the Entries in the List II-State List of Schedule VII lay down the field of such exercise of power. The executive power of the State cannot be exercised if the State legislature is having no power to legislate on the subject, as such an exercise of executive power, would transgress the constitutional limitations.

69. The State legislature is also thus, competent to create, alter or abolish a district by legislation in view of Entry 45 of State List - List-II. If a district is created, altered or abolished by legislature, it would be an act of legislature and may be a legislative act. But if power is exercised by the executive by virtue of Section 11 of the Uttar Pradesh Land Revenue Act, then it would only be an exercise of executive power, which cannot be termed as legislative act.

70. It has been held by the Apex Court in *Union of India (UOI) and Others Vs. Valluri Basavaiah Chowdhary and Others*, that there is a difference between an act of legislature and legislative act and the only legislative act which is performed by the Governor is with regard to giving assent to bills under Article 200 of the Constitution or to issue an Ordinance under Article 213 of the Constitution. This view is borne out from the following observations made in that case:

There is a clear distinction between "an Act of legislature", "a legislative act" and "a resolution of the House". The High Court has completely overlooked this distinction.

The Governor is a constitutional head of the State Executive, and has, therefore, to act on the advice of a Council of Ministers under Article 163. The Governor is, however, made a component part of the State Legislature under Article 164, just as the President is a part of Parliament. The Governor has a right of addressing and sending messages to under Arts. 175 and 176, and of summoning,

proroguing and dissolving under Article 174, the State Legislature, just as the President has in relation to Parliament. He also has a similar power of causing to be laid before the State Legislature the annual financial statement under Article 202(1), and of making demands for grants and recommending "Money Bills" under Article 207(1). In all these matters the Governor as the constitutional head of the State is bound by the advice of the Council of Ministers.

The Governor is, however, made a component part of the legislature of a State under Article 168, because every Bill passed by the State legislature has to be reserved for his assent under Article 200. Under that article, the Governor can adopt one of the three courses, namely (i) he may give his assent to it, in which case the Bill becomes a law; or (ii) he may except in the case of a "Money Bill" withhold his assent there from, in which case the Bill falls through unless the procedure indicated in the first proviso is followed, i.e., return the Bill to the Assembly for reconsideration with a message, or (iii) he may (subject to Ministerial advice) reserve the Bill for the consideration of the President, in which case the President will adopt the procedure laid down in Article 201. The first proviso to Article 200 deals with a situation where the Governor is bound to give his assent when the Bill is reconsidered and passed by the Assembly. The second proviso to that article makes the reservation for consideration of the President obligatory where the Bill would, "if it became law", derogate from the powers of the High Court. Thus, it is clear that a Bill passed by a State Assembly may become law if the Governor gives his assent to it, or if, having been reserved by the Governor for the consideration of the President, it is assented to by the President. The Governor is, therefore, one of the three components of a State legislature. The only other legislative function of the Governor is that of promulgating Ordinances under Art. 213 (1) when both the Houses of the State legislature or the Legislative Assembly, where the legislature is unicameral, are not in session. (underlined by us) The Ordinance-making power of the Governor is similar to that of the President, and it is co-extensive with the legislative powers of the State legislature. From an enumeration of the powers, functions and duties of the Governor, it is quite clear that he cannot, in the very nature of things, participate in the proceedings of the House or Houses of Legislature, while the State legislature passes a resolution in terms of Article 252(1), not being a member of the legislature under Art 158.

The function assigned to the Governor under Article 176(1) of addressing the House or Houses of Legislature, at the commencement of the first session of each year, is strictly not a legislative function but the object of this address is to acquaint the members of the Houses with the policies and programmes of the Government. It is really a policy statement prepared by the Council of Ministers which the Governor has to read out. Then again, the right of the Governor to send messages to the House or Houses of the Legislature under Article 175(2), with respect to a Bill then pending in the legislature or otherwise, normally arises when the Governor withholds his assent to a Bill under Article 200, or when the President, for whose consideration a Bill is reserved for assent, returns the Bill

withholding his assent. As already stated, a "Bill" is something quite different from a "resolution of the House" and, therefore, there is no question of the Governor sending any message under Article 175(2) with regard to a resolution pending before the House or Houses of the Legislature.

71. By means of the impugned notification dated 01.07.2010, the earlier notification dated 13.11.03 was cancelled and nothing more was done. It is doubtful if by mere cancellation of the earlier notification, the new district could be revived. However, we shall deal with this proposition in the later part of the Judgment.

72. Thus, the notification dated 01.07.2010 is not an act of legislature, because it was not passed or enacted by the State Legislature in accordance with the prescribed legislative procedure. The impugned notification is not a legislative function because it does not lay down any legislative policy. It is not a conditional legislation because it does not apply an existing law with or without any modification to any particular area and/or from a particular date. There is no element of any subordinate or delegated legislation by filling any details in it for carrying out any legislative policy. Therefore, it cannot be but an executive act, the exercise of administrative power conferred by the statute.

73. It is obvious that if an act of the Governor which is done in exercise of statutory power under the Constitution or any legislative enactment is not a legislative act or a judicial act, then it must be necessarily an executive act only. (See Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, Therefore, anything done by the Governor in exercise of power u/s 11 of the Uttar Pradesh Land Revenue Act will be an executive act, even though it may have the effect of a legislative instrument. It cannot be a legislative act of its own force.

74. In such a situation, as indicated above, the Governor/State Government will have to put the provisions of Section 11 of the Uttar Pradesh Land Revenue Act in abeyance during census operations and cannot perform an executive act which has the effect of negating the provisions of rule 8(iv) of the Census Rules, even though, the executive act in question of the Governor/State Government may have the effect of a legislative instrument of general rule of conduct for the sake of argument.

75. The above proposition is also supported by the provisions of Article 256 of the Constitution which provides that the executive power of every state shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply to that State. Therefore, it does not lie within the power of the State Government/Governor to do an act which has the effect of defeating or stifling the provisions of the Census Act and the Rules made there under.

76. For argument sake, even if we assume that the impugned notification dated 01.07.2010 issued by the State Government is a legislative instrument of general

rule of conduct then the question arises for consideration is that whether the impugned notification can be held to be inconsistent with rule 8 (iv) of the Census Rules, 1990 and the effect of the said Rule on the power exercised by the Governor u/s 11 of the Uttar Pradesh Land Revenue Act.

77. The power of the State Legislature to make a law is derived from the provisions of Article 246, which corresponds to Section 100 of the Government of India Act, 1935. Article 246 reads as under:

Article 246 - Subject-matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in Clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List 1 in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in Clause (3), Parliament and subject to Clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to Clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included (in a State) notwithstanding that such matter is a matter enumerated in the State List.

78. Article 246(3) is to be read with the relevant entries in the State List of the Constitution. The ambit of the power as enumerated in the State List is limited by the entries in the Union List and Concurrent List by virtue of Articles 246(1), 246(2) and 246(3) of the Constitution. The corresponding provisions of Article 246 were contained almost in similar language in Section 100 of the Government of India Act, 1935. That being so, the State Government cannot enlarge that power at the stage of operation of the statute. Thus, the exercise of power under a state law has to be exercised subject to and restricted by the power of the Central Government to legislate. In other words, if the State Government purports to act under a state law, the power to do so would be controlled and restricted by the provisions of the central legislation applicable.

79. Rule 8(iv) of the Census Rules provides that the State Government shall freeze the administrative boundaries of the districts during census operations i.e. from the date intimated by Census Commissioner and till the completion of the census. Therefore, the provisions of rule 8(iv) which will be deemed to be part of the Census Act itself are restrictive of and limit the power of the State Government u/s 11 of the Uttar Pradesh Land Revenue Act to create a new district or to alter the boundaries of a district during the census operations;

otherwise, the exercise of power u/s 11 during that period cannot be reconciled or harmonized with the provisions of rule 8 (iv) of Census Rules.

80. A perusal of the aforesaid rule admits of no ambiguity that the directive contained therein for the State Government and Union Territory is mandatory and the State Government has no choice but to freeze the administrative boundaries of the Nagar Palikas, Revenue villages, Tehsils, Police Stations, Vikas Khands, Talluqas, Parganas and Districts, etc.

81. Census Rules, 1990 including rule 8(iv) have been framed by the Central Government under the statutory powers vested in it under the Census Act and in particular Section 18 Sub-clause (1).

Rule 8(iv) of Census Rules, 1990 reads as under:

8. Notifications, Orders and Instructions to be issued by State Government - The State Governments and the Union territory Administration shall, -

(i).....

(ii)...

(iii)...

(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;

82. Any state enactment or executive or administrative order has to be in consonance with the central enactment and so would be the case vis-a-vis Rules framed under the Central Act. To term it in common parlance, central enactment and the statutory rules framed by the Central Government, would be on a higher pedestal than the state enactment or executive or administrative orders passed by the State Government in exercise of its powers under any State law. Of course, if there is a case of repugnancy of two Acts, the same has to be resolved by taking recourse to the relevant provisions of the Constitution but in a matter like the present one, it cannot be said that there is any repugnancy between the two existing laws, framed before the commencement of the Constitution. The only inconsistency between the impugned notification and the statutory rules framed under the Central enactment is the imperative incorporated under rule 8 (iv) for freezing the administrative boundaries of tehsils, districts etc, whereas by the State action, the said boundaries have been altered. The question, therefore, arises that whether the State would have any authority to act in direct conflict with aforesaid statutory directive. The answer would be in negative.

83. In *M. Karunanidhi Vs. Union of India and Another*, , the Supreme Court while considering the meaning and scope of Article 254 of the Constitution, observed as under:

It is well settled that the presumption is always in favour of the constitutionality

of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:

1. That there is a clear and direct inconsistency between the Central Act and the State Act.
2. That such an inconsistency is absolutely irreconcilable.
3. That the inconsistency between the provisions of the two Acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other.

84. The Court also took note of Colin Howard's Australian Federal Constitutional Law, 2nd Edition, wherein the author while describing the nature of inconsistency between the two enactments, observed as follows:

An obvious inconsistency arises when the two enactments produce different legal results when applied to the same facts.

85. The Court with approval quoted the observations of the case of. Knox, C.J., in Hume v. Palmer wherein his Lordship observed as follows:

The rules prescribed by the Commonwealth Law and the State law respectively are for present purposes substantially identical, but the penalties imposed for the contravention differ...

In these circumstances, it is I think, clear that the reasons given by my brothers. Isaacs and Starke for the decisions of this Court in Union Steamship Co. of New Zealand v. Commonwealth and Clyde Engineering Co. v. Cow-burn establish that the provisions of the law of the State for the breach of which the Appellant was convicted are inconsistent with the law of the Commonwealth within the meaning of Section 109 of the Constitution and are therefore invalid.

Isaacs, J. observed as follows:

There can be no question that the Commonwealth Navigation Act, by its own direct provisions and the Rules made under its authority, applies upon construction to the circumstances of the case. It is inconsistent with the State Act in various ways, including (1) general supersession of the rules of conduct, and so displacing the State rules, whatever those may be; (2) the jurisdiction to convict, the State law empowering the Court to convict summarily, the Commonwealth Law making the contravention an indictable offence, and therefore bringing into operation Section 80 of the Constitution, requiring a jury; (3) the penalty, the State providing a maximum of 50 the Commonwealth Act prescribing a maximum of ? 100, or imprisonment, or both; (4) the tribunal itself.

Starke J. observed as follows:

It is not difficult to see that the Federal Code would be "disturbed or deranged" if the State Code applied a different sanction in respect of the same act. Consequently the State rules are, in my opinion, inconsistent with the law of the Commonwealth and rendered invalid by force of Section 109 of the Constitution.

86. In Govt. of A.P. and Another Vs. J.B. Educational Society and Another etc., , the Court while discussing the scope of Articles 246 and 254 and considering the proposition laid down by this in M. Karunanidhi Vs. Union of India and Another, with respect to the situations in which repugnancy would arise, in Paras 9, 10 and 11 of the report, held as follows:

9. Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I, notwithstanding anything contained in Clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by Parliament with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List I and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule.

10. There is no doubt that both Parliament and the State Legislature are supreme in their respective assigned fields. It is the duty of the court to interpret the legislations made by Parliament and the State Legislature in such a manner as to avoid any conflict. However, if the conflict is unavoidable and the two enactments are irreconcilable, then by the force of the non obstante clause in Clause (1) of Article 246, the parliamentary legislation would prevail notwithstanding the exclusive power of the State Legislature to make a law with respect to a matter enumerated in the State List.

11. With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict.

87. The aforesaid view was affirmed by the apex court in the case of Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra (2010) 5 SCC 246.

88. In A.L.S.P.P.L. Subrahmanyam Chettiar v. Muttuswami Goundan AIR 1941 FC 541, the question of competence of Madras Legislature in enacting the Madras Agriculturists Relief Act, 1939, alongwith other questions was involved.

89. The Court by majority, dismissed the appeal. In the words of Gwyer, C.J., it was observed as follows:

Section 100(3), Constitution Act, provides that a Provincial Legislature has the exclusive power of legislating with respect to the matters enumerated in List II, the Provincial Legislative List. But this power is expressly stated to be subject to the provisions of Section 100(1), which give an exclusive power to the Federal

Legislature to legislate with respect to the matters enumerated in List I, the Federal Legislative List. Hence, though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided, *ex majori cautela*, that if the two sets of legislative powers should be found to overlap, then the federal legislation is to prevail. And the reason for this is clear. However, carefully and precisely lists of legislative subjects are defined, it is practically impossible to ensure that they never overlap; and an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory.

90. In the case of *Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd.*, , the question before the apex court was, whether by the declaration of electricity as an essential article under the Act, the Act so impinges upon various matters either in List I or List III of the Seventh Schedule to the Constitution.

91. Considering the aforesaid question, their Lordships considered the scope of Article 246 and in particular the word "notwithstanding" in Clause 1 of Article 246 and "subject to" in Clause 3. The Court found that they mean that where an entry is in general terms in List II and part of that entry is in specific terms in List I, the entry in List I takes effect notwithstanding the entry in List II.

92. The Court further observed that this is also on the principle that the "special" excludes the "general" and the general entry in List II is subject to the special entry in List I. For instance, though house accommodation and rent control might fall within either the State List or the Concurrent List, Entry 3 in List I of Seventh Schedule carves out the subject of rent control and house accommodation in cantonments from the general subject of house accommodation and rent control (see *Indu Bhushan Bose Vs. Rama Sundari Debi and Another*, . Furthermore, the word "notwithstanding" in Clause (1) also means that where it is not possible to reconcile the two entries the entry in List I will prevail. But before that happens attempt should be made to decide in which list a particular legislation falls (para. 5).

93. In the case of *The Central Provinces and Berar Act No. XIV, 1938*, AIR 1939 1 (Federal Court) , Sir Maurice Gwyer, with reference to the corresponding provisions of the Government of India Act, observed as follows:

It will be observed that by Section 100 (1) the Federal Legislature is given the exclusive powers enumerated in the Federal Legislative List, "notwithstanding anything in the two next succeeding Sub-Sections" of that Section. Sub-Section (2) is not relevant to the present case, but Sub-Section (3) is, as I have stated, the enactment which gives to the Provincial Legislatures the exclusive powers enumerated in the Provincial Legislative List. Similarly Provincial Legislatures are given by Section 100 (3) the exclusive powers in the Provincial Legislative List "subject to the two preceding Sub-Sections", that is Sub-Sections (1) and (2). Accordingly, the Government of India further contend that, even if the impugned Act were otherwise within the competence of the Provincial Legislature, it is

nevertheless invalid, because the effect of the non obstante Clause in Section 100 (1), and a fortiori of that clause read with the opening words of Section 100(3), is to make the federal power prevail if federal and provincial legislative powers overlap.

He observed further:

Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavor must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

94. The provisions of Article 246 corresponds to Section 100 of the Government of India Act, 1935 and, therefore, it can safely be concluded that even if the impugned notification issued was within the competence of the State Government, it would be invalid because of the operation of central enactment, namely, Census Act, 1948 and the Census Rules, 1990 framed there under, which has to prevail over the State action.

95. Applying the aforesaid principles, if in the presence of the notification issued under rule 8(iv) of the Census Rules, a notification of creating district is issued u/s 11, it will obviously give two different and conflicting legal results, i.e. Central Act prescribes freezing of boundaries and the State action creates new boundaries.

96. This creates an anomalous situation, which cannot be permitted.

97. The plea of the Respondent-State that there is no conflict between the central enactment, rules framed there under, directives contained therein and the impugned notification, for the reason that soon on the issuance of the notification dated 01.07.2010, a letter has been written to the Census Commissioner informing and assuring him that this creation of new district would not affect the census operations as for the purpose of said operations, boundaries of the pre-existing district i.e. Sultanpur would be taken to be in existence and, therefore, without any disturbance to the areas and boundaries of revenue villages or Tehsil, Police Stations etc. census operations can go on, is on the face of it, not worth being accepted.

98. The State Government cannot act in a manner which is contrary to the statutory provisions aforesaid and cannot protect such an action by giving assurance that census operations would not be affected and for that purpose, old boundaries of district Sultanpur would be taken to be maintained. The use of the

words "shall freeze the administrative boundaries" in Rule 8(iv) makes it binding and obligatory upon the State Government to freeze the boundaries of districts on directive so being issued by the Central Government.

99. Besides, the fact that once a new district has been created in the name of CSM Nagar, the question of maintaining the boundaries of old district Sultanpur would not arise. It is also clear that such an assurance was given by the State Government only for the reason that the State Government knew and was conscious that no such notification could be issued on 01.07.2010 in presence of the earlier notification dated 22.12.09.

100. It is just to circumvent the aforesaid notification of 22.12.09 that the said methodology has been adopted by the State, which does not have any legal support nor any basis.

101. For the reasons aforesaid, we are of the opinion that issuance of notification u/s 11 of the Uttar Pradesh Land Revenue Act is an administrative act, which cannot, in any manner whatsoever, be termed as legislative act or legislative instrument of general rule of conduct, though it may be a statutory instrument, and may have legislative force.

102. We are, therefore, respectfully, unable to subscribe with the view expressed by the Division Bench Judgments in the cases of Rakesh Kumar Sharma (supra) and Hari Bhajan Singh (supra).

103. This brings us to the next plea of the Petitioners that the notification dated 01.07.2010 cannot be taken to be a notification creating the district CSM Nagar. This point will also include the plea of the Petitioners that Section 21 of the General Clauses Act was not available to the State Government for issuing the impugned notification and also that the said provision does not allow anything to be done, which is not provided u/s 21 itself.

104. Sri D.K. Upadhyaya opposed the said plea on the ground that there is no specific pleading to that effect in the writ petition, whereas counsel for the Petitioners submitted that it is purely a legal plea and the notification dated 1.7.2010 is under challenge.

105. The plea aforesaid arises from a bare perusal of the aforesaid notification and it being a purely legal plea, we have allowed the said plea to be raised.

106. Section 11 of the Uttar Pradesh Land Revenue Act gives power to the State Government to create, alter and abolish a district, and reads 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."

Section 21 of the Uttar Pradesh General Clauses Act provides as under:

21 - Power to make to include power to add to, amend, vary or rescind, orders, rules or bye-laws:

Where, by any Uttar Pradesh Act, a power to issue statutory instrument 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, amend, vary, or rescind any statutory instrument so issued.

107. In the case of State of Jharkhand and Others Vs. Pakur Jagran Manch and Others, , the Supreme Court, while considering the provision of Section 24 of the State General Clauses Act, made the following observations:

The Appellants seek to support the notification dated 31.5.2007 with reference to Section 24 of the State General Clauses Act (corresponding to Section 21 of the Central Act) which provides that where by any State Act or Rule, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to like sanction and conditions if any, to add to, amend, vary or rescind any notification, orders, rules or bye-laws so issued. The power implied from the said provision of General Clauses Act would be available only to add, amend, vary or rescind a notification issued in exercise of power conferred by a State Act or Rule (which does not specifically confer the power to add, amend, vary or rescind such notification).

108. Section 21 of the Uttar Pradesh General Clauses Act would be applicable or can be attracted only where the State Act confers power to issue statutory instrument but which does not specifically confer power to add, amend or rescind such statutory instrument. This means that if the Act which confers power to issue statutory instrument also prescribes and confers power to add, amend, vary or rescind such notification, then in such a situation Section 21 of the Uttar Pradesh General Clauses Act cannot be attracted nor can be made applicable but if the latter power is not to be found in the State Act then, of course, assistance can be taken of General Clauses Act to exercise power of adding, amending, varying or rescinding the statutory instrument already issued.

109. The other important condition of applicability of Section 21 of the General Clauses Act is that the said power has to be exercised in the like manner and subject to like sanction and conditions, if any, to add, amend, vary or rescind the notification (statutory instrument), so issued, meaning thereby that if notification is issued under the State Act then if it is to be amended, varied or rescinded, the same has to be done in the like manner and subject to like sanction and conditions, if any and not otherwise. The apex court in Seth Bikhraj Jaipuria Vs. Union of India (UOI), (see also Babaji Kondaji Garad Vs. Nasik Merchants Co-operative Bank Ltd., Nasik and Others, laid down:

Where a statute requires that a thing shall be done in the prescribed manner or form but not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner of form prescribed can have no effect or validity.

110. Section 11 of the Uttar Pradesh Land Revenue Act not only confers power upon the State Government to create a district but also gives power to alter and abolish the same.

111. Section 21 of the Uttar Pradesh General Clauses Act gives power to add, amend, vary or rescind such statutory instrument (notification). Once the power to create, alter and abolish the districts has been given in Section 11. This power of creation, alteration or abolition of districts is to be exercised in the manner prescribed therein and not by taking recourse to Section 21 of Uttar Pradesh General Clauses Act.

112. It is crystal clear that power u/s 11 relates to creation, alteration and abolition of districts, for which notification can be issued under the said Section while Section 21 of the Uttar Pradesh General Clauses Act permits to amend, vary or rescind such notifications, which provision will only be available, if such power had not been given in Section 11.

113. Assuming for argument sake that Section 21 would also be available for the purpose of amending, varying and rescinding such notification, yet power to restore a district by merely rescinding the notification abolishing the said district, cannot be read into the aforesaid provisions.

114. Initially the district in question was created by issuance of a notification u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act on 21.05.03. The said district was abolished by issuance of notification u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act. Once the district was abolished under the aforesaid notification, there remained nothing which could be revived or restored.

115. Since the aforesaid notification dated 13.11.03 was issued u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act, wherein it was specifically provided that the district CSM Nagar stands abolished, the only meaning which could be given to the applicability of Section 21 of General Clauses Act, would be that the earlier notification was rescinded.

116. The effect of the abolition of district by notification dated 13.11.03, would be that on abolition of the district, CSM Nagar no more remained a district. Now by means of the impugned notification dated 01.07.2010, district CSM Nagar has not been created. There is no such notification nor the language used in the

impugned notification issued u/s 11 says that a district is being created or has been created u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act. What the impugned notification says is that the notification dated 13.11.03 is being rescinded in exercise of power u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act and a further direction is issued that the district CSM Nagar shall be restored.

117. Section 11 of the Uttar Pradesh Land Revenue Act does not permit issuance of such a notification or the restoration of a district which stands abolished. Section 21 of the Uttar Pradesh General Clauses Act also does not envisage any such situation.

118. The notification dated 01.07.2010 is in two parts. The first part of the notification rescinds the notification dated 13.11.03 abolishing the district, whereas the second part issues directions for restoration of CSM Nagar.

119. The first part of the notification does not have the effect of reviving the abolished district CSM Nagar, which was not in existence on 01.07.2010. The rescinding of the earlier notification dated 13.11.03 would only mean rescinding thereof and nothing beyond that. Section 21 of the Uttar Pradesh General Clauses Act also speaks of only rescinding the notification but does not give the effect of such recession. The impugned notification is a statutory instrument issued u/s 11 within the meaning of Section 21 of the Uttar Pradesh General Clauses Act and, therefore, unless there is a specific express provision in the parent Act i.e. Section 11 providing a certain effect of revival of the district on rescinding such a notification, the State Government cannot issue a notification u/s 11 by adding words or reading words to that effect in the parent Act either expressly or impliedly, though they do not find mention in the parent Act.

120. Section 6 of the Uttar Pradesh General Clauses Act would also not come to the rescue of the Respondent-State as it itself says that repeal of an enactment does not ipso facto revive the repealed enactment.

121. The second part of the impugned notification, which issues direction for restoration of district CSM Nagar, is thus not backed by any legal provision either u/s 11 of the Uttar Pradesh Land Revenue Act or u/s 21 of the Uttar Pradesh General Clauses Act and, therefore, at the highest, it can only be read as explanatory of the effect of the cancellation of the earlier notification, which the State Government intended. This intention is not sufficient to create the new district. The impugned notification does not in terms create district and cannot, therefore, be described as exercise of power u/s 11. To put it slightly in different words, the direction for restoration of district does not tantamount to creation of district. A thing which has ceased to exist cannot be restored.

122. We, therefore, find force in the argument of the learned Counsel for the Petitioners Sri Akhilesh Kalra that, in fact, no notification has been issued by the Governor for creation of new district CSM Nagar and it appears that it is under

misconception that the said district can be restored u/s 11 of the Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act merely on rescinding the notification dated 13.11.03, the aforesaid notification dated 01.07.2010 has been issued.

123. In view of the discussions made above, we are of the opinion that it cannot be taken as a fact much less legal, that any district in the name of CSM Nagar can be said to have been created by issuance of impugned notification u/s 11 nor such a notification can be given a legal status.

124. Sri Ashok Pandey, who has moved an application as intervener on behalf of one Uma Shankar Pandey, submitted that the impugned notification dated 01.07.2010 has been issued in compliance of the order passed by a Division Bench of this Court in Writ Petition No. 6077 (MB) of 2003, wherein on the plea of Uma Shankar Pandey that new district CSM Nagar be created, the Court issued a direction to decide his representation within the given time and, therefore, the notification issued in pursuance of the Court's directive will supersede all enactments. He also pleaded that in the case of Rakesh Kumar Sharma, all the districts and divisions which were abolished, were found to be validly created and notification of abolition of district was quashed, then district CSM Nagar cannot be discriminated, it having been initially created in the year 2003 itself.

125. We have perused the order passed in the writ petition of Uma Shankar Pandey and we find that there the Court did not issue any direction for creation of district but only directed for deciding the representation of the Petitioner. It was for the State to consider while deciding such representation, whether any such new district can be created in the presence of the notification issued on 22.12.09 and that merely because there was a direction for considering the representation, it does mean that it was a directive for creating the district.

126. The other plea of Sri Ashok Pandey that parity of the Judgment in the case of Rakesh Kumar Sharma be given in the case of CSM Nagar also has no force for the reasons which we have recorded in the present order.

127. The Respondent-State has urged that power to create district lies in the exclusive domain of the State Government and for that reliance has been placed upon paras 6, 7, 8 and 9 in the case of Samvidhan Bahali Aandolan v. Union of India and Ors. 1997 (88) RD 535 wherein the Court held tat the power to create district exclusively lies within the domain of the State Government.

128. For the aforesaid proposition, reliance has also been placed upon the case of Ram Milan Shukla (supra) and State of U.P. and Others Vs. Chaudhari Ran Beer Singh and Another, .

129. As already stated above, there cannot be any quarrel that creation of a district is the prerogative of the State Government and the power exclusively lies within its domain but if the action so taken for creation of district is arbitrary or

so to say, exercise of power is arbitrary, the same can be subjected to judicial review.

130. In *Ram Milan Shukla* (supra) the Division Bench did observe though power to create district is administrative in nature but this power like any other administrative power, cannot be exercised arbitrarily.

131. On the factual plea of the Petitioners that, in fact, the necessary infrastructure and paraphernalia has not been made available before creation of the district CSM Nagar and so is the case with almost all the districts created within last 15 years, we required the learned Chief Standing Counsel to inform the Court about the necessary infrastructure being made available in all the districts, which have been created during the aforesaid period.

132. A chart has been produced by the State counsel which we have taken on record. A perusal of the aforesaid chart reveals that the State has not given any specific answer to the query made but has given evasive reply regarding the infrastructure being made available in all the districts so created. It has been stated that in all districts, several posts have been created and persons have been deputed and posted.

133. We do not find from the said chart that but for the construction of Collectorate building and some more buildings at some places, whether any other building like school, hospital and in particular court buildings both for residential purposes and for holding the courts have been constructed. The chart also does not indicate that required government buildings have been constructed to accommodate the government offices and residences for the government officers and the staff, who is entitled for such official residence. There is, of course, lack of medical care, markets and good schools.

134. The districts are created and can be created on a decision being taken by the State Government but not to repeat, but to reiterate, such an action cannot be allowed to be arbitrary. It goes without saying that if a new district is created, superior officers are to be posted there alongwith sub-ordinate officers and staff including Class III and Class IV employees. This of course requires accommodation for housing the government officers and employees but apart from this, children of such employees also have a right to good education and, therefore, in the absence of any good school, the children suffer. In the absence of proper medical care and provision for medical treatment, the health of the officers, employees, their children and family members also suffers.

135. This cannot be the intention of creating a district. The officers and staff who are posted in newly created district also have a right to live a life of dignity, where proper health care and proper education is provided.

136. We can understand that a fully developed infrastructure cannot be provided in a day or two, but the State while creating a district has to ensure that basic necessities and necessary infrastructure is made available before the creation of

district and within a reasonable time, it should be developed in its full capacity.

137. The Court in the case of Ram Milan Shukla (supra) expressed serious concern about the manner in which districts are created and observed in para. 11 that before creating a district a serious exercise must be carried out about the available financial resources and infrastructure must be created, otherwise, it will be putting the cart before the horse. Till the infrastructure facilities have been arranged and worked out, the decision to create a new district cannot and ought not to be implemented, and the notification u/s 11 of the Uttar Pradesh Land Revenue Act should not be issued. Further the Court observed that in order to bring transparency in administration, the Government must disclose the compelling administrative, political and economic compulsions for taking such a decision. But that has not been done in this case. Experience has shown that districts have been created on the spur of the moment actuated by collateral and extraneous political reasons resulting in dislocation of finances and administrative problems. Further the Court observed that before creating a district, necessary infrastructure must be made available for the same. However, we do not intend to decide this plea of the Petitioners but confine ourselves to consider the present petitions in light of Hari Bhajan Singh in deference to the observations of the apex court in the civil appeals remitting the matter to this Court.

138. Since pleas No. 4 and 5 raised by the Petitioners have not been considered in either of the two Judgments of Rakesh Kumar Sharma and Hari Bhajan Singh (supra), therefore, there is no occasion to make a reference in regard to the observations made by us on the said pleas, but in view of our respectful disagreement with the views expressed in the case of Rakesh Kumar Sharma and Hari Bhajan Singh (supra) and also because the present writ petitions raise serious questions of public importance regarding the nature of the exercise of power by the Governor u/s 11 of the Uttar Pradesh Land Revenue Act, we refer the following questions for consideration by the larger Bench.

(i) Whether the issuance of notification u/s 11 of the Uttar Pradesh Land Revenue Act read with Section 21 of the Uttar Pradesh General Clauses Act by the Governor is legislative act or administrative act.

(ii) Alternatively, if the exercise of statutory power u/s 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 Uttar Pradesh 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.

139. Let the matter be placed before Hon"ble the Chief Justice, for constitution

of larger Bench to answer the questions in reference.