APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2013

BEFORE
THE HON'BLE SAAEED-UZ-ZAMAN SIDDIQI J.
APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2013

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Second Appeal No. 36 of 2010

Vidhyawati Verma ...Petitioner
Versus
Amita Srivastava and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Singh
Dr. Vinod Kumar Rai

Counsel for the Respondents:
Sri A.K. Dave, Sri Abhishek Mishra
Sri K.N. Mishra

Code of Civil Procedure-Section 100-Second Appeal-Substantial question of law-suit for cancellation of Sale deed-dismissed by both Courts below-with finding the amount of sale consideration given before sub Registrars-presumption in favor of endorsement made by sub-Registrar-under Section 60(2) of Registration Act Available concurrent findings of fact can not be interfered unless illegality irregularity or perversity pointed out-appeal dismissed.

Held: Para-22
However, that itself would not result in any benefit to the plaintiff-appellant in the present case for the reason that the oral evidence has been discussed by Trial Court and after discussion it has found that plaintiff has miserably failed to prove her case. The Lower Appellate Court has also recorded a concurrent finding. In the discussion of courts below about oral evidence adduced by plaintiff-appellant, no illegality, irregularity, inconsistency or perversity has been shown or pointed out. The only thing hammered repeatedly by counsel for plaintiff-appellant is that defendants did not produce her own bank's passbook and, therefore, a conclusive inference should have been drawn in favour of plaintiff to prove her case and the suit ought to have been decreed. This assumption per se is fallacious and misconceived. Therefore, the entire judgment in Ishwar Dass Jain (supra) I find is of no help to plaintiff-appellant at all.

Case Law discussed:
(1999) 8 SCC 396; AIR 2012 SC 2528; Second Appeal No. 2276 of 1977; AIR 2000 SC 426; JT 2003(1) SC 150; 2008 All. C.J. 1346; AIR 1988 SC 1858; 1992(1) SCC 647; 1995 Suppl.(4) SCC 534; 1998(2) SCC 295; 1991(1)SCC 143; AIR 1982 SC 20

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

1. This is a plaintiff's second appeal filed under Section 100 C.P.C. After hearing this appeal under Order 41 Rule 11 C.P.C. this Court formulated following substantial question of law on 30.04.2010:

"(i) Whether the transaction regarding sale of house was fair, proper and transparent and defendant respondent no.1 took advantage of her relationship from the plaintiff, who was mother?

(ii) Whether the factum of sale consideration is proved from the oral and documentary evidence produced before the court below or the findings in this regard are based on presumption?

(iii) Whether the Courts below have committed illegality in not recording the finding regarding formation of a valid contract and payment of sale consideration

between the parties and the impugned judgments of the Courts below are vitiated on account of misreading of evidence on record.

2. Sri Ashok Kumar Singh, learned counsel appearing for appellant and Sri K.N. Mishra and Sri A.K. Dave, Advocates for respondents have advanced their submissions on aforesaid questions.

3. To appreciate the above issue, the bare facts necessary for adjudication of aforesaid questions I may refer to the case set up by parties before the courts below.

4. The plaintiff-appellant, Smt. Vidhyawati Verma instituted Original Suit No. 12 of 2006 in the Court of Civil Judge (Senior Division), Allahabad for cancellation of sale deed dated 17.11.1997 registered on 16.12.1997 in respect to House No. 1027, G.T.B. Nagar Kareli Scheme, Allahabad and for a decree of injunction and possession.

5. The plaint case set up by her is that she herself was working as Nurse in the medical department under Central Government and retired therefrom in 1992. The disputed house was allotted to her by U.P. Awas Evam Vikas Parishad (hereinafter referred to as the "Parishad") pursuant whereto an agreement for sale was executed on 25.03.1980 and possession was delivered to plaintiff on the same day. She paid all the installments/consideration to Parishad, whereafter a sale deed was executed in her favour on 28.07.1997. The plaintiff initially had two sons and two daughters but her younger son, Raju Verma died in 1994 leaving only one son, Sudhir Verma. The names of her daughters are Reeta Srivastava and Amita Srivastava.

6. Her son Sudhir Verma was married in 1996 and was appointed in Accounts Department of CDA Pension in 1997. He was allotted a Government accommodation and started living therein. Her daughter, Reeta Srivastava is residing with her husband at Preetam Nagar, Allahabad. Her younger daughter, Amita Srivastava, whose husband is an employee in HYDLE Department is also living separately with him. However plaintiff had extra affection to her younger daughter, Amita Srivastava who used to visit and serve her (plaintiff) in various ways. Taking advantage thereof the younger daughter and her husband manipulated and got a forged sale deed executed on 17.11.1997, registered on 16.12.1997, though no consideration was paid to her. The sale deed is forged and fictitious.

7. The suit was contested by defendants. Besides, they also lodged a counter claim for execution of sale deed, alleging that despite and payment of entire consideration, the plaintiff is not delivering possession of disputed house and, therefore, possession thereof be directed to be handed over to them.

8. The Trial Court formulated eleven issues in all but for the purpose of present appeal the issues No. 1, 2 and 3, relevant, are reproduced as under:

''1– क्या बैनामा बहक अमिता श्रीवास्तव जिसकी रजिस्ट्री दिनॉक 22–02–2007 को हुयी निरस्त किये जाने योग्य है ?

2– क्या वाद ग्रस्त भवन जिसका विवरण वाद पत्र के अंत में दर्ज है के सम्बन्ध में प्रतिवादीगण के विरूद्ध स्थाई निषधाज्ञा जारी किये जाने योग्य है? यदि हॉ तो उसका प्रभाव ?

3– क्या वादग्रस्त भवन जिसका विवरण वादपत्र के अन्त में दर्ज है, के दखलनामा की डिकी वादिनी के पक्ष में जारी करते हुये प्रतिवादीगण को वादग्रस्त भवन

के भूतल के कमरों से बेदखल किये जाने योग्य है? एवं क्या वादिनी को कब्जा दिलाये जाने योग्य है?"

1. Whether the sale-deed executed in favour of Amita Srivastava, registered on 22.02.2007, deserves to be cancelled?

2. Whether the building in litigation, particulars whereof have been mentioned at the bottom of the plaint, warrants an order of permanent injunction against the Defendants? If yes, its effect?

3. Whether the building in litigation, particulars whereof have been mentioned at the bottom of the plaint, warrants a decree for occupancy to be passed in favour of the lady Plaintiff, the eviction of the Defendants from its ground floor rooms and possession thereof to be handed over to the lady Plaintiff?" (English translation by the Court)

9. In respect to issue no. 1 the Trial Court, from the evidence of parties, found that the plaintiff admitted to have visited the office of Sub-Registrar for the purpose of registration. The part payment of consideration was made through cheque and payment thereof credited in the accounts of plaintiff as was found proved by Trial Court. It also found that the plaintiff has signed the instrument of sale and on this aspect also there was no dispute. The witnesses to the sale deed were also relatives to both parties. DW-2, Sri Umesh Prakash Singh proved the case of defendants. Though the plaintiff set up case of fraud and misrepresentation but could not adduce any evidence whatsoever, except of her oral statement as well as statement of her son Sudhir Verma as PW-1 and PW-3.

10. PW-2, Smt. Vidyawati though claimed to be an independent witness but her deposition also did not support the case of plaintiff. Instead it proved that her relations with son Sudhir Verma were strange and he used not to take care and maintain his mother. The plaintiff denied of having receipt of any amount whatsoever but Rs. 55,000/- in all were paid through three cheques and all were found credited in the bank account of plaintiff which clearly belie her case and prove that she was making a false statement. It is in these facts and circumstances, the Trial Court decided issue No. 1 against plaintiff and in that view of the matter the issues No. 2 and 3 were also decided against her. With respect to possession it found that plaintiff being mother of defendant no. 1 and mother-in-law of defendant no. 2, there was nothing uncommon if there was an agreement between parties that despite sale of disputed house, the plaintiff may continue to stay therein. The suit was consequently dismissed by Trial Court vide judgment and decree dated 24.02.2009 and thereagainst the plaintiff's appeal has been dismissed by Lower Appellate Court giving concurrent findings vide judgment and decree dated 09.10.2009.

11. Learned counsel for the appellant endeavour to show that defendants having failed to produce the passbook of their bank Account No. 17106 of Punjab National Bank of the relevant date and year as was summoned by plaintiff and in respect whereof an order was also passed by Trial Court, it was incumbent upon it to draw an inference against defendant no. 1 that she did not possess requisite founds to make payment as claimed by her and, therefore, there was no evidence that Rs. 40,000/-, i.e., the balance towards consideration was actually paid to plaintiff.

12. It is no doubt that the defendants though were required to produce pass book of bank Account No. 17106 of Punjab National Bank of the year 1997 but the said pass book was not produced. The question would be, whether this very fact, even if an adverse inference is drawn against defendants, would be sufficient to entitle the plaintiff to have her suit decreed whereby she has sought to cancel sale deed 17.11.1997.

13. Even if no evidence or no contest is made by defendants still suit straight-away cannot be decreed unless the plaintiff proves its case. The sale deed in question was sought to be cancelled on the ground of fraud and misrepresentation. It is not a case of Pardanashin lady or illiterate rural folk so as to tilt or shift onus to prove the aforesaid facts upon defendants in view of Section 16(3) of Contract Act. Here the plaintiff is a well educated lady, capable to maintain herself, having served in a Government department and at the time of execution of sale deed, was a retired employee. The receipt of partial consideration through bank's transaction, credit whereof were shown in plaintiff's bank account was attempted to explain that aforesaid amount was subsequently refunded to defendant no. 1 but this alleged refund, as a matter of act, has not been proved at all. Rs. 55,000/- through cheques were paid to plaintiff and this fact was found proved through the bank account statement of plaintiff. So far as remaining 40,000/- is concerned, the said amount is said to have been paid at the time of registration. It is not disputed that registered sale deed contains endorsement of Sub-Registrar about the compliance of requirements of Registration Act, 1908 (hereinafter referred to as the "Act, 1908") as also the statement made before Sub-Registrar that vendor has received consideration money from vendee. Section 60(2) of Act, 1908 also provides a statutory presumption in favour of endorsement made by Sub-Registrar on the registered sale deed and such statutory presumption can be negatived or ignored only when there are cogent and credible evidence to show something otherwise. No such evidence has been adduced before the courts below and none referred to before this Court. The mere fact that defendants did not adduce pass book of her own bank account, by itself, therefore, would not have turned anything in the case. A suit could have been decreed only if the plaintiff succeeds in proving her/his case and not on the weakness of defence taken by defendants. It is no doubt true that even if no written statement is filed and the defendants have not contested the matter yet the plaintiff is not entitled for decree of suit inasmuch as he/she is under an obligation to prove his/her case and only then he/she can be granted relief and not otherwise.

14. Under Order VIII Rule 10 C.P.C. the Court has been enabled to proceed to deliver a judgment where defendants or one of several defendants have chosen not to contest the suit by filing written statement but it does not mean that plaintiff is absolved from his obligation to prove the case. The procedure prescribed therein is discretionary. In the context of Order VIII Rule 10 C.P.C. the Apex Court has considered the matter in **Balraj Taneja & Anr. Vs. Sunil Madan & Anr.**, (1999) 8 SCC 396 and observed:

"30. As pointed out earlier, the Court has not to act blindly upon the admission

of a fact made by the defendant in his Written Statement nor the Court should proceed to pass judgment blindly merely because a Written Statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a Written Statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the Written Statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in Sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

15. The above quote in **Balraj Taneja & Anr. (supra),** has been followed recently in **C.N.Ramappa Gowda Vs. C.C. Chandregowda (D) by L.Rs. & Anr**., AIR 2012 SC 2528 wherein also it has been held that Court is duty bound to adjudicate even in the absence of complete pleadings or in absence of pleadings of one or more party. In para 14 of the judgment, the court said that effect of non-filing of written statement and proceeding to try the suit is clearly to expedite disposal of the suit. It is not penal in nature wherein the defendant has to be penalised for non filing of written statement by trying the suit in a mechanical manner by passing a decree. Apex Court reiterated its earlier observations in following words:

"....We wish to reiterate that in a case where written statement has not been filed, the Court should be a little more cautious in proceeding under Order 8 Rule 10 Code of Civil Procedure and before passing a judgement, it must ensure that even if the facts set out in the plaint are treated to have been admitted, a judgement and decree could not possibly be passed without requiring him to prove the fact pleaded in the plaint. It is only when the Court for recorded reasons is fully satisfied that there is no fact which needs to be proved at the instance of the Plaintiff in view of the deemed admission by the Defendant, the Court can conveniently pass a judgement and decree against the Defendant who has not filed the written statement. But, if the plaint itself indicates that there are disputed questions of fact involved in the case arising from the plaint itself giving rise to two versions, it would not be safe for the Court to record an ex-parte judgement without directing the Plaintiff to prove the facts so as to settle the factual controversy. In that event, the ex-parte judgement although may appear to have decided the suit expeditiously, it ultimately gives rise to several layers of appeal after appeal which ultimately

compounds the delay in finally disposing of the suit giving rise to multiplicity of proceeding which hardly promotes the cause of speedy trial. However, if the Court is clearly of the view that the Plaintiff's case even without any evidence is prima facie unimpeachable and the Defendant's approach is clearly a dilatory tactic to delay the passing of a decree, it would be justified in appropriate cases to pass even an uncontested decree. What would be the nature of such a case ultimately will have to be left to the wisdom and just exercise of discretion by the trial court who is seized of the trial of the suit."

16. The above two authorities have been referred to and followed recently by this Court in **Maharaji Kunwar Vs. Sheo Shanker, Second Appeal No. 2276 of 1977**, decided on 10.04.2013.

17. On behalf of plaintiff reliance has been placed on Apex Court's decisions in **Ishwar Dass Jain Vs. Sohan Lal,** AIR 2000 SC 426; **Krishna Mohan Kul @ Nani Charan Kul and another Vs. Pratima Maity and others**, JT 2003(1) SC 150; and, **Late Sohan Lal Vs. Sabhajeet,** 2008 All.C.J. 1346.

18. Having gone through the aforesaid authorities very carefully, I do not find as to how they can advance the case of plaintiff-appellant.

19. In **Ishwar Dass Jain (supra)** a suit was filed for redemption of usufructuary mortgage dated 15.04.1969 and for possession. It was dismissed by Trial Court, Appellate Court as well as High Court. The High Court observed that notwithstanding the fact the defendants executed registered mortgage dated 15.04.1969, the real relationship between parties was that of landlord and tenant and the defendants, thus, could not have been evicted except under Rent Control Law. Before Apex Court one of the question raised, whether there was a substantial question of law arisen from the case so as justify hearing of appeal after issuing notice to respondents-defendants. It was contended that a vital evidence which could have led to a different conclusion was omitted or if inadmissible evidence was relied on which if omitted could have led to a different conclusion, would have given rise to a substantial question of law for the purpose of justifying interference of High Court in appeal under Section 100 C.P.C. even though there are concurrent findings of facts or findings of facts arrived at by Lower Appellate Court. As a proposition of law if the contingencies, as noticed above, exist it would have justified interference by the Second Appellate Court under Section 100 C.P.C. The Apex Court in paras 11 and 12 of the judgment, after relying on its earlier decisions in **Dilbagrai Punjabi Vs. Sharad Chandra,** AIR 1988 SC 1858; **Jagdish Singh Vs. Nathu Singh**, 1992(1) SCC 647, **Sundra Naicka Vadiyar Vs. Ramaswami Ayyar,** 1995 Suppl.(4) SCC 534; **Mehrunissa Vs. Visham Kumari**, 1998(2) SCC 295; and, **Sri Chnad Gupta Vs. Gulzar Singh**, 1991(1) SCC 143, said:

"11. There are two situations in which interference with findings of fact is permissible. The first one is when material or relevant evidence is not considered which, if considered would have led to an opposite conclusion. This principle has been laid down in a series of judgments of this Court in relation to Section 100 CPC after the 1976 amendment. . ."

"12. The second situation in which interference with findings of fact is permissible is where a finding has been arrived at by the appellate court by placing reliance on inadmissible evidence which if it was omitted, an opposite conclusion was possible. . . . "

20. Having said so this Court finds that the question of proving a document would have arisen if its execution is denied. That question does not arise in the present case inasmuch as the sale deed in question was admittedly a registered instrument and it was before the Court. The signature on the registered instrument were not disputed by plaintiff though she tried to explain that the same were obtained by giving her an impression that this is a document of will and not sale deed. This explanation had to be proved by plaintiff but she failed. This explanation would not result doubting the very existence and factum of execution of instrument but would have justified only a suspicion against such document, if such explanation would have been proved. However, the plaintiff failed to prove this explanation.

21. Then comes the third question, whether an oral evidence is admissible under Section 91(1) of Evidence Act to prove that a document though executed was a sham document. It cannot be doubted that terms and conditions settled in a document cannot be contradicted by oral evidence but the factum about the circumstances in which a document was executed etc., for that purpose oral evidence is admissible. There is no doubt about it and if any authority is required I may refer to the decision in **Gangabai Vs. Chhabubai,** AIR 1982 SC 20.

22. However, that itself would not result in any benefit to the plaintiff-appellant in the present case for the reason that the oral evidence has been discussed by Trial Court and after discussion it has found that plaintiff has miserably failed to prove her case. The Lower Appellate Court has also recorded a concurrent finding. In the discussion of courts below about oral evidence adduced by plaintiff-appellant, no illegality, irregularity, inconsistency or perversity has been shown or pointed out. The only thing hammered repeatedly by counsel for plaintiff-appellant is that defendants did not produce her own bank's passbook and, therefore, a conclusive inference should have been drawn in favour of plaintiff to prove her case and the suit ought to have been decreed. This assumption per se is fallacious and misconceived. Therefore, the entire judgment in **Ishwar Dass Jain (supra)** I find is of no help to plaintiff-appellant at all.

23. Coming to the next authority, i.e., **Krishna Mohan Kul @ Nani Charan Kul** (supra), I find that there also the Court has discussed as to what a substantial question of law would be and upon whom the burden of proof lie with reference to Sections 101, 104 and 111 of Evidence Act. There the Court has very clearly held that the initial burden to prove the case would lie upon plaintiff.

24. The decision of this Court in **Late Sohan Lal (supra)** also lends no support to plaintiff-appellant inasmuch as if the two circumstances, as discussed above, are satisfied which permits interference with the findings of fact, there is no doubt that under Section 100 CPC this Court can interfere but the moot question is, whether these circumstances

actually exist in a particular case or not. In the present case both these circumstances do not exist at all.

25. In view of above, I answer all the three questions against plaintiff-appellant and hold that the plaintiff not only failed to prove that sale of house was not fair, proper and transparent but also that the defendants-respondents took advantage of their relationship with plaintiff. Similarly, I hold that the factum of sale consideration having been paid to plaintiff stand proved and otherwise case set up by plaintiff, she failed to prove.

26. In the result, the appeal, being devoid of merit, is dismissed with costs throughout.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2013

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE DINESH GUPTA, J.

Crl. Misc. Writ Petition No. 62 of 2013

Anil Kumar Sharma ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Hitesh Pachori

Counsel for the Respondents:
A.G.A.

Constitution of India Art. 226- Speedy Trail-submition of charge sheet by police u/s 173 Cr. P.C.-DGP directed to ensure presence of accused before the magistrate-for that purposes police to get ready the photo state copy of case diary-direction for strict compliance issued-expressing great concern with the decision of Home Secretary for not providing the copy-magistrate also must refrain from taking cognizance unless accused is produced with I.O. report u/s 173(2) Cr.P.C.-Registrar General to ensure compliance of direction-put up matter on 19.07.2013.

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

1. Heard Sri Sudhir Mehrotra, learned Special Counsel for the Allahabad High Court and Sri Vimlendu Tripathi, learned Additional Government Advocate representing the State.

2. Two affidavits of compliance dated 8.3.13 on behalf of the Home Department and the Director General of Police, UP have been filed by the learned Additional Government Advocate.

3. An affidavit of compliance of the Registrar General, High Court dated 15.5.13 has been filed by Sri Mehrotra.

4. As a final report has been submitted by the I.O. regarding which an affidavit dated 8.3.13 has also been filed, it will now be a matter for consideration by the Court concerned on whether to accept or to reject the final report. No further orders are needed in the matter, so far as the petitioner is concerned.

5. However as a number of other issues have arisen for expediting the process of trials and associated matters in the State of U.P., as a result of this Courts' orders in this petition, affidavits and reports furnished by the parties from whom this Court has sought directions/ information, looking to the importance of the matter, this bench will continue to monitor the said matters by an on-going hearing of this petition.

DGPs circular dated 7.3.2013 directing police officers to produce the accused in Court on the date of submission of the report u/s 173(2) Cr.P.C.

6. We are pleased to note that a circular dated 7.3.2013 has been issued by the Director General of Police pursuant to the High Court's orders dated 7.1.2013, 17.1.2013 and 5.2.13 in the present writ petition for ensuring the appearance of the accused persons in the Court on the date when the report u/s 173(2) Cr.P.C is to be filed, which inter alia provides that where the accused was arrested prior to submission of charge sheet and where he has got himself bailed out, or in those cases where the provisions of section 41(1)(a) and 41(1)(b) Cr.P.C apply or where there was a stay order restraining the arrest of the accused till submission of the charge sheet under section 173(2) Cr.P.C. or an unconditional stay of arrest order, in all those eventualities, the accused may be directed to appear before the Court concerned on the date fixed. If the accused was in jail and has not been bailed out, then the Jailer should be directed to produce him on the date fixed, when the report u/s 173(2) Cr.P.C is to be submitted. If the accused is absconding and his arrest was not possible, then action may be taken against the accused persons under section 174(a) IPC. A proforma directing the accused to appear on the date that the charge sheet is filed has also been prepared and is appended to the DGPs circular. The steps taken in this regard are to be noted by the I.O. in his case diary. The supervising officer must also ensure compliance of the aforesaid directions. Any negligence in ensuring compliance with this circular will invite stringent action against the I.O. and his supervising officer. We also direct strict compliance of the DGPs circular, and a submission of a compliance report on the next listing as to the extent that the DGPs circular on the directions issued is being followed.

Criticism of Affidavit of Home Department refusing to direct police officers to prepare copies of papers u/s 173(2) Cr.P.C for furnishing to accused on first appearance before Magistrate.

7. In the affidavit filed on behalf of the Home Department it has been mentioned that a meeting was held on 5.3.2013 under the Chairmanship of the Principal Secretary (Home) in which Addtl. L.R., Special Secretary (Finance), ADG (Prosecution), DIG (Headquarters) and the Joint Director (Prosecution) participated. It was decided in the meeting dated 5.3.13 that the direction of this Court in the order dated 5.2.13 that photo copies of the police report required to be handed over to the accused under section 207 Cr.P.C be provided by the police officer/ I.O. at the time of his appearance before the Court could not be complied with as it was the obligation of the Magistrate concerned to supply the copies. Also there were problems in arranging for the photocopies because of lack of manpower and infrastructure at the police stations. However the Court system could be strengthened and the necessary budget could be provided.

8. We may state unequivocally that we are distressed by this attitude of the Home Secretary's Committee. We may mention here that under the present system the office of the subordinate Courts have excess paper work on their hands, as copies of papers have to be

handed over in innumerable matters and are to be prepared for multiple purposes. When all of a sudden the report u/s 173(2) Cr.P.C is produced by the police officer before the Court (usually in the absence of the accused), then routinely the matter is sent for preparation of its copies to the copying section, without any date being fixed. The I.O. also conveniently absolves himself of the responsibility of producing the accused, by taking the ingenious plea that after submission of the report he is not required to arrest or produce the accused without warrants or summons being issued by the concerned Courts. Owing to routine pressure before the Criminal Courts, absence of copies of the papers, delays are unavoidable. Also occasionally the accused collude with inferior officials in the district courts and matters are not brought to the notice of the concerned Magistrates for issuance of warrants or summons for appearance of the charge sheeted accused on a fixed date, for long periods of time. The result, as the figures hereunder will show, has been catastrophic.

9. In this connection it may be noted that by the order dated 5.2.13 we had also asked details from the State government and the High Court registry through the district judges as to the number of cases where the accused have not appeared in the Courts after the submission of the report under section 173(2) Cr.P.C for periods up to 3 months, 6 months, 9 months, 12 months or 2 years or more. In the meeting headed by the Home Secretary dated 5.3.13 three months further time was sought for furnishing these details. However we are pleased to note that the registry has taken our direction very seriously and on on the basis of the information furnished by the District Judges from 71 districts it has prepared a tabular chart which shows that in as many as 6,20,104 (six lakh, twenty thousand, one hundred and four cases) the accused have not been arrested after submission of the reports u/s 173(2) Cr.P.C. Out of which in 10371 cases the accused have not appeared for a period of up to 3 months, in 95385 cases for a period up to 6 months, in 97948 cases for a period up to 9 months, in 96155 cases for a period up to 12 months, in 164313 cases for a period up to 2 years, in 62602 cases for a period of more than two years. These figures shock the conscience of the Court. We must record our strongest disapproval against the attitude of unwillingness to assume responsibility and the policy of shifting the burden adopted by the Home Secretary's committee in its 5.3.2013 meeting, where instead of taking on this grave problem of delay in bringing accused to justice head on, once the charge sheet is submitted by ensuring that the accused are produced/ appear before the Court on the first date when the charge sheet is submitted, (as has been directed by the DGP's circular dated 7.3.13), by immediately ensuring that the 207 Cr.P.C papers are ready and duly handed over to the accused through the Magistrates concerned, so that the people's confidence in the justice administration system is not destroyed. The committee has instead chosen to take such escapist pleas, that the duty is of the Courts with their overload of cases and lack of staff, (for which the State is eventually responsible) that they must get the photocopies prepared for handing over the accused, even though as a result of the earlier system where the police officer could shirk his responsibility of bringing the accused to justice by taking the spurious plea that no warrants or

summons have been issued by the Court concerned, and thereafter summons or warrants could be avoided as the 173(2) Cr.P.C copies were not available for handing over to the accused, the result has been that in over 6 lakhs 20,000 cases, the accused have merrily roamed around for years even after a prima facie case was established against them on submission of the reports u/s 173(2) Cr.P.C. Compared to the delays and complications involved in the Court getting the papers prepared in all the cases where reports u/s 173 (2) Cr.P.C are submitted, it is a comparatively minor problem for a police officer, to have the photo copies of the papers mentioned in s. 207 Cr.P.C available in the few cases where he decides to submit the charge sheet, for passing on to the Magistrate for supply to the accused u/s 207 Cr.P.C when he submits his report u/s 173(2) Cr.P.C and simultaneously to ensure that the accused is present at that time. This small step could have gone such a long way for solving the problem of the accused not being brought to justice for such long periods of time, which would have substantially reduced the delays in the trial process.

10. Section 207 only requires the Magistrate to hand over the report and papers mentioned in s. 173 Cr.P.C to the accused free of cost. It does not direct that the Court alone should get the papers prepared. Under section 173(7) Cr.P.C also powers have been conferred on the I.O. to furnish copies of the papers mentioned in s. 173(5) Cr.P.C to the accused. With computerization of papers and other facilities we also see no impediment before the I.O., handing over the papers to the accused, and obtaining a receipt from him, when the report u/s 173(2) Cr.P.C is to be submitted. There could thus be no harm if the papers could be prepared and were available with the I.O. for getting them handed over directly or by the Magistrate, when he submits his report u/s 173(2) Cr.P.C., and the accused are also present.

11. The Principal Secretaries Home, is therefore being assigned the responsibility to ensure that a) the accused are present in Court when the report u/s 173(2) Cr.P.C is submitted, as has been directed by the DGPs circular dated 7.3.13 in compliance of this Court's earlier orders and b) that copies of the papers mentioned u/s 207 Cr.P.C are available with the I.O. for handing over free of cost to the accused though the Magistrate at the time of the initial appearance of the accused. For this objective the Home Secretary must ensure that either infrastructure and manpower for photocopying is directly available in the police stations/ C.O.'s office or indirect arrangements for preparing photocopies of these papers is made. The Principal Secretaries Finance and Law, the DGP and the Director Prosecutions are directed to render all assistance to the Home Secretary for complying with these directions.

Direction to DGP and Principals Secretary (Home) to ensure appearance of accused in 62014 cases where they have not appeared despite submission of reports u/s 173(2) Cr.P.C

12. We also direct the DGP and the Principal Secretary (Home), U.P. and Director (Prosecutions) to ensure that in all the aforementioned 620104 cases, the accused must be produced before the Courts concerned where the reports u/s

173(2) Cr.P.C have been submitted within a period of 3 months. They will not be required to first obtain warrants/ summons from the Courts concerned in each case for production of the accused in all such cases where the accused have not yet been produced or appeared before the Court even though reports u/s 173(2) Cr.P.C have been submitted, and that the copies of the papers mentioned u/s 207 Cr.P.C. be available for handing over to the accused on their first appearance.

Courts directed not to accept reports u/s 173(2) Cr.P.C unless accused produced

13. The Courts concerned are directed not to accept the reports u/s 173(2) Cr.P.C unless the accused are produced in custody or appear before the Court at the time of submission of the report. The only exception to this direction could be when the production of an accused who is in custody cannot be avoided due to illness or other genuine reason, and the 60 or 90 days period for completion of investigation by submission of the charge sheet mandated u/s 167(2) Cr.P.C, is about to expire.

14. The Magistrate could then pass appropriate orders for custody or bail and immediately issue other directions such as for taking cognizance and for committing the case to the Court of Sessions Judge and directing the accused to appear before the Court concerned on the dates fixed.

15. In case the State government disputes the correctness of the figures regarding the number of cases or the accused who have not appeared before the Courts after submission of the reports u/s 173(2) Cr.P.C as furnished in the R.G.s affidavit, they may give the correct figures as per their estimation on the next listing.

16. The copy of the affidavit of the Registrar General, High Court, Allahabad dated 15.3.2013 may be handed over to the learned AGA at the earliest.

Feedback sought from Secretary (Law), and Secretary (Home), UP and Law Commission of India on amending s. 209 Cr.P.C for allowing police to directly submit charge sheets to the Sessions Courts in Sessions triable cases, without requirement for committal by Magistrate

17. Let a fresh reminder be sent forthwith (along with the copy of the earlier order of this Court dated 5.2.13) suggesting that s. 209 Cr.P.C be amended and the police be directed to submit the reports u/s 173(2) Cr.P.C directly to the Sessions Judge in Sessions triable cases without compelling the police officer to follow the circumlocutory procedure of first submitting the report to the Magistrate, who in turn is required to commit the same under section 209 Cr.P.C. to the Court of Sessions. Such a letter No. 3348 dated 7.2.13 was already sent to the Secretary (Law), and Secretary (Home), UP as well as the Law Commission of India, New Delhi along with Chief Justice's approval note dated 27.2.13 pursuant to our earlier order dated 5.2.13. We would like a response of the said respondents on this suggestion by the next listing.

Direction for issuance of effective circular under section 309 Cr.P.C for ensuring day to day trials of accused

18. In the previous order, dated 5.2.13 we had directed that a more effective circular under section 309 Cr.P.C for day to day trials of the accused be issued on the same lines as has been issued by the Delhi High Court as is described in paragraph 27 in Akil @ Javed v State of NCT, Delhi, 2012(11) SCALE 709, by the next listing, i.e. by 8.3.2013, keeping in mind the fact that the brief circulars issued so far by the registry (one such brief circular being the circular dated 8.3.13 which has even been annexed with the RG's affidavit of compliance) did not give clear and effective directions to the lower Courts on how to ensure proper compliance with the mandate of s. 309 Cr.P.C.

19. We regret to note that although a detailed circular seems to have been prepared by the Registry, it has still not been issued and circulated and there has been a failure to comply with that important direction for checking unwarranted delays in the trials. It may be noted that now an outer time limits of two months from the date of charge sheet in rape and allied cases u/s 376, 376 A to 376 D (instead of from the date of first examination of the witnesses), has been fixed by the of the Criminal Law Amendment Act, 2013 with effect from 3.2.13. The Apex Court has again in a recent judgment dated 10.5.2013 in Gurnaib Singh v. State of Punjab reviewed the law and cases reiterating the mandatory nature of s. 309 Cr.P.C, and has criticized the Punjab High Court for allowing the trial to be unduly prolonged in contravention of this salutary provision. Hence any further delay in issuing an effective circular under section 309 Cr.P.C is wholly unwarranted.

20. We therefore direct that the Registrar General ensures that the said detailed circular is issued by the next listing.

21. We have also not received adequate feed back from the District Judges regarding the information sought in the order dated 5.2.13 about the extent of compliance with s. 309 Cr.P.C by the subordinate Courts and their suggestions for expediting trials and the difficulties that they face. Let reminder letters be expeditiously sent by the registry to all the concerned District Judges for furnishing the said information before the next listing.

22. List this case on 19.7.2013.

23. On that date, we would like personal affidavits of to be filed by the Principal Secretary, Home, Finance, and Law, DGP and Director (Prosecutions), U.P. regarding the extent to which the aforesaid directions by the present order and by the earlier order dated 5.2.13 have been complied with. Senior officers under the DGP, Principals Secretaries Home, Finance and Law capable of taking decisions and who can acquaint the Court on the steps taken on these matters be also present on the next listing.

24. Copy of this order may also be given to Shri Sudhir Mehrotra, Special Counsel for Allahabad High Court and Shri Vimlendu Tripathi, learned Additional Government Advocate for compliance. The order may also be placed before the Hon'ble Chief Justice and the Registrar General at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2013

BEFORE
THE HON'BLE KALIMULLAH KHAN, J.

Criminal Misc Transfer Application No. 106 of 2013(u/s 407 Cr.P.C.)

Smt. Kasmun Nisan ...Applicant
Versus
State of U.P. and Ors ....Respondents

Counsel for the Petitioner:
Sri Saurabh Sachan, Sri A.K. Sachan

Counsel for the Respondents:
A.G.A., Sri Shashank Tripathi

Code of Criminal Procedure-Section 407- Transfer of criminal case pending before J.M. Kanpur Dehat-on ground-fair and impartial trail could not be at Kanpur-as prosecution witness due to terror of accused person failed to appear-and even on complaint-neither any protection given by magistrate nor by police officer-considering peculiar facts of the case-trail of case transferred to Session Division Fatehpur-considering convenience of both parties.

Held: Para-6
To my mind the concerned criminal trial should not be allowed to prolonge which should be decided at an early date by a Court where neither of the parties may exercise man power in the proceedings in the Court premises. It would be convenient for the parties also that the case may be sent to such a place where the parties may conveniently appear. To my mind, Sessions Division, Fatehpur is on main route of train where parties may reach conveniently from Kanpur Nagar.

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

1. Heard learned counsel for the parties and perused the record, including counter and rejoinder affidavits, already exchanged.

2. This transfer application has been filed under Section 407 Cr.P.C to transfer the Case No. 184 of 2012 (State Vs. Gulam Muhiuddin & others) pending in the Court of Judicial Magistrate, Kanpur Dehat arising out of Case Crime No. 76 of 2009, under Sections 498-A, 323, 504, 506, 324 IPC and 3/4 D.P.Act, P.S. Rajpur, District Kanpur Dehat to some other neighbouring district.

3. The ground of transfer in nutshell is that opposite party No.2 to 11 are the accused in Criminal proceeding under Sections 498-A, 323, 504, 506, 324 IPC and 3/4 D.P.Act, P.S. Rajpur, District Kanpur Dehat pending before the Court of Judicial Magistrate, Kanpur Dehat. The applicant's contention is that prosecution witness could not be produced due to terror of the accused/ respondent No.2 to 11 and applicant and her father were threatened for dire consequences. Applicant has given application for protection by police to the Judicial Magistrate Ist , Kanpur Dehat but no action has been taken and police has also not provided any protection to the applicant and her family.

4. The counter affidavit has been filed denying the aforesaid allegations of threating etc. and submitted that applicant by misleading the Hon'ble Court filed the present application which is liable to be dismissed.

5. From the perusal of record it transpires that the relation of applicant wife and her husband accused opposite party No.2 is strained and both the parties are resident of Kanpur Nagar. Accused

Party is said to mount undue pressure upon the applicant to withdraw the criminal trial in question and threatens her. Complaints made by her to authorities have turned futile. Without making any observation or without expressing any opinion on the truthfulness or otherwise of the allegations and cross allegations made by the parties against each other in the aforesaid facts and circumstances of the case it is in the ends of justice to transfer the aforesaid criminal case from judgeship Kanpur Dehat to some other adjoining district because fair and impartial enquiry or trial cannot be had in this case in judgeship Kanpur Dehat where opposite parties may be in a position to mount pressure upon the applicant through their men and in several other manner. In the affidavit filed by opposite parties in support of therir interim stay vacation application they have deposed that if the case is transferred to some other neighbouring district other than district Auraiya they would have no objection because the applicant and her father have strong man power in district Auraya and it would be inconvenient for them to appear there.

6. To my mind the concerned criminal trial should not be allowed to prolonge which should be decided at an early date by a Court where neither of the parties may exercise man power in the proceedings in the Court premises. It would be convenient for the parties also that the case may be sent to such a place where the parties may conveniently appear. To my mind, Sessions Division, Fatehpur is on main route of train where parties may reach conveniently from Kanpur Nagar.

7. Let proceeding of 184 of 2012 (State Vs. Gulam Muhiuddin & others) pending in the Court of Judicial Magistrate, Kanpur Dehat arising out of Case Crime No. 76 of 2009, under Section 498-A, 323, 504, 506, 324 IPC and 3/4 D.P.Act, P.S. Rajpur, District Kanpur Dehat be transferred to the Court of CJM, district Fatehpur who shall dispose of the matter finally in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE ARVIND KUMAR TRIPATHI-ii, J.

First Appeal from Order No.141 of 2006

Smt. Shobha Singh and Anr. ...Petitioner
Versus
Mandal Prabandhak, the O.I.C. Co. Ltd. & Anr ....Respondents

Counsel for the Petitioner:
Sri Rajendra Jaiswal and Sri Mukesh Singh

Counsel for the Respondents:
Sri Ashok Mehrotra

Motor Vehicle Act 1988- Section 166- Appellant suffered permanent disability - due to accident caused by Truck-driving very rash and negligent manner-Tribunal inspite of finding of 50% permanent disability due to want of income certificate awarded Rs. 75000/- for loss of future earning-held-award for pain, suffering and loss of future prospects-wholly inadequate- as per Laxmi Devi judgment notional income world be 3000/- per month after 1/3 deduction annual income would be 24000/-as per schedule-II of Section 163 A-at age of 39 yrs.-if 16 multiplier applied total income shall be 3,84000/- apart from Rs. 2 Lacs for future medical expenses alongwith 6% interest-per annum.

Held: Para-20

Admittedly, there is no evidence on record to establish the actual income of the injured/appellant No.2 and as such, compensation would be awarded on the basis of notional income of the injured. Hon'ble Supreme Court in the case of Laxmi Devi and others versus Mohammad Tabbar and another [2008 (2) TAC 394 (SC)] has held that notional income to be Rs.3,000/- per month after deduction of 1/3rd personal expenses, the annual income shall come to Rs.24,000/-.

Case Law discussed:

(1995) 2 SCC 551; (2009) 6 SCC 1; (2009) 13 SCC 422; (2010) 10 SCC 254; (2011) 1 SCC 343; (2003)2 SCC 274; [2008(2) TAC 394 (SC)]

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

1. As per the report of Joint Registrar (Listing) dated 30.4.2013, service is sufficient on respondent No.2. Sri Ashok Mehrotra has filed his power on behalf of respondent No.1.

2. When the case called out, neither the respondents were present nor any one has put in appearance on their behalf. It has been reported that there is no slip/request for passing over or adjournment of the case.

3. Heard Sri Mukesh Singh, learned Counsel for the appellants/claimants and perused the records.

4. Appellant No.2/claimant No.2 (Sabhajeet Singh), victim of a motor vehicle accident has come to this Court making grievance about the inadequate amount of compensation awarded to him by the Motor Accident Claims Tribunal.

5. Appellant No.2 used to earn his livelihood as a farmer. On 25.11.2003, at about 5.00 pm, appellant No.2 was repairing his tractor at the shop of a Mistri (joiner) when he was hit by a truck, bearing registration No. 42-B/7094, which was being driven in a rash and negligent manner. In the accident, the left leg of the appellant No.2 was seriously injured and after operation of his feet, it has become 2 inch short. Appellant No.2 filed an application (Claim Case No.61/2004) before the Motor Accident Claims Tribunal/Additional District Judge, E.C.Act, Faizabad, claiming compensation for the injuries suffered by him under Section 166 of the Motor Vehicles Act, 1988. It was stated by him before the Tribunal that at the time of accident, his age was 39 years and due to the accident, his savings were lost upto Rs.50,000/-. As a result of the deformity of his leg, he was no longer in a position to walk without support and he was, therefore, rendered incapable of doing any work and to earn his livelihood.

6. The Tribunal found and held that the accident took place as a result of the negligent and rash driving by the truck driver. Coming to the extent of disability, the Tribunal referred to the disabled-person certificate given to the appellant No.2 in which his disability was shown as 50%. Having held that that his disability was 50%, fixed the amount of Rs.75000/- as compensation for loss of future earnings. In addition to this, the Tribunal gave to the appellant No.2 Rs.10,000/- for mental and physical agony due to permanent disability, Rs.6,000/- for traveling and Rs.75,000/- for medical expenses. Accordingly, the Tribunal, by its award dated 31.10.2005 held the appellant No.2 entitled to receive a total

sum of Rs.1,66,000/- as compensation along with interest at the rate of 6% per annum from the date of filing of the claim petition on 16.3.2004 till the date of payment.

7. Hence the instant appeal.

8. In last two decades, the Apex Court as well as this Court has decided large number of cases involving claim of compensation by the victims of accidents and/or their families. It will be useful to notice some of the judgments in which general principles have been laid down for the guidance of the Tribunals and the Courts.

9. In **R.D. Hattangadi v. Pest Control (India) Private Limited** reported in (1995) 1 SCC 551, the Apex Court, while dealing with a case involving claim of compensation under the Motor Vehicles Act, 1939, referred to the judgment of the Court of Appeal in Ward v. James (1965) 1 All ER 563, Halsbury's Laws of England, 4th Edition, Volume 12 (page 446) and observed:

"Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

10. In the above case, the Apex Court further observed:

"In its very nature whenever a tribunal or a court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards."

11. In **Nizam's Institute of Medical Sciences v. Prasanth S. Dhananka** reported in (2009) 6 SCC 1, the Three Judge Bench of the Apex Court was dealing with a case arising out of the complaint filed under the Consumer Protection Act, 1986. While enhancing the compensation awarded by the National Consumer Disputes Redressal Commission from Rs.15 lakhs to Rs.1 crore, the Apex Court made the following observations which can appropriately be applied for deciding the petitions filed under Section 166 of the Act:

"At the same time we often find that a person injured in an accident leaves his family in greater distress vis-`-vis a

family in a case of death. In the latter case, the initial shock gives way to a feeling of resignation and acceptance, and in time, compels the family to move on. The case of an injured and disabled person is, however, more pitiable and the feeling of hurt, helplessness, despair and often destitution enures every day. The support that is needed by a severely handicapped person comes at an enormous price, physical, financial and emotional, not only on the victim but even more so on his family and attendants and the stress saps their energy and destroys their equanimity."

(emphasis supplied)

12. In **Reshma Kumari V. Madan Mohan** reported in (2009) 13 SCC 422, the Apex Court reiterated that the compensation awarded under the Act should be just and also identified the factors which should be kept in mind while determining the amount of compensation. The relevant portions of the judgment are extracted below:

"The compensation which is required to be determined must be just. While the claimants are required to be compensated for the loss of their dependency, the same should not be considered to be a windfall. Unjust enrichment should be discouraged. This Court cannot also lose sight of the fact that in given cases, as for example death of the only son to a mother, she can never be compensated in monetary terms. The question as to the methodology required to be applied for determination of compensation as regards prospective loss of future earnings, however, as far as possible should be based on certain principles. A person may have a bright future prospect; he might have become eligible to promotion immediately; there might have been chances of an immediate pay revision, whereas in another (sic situation) the nature of employment was such that he might not have continued in service; his chance of promotion, having regard to the nature of employment may be distant or remote. It is, therefore, difficult for any court to lay down rigid tests which should be applied in all situations. There are divergent views. In some cases it has been suggested that some sort of hypotheses or guess work may be inevitable. That may be so.

In the Indian context several other factors should be taken into consideration including education of the dependants and the nature of job. In the wake of changed societal conditions and global scenario, future prospects may have to be taken into consideration not only having regard to the status of the employee, his educational qualification; his past performance but also other relevant factors, namely, the higher salaries and perks which are being offered by the private companies these days. In fact while determining the multiplicand this Court in Oriental Insurance Co. Ltd. v. Jashuben held that even dearness allowance and perks with regard thereto from which the family would have derived monthly benefit, must be taken into consideration.

One of the incidental issues which has also to be taken into consideration is inflation. Is the practice of taking inflation into consideration wholly incorrect? Unfortunately, unlike other developed countries in India there has been no scientific study. It is expected that with the rising inflation the rate of interest would go up. In India it does not happen. It, therefore, may be a relevant factor

which may be taken into consideration for determining the actual ground reality. No hard-and-fast rule, however, can be laid down therefor."

(emphasis supplied)

13. In **Arvind Kumar Mishra V. New India Assurance Company Limited** reported in (2010) 10 SCC 254, the Apex Court considered the plea for enhancement of compensation made by the appellant, who was a student of final year of engineering and had suffered 70% disability in a motor accident. After noticing factual matrix of the case, the Apex Court observed:

"We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was insofar as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered."

(emphasis supplied)

14. Recently, the Apex Court again considered the matter in detail in **Raj Kumar vs. Ajay Kumar** reported in (2011) 1 SCC 343 and held :

"The provision of the Motor Vehicles Act, 1988 ("the Act" for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. [See C.K. Subramania Iyer v. T. Kunhikuttan Nair (1969) 3 SCC 64, R.D. Hattangadi v. Pest Control (India) (P) Ltd. (1995) 1 SCC 551 and Baker v. Willoughby 1970 AC 467.] The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalisation, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability. (iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v)Loss of amenities (and/or loss of prospects of marriage). (vi) Loss of expectation of life

(shortening of normal longevity). In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life. Assessment of pecuniary damages under Item (i) and under Item (ii) (a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses--Item (iii)--depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages--Items (iv), (v) and (vi)--involves determination of lump sum amounts with reference to circumstances such as age, nature of injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decisions of this Court and the High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability--Item (ii)(a). We are concerned with that assessment in this case.

Assessment of future loss of earnings due to permanent disability Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation. The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not,

with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.

Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation."

15. In the light of the above, we shall now consider whether the compensation awarded by the Tribunal is just and reasonable or claimant/appellant is entitled to get higher compensation.

16. According to the claimants/appellants, the Tribunal admitted the fact that left leg of the appellant was amputated/shortened due to injuries caused in the accident and also relied upon the disability certificate, the Tribunal assessed 50% disability but even then, the Tribunal has not applied the basic principle of computation of compensation on multiplier basis and awarded Rs.75,000/- as compensation for amputation/physical disability.

17. Although the appellant had suffered 50% disablement, the documentary evidence shows that he will require treatment in future. The Tribunal has not awarded any compensation for future treatment, which would necessarily include doctor's fee, cost of medicine, transportation, diet etc. Keeping in view the high cost of living, we feel that ends of justice will be served by awarding a lump sum amount of Rs. 2 lacs for future treatment.

18. The award made by the Tribunal for pain, suffering and trauma and in lieu of loss of the future prospects is wholly inadequate. The claimant will neither be able to work properly nor he will be able to lead a normal life. His future prospects are also bleak. Therefore, it is apposite to award reasonable and just compensation to the appellant for pain, suffering and trauma caused due to the accident and loss of amenities and enjoyment of life which, in our view, should be Rs.2 lacs.

19. It is true that in the petition filed by him under Section 166 of the Act, the appellant had claimed compensation of Rs. 9,75,000.00 only, but as held in **Nagappa Vs. Gurudayal Singh** reported in (2003) 2 SCC 274, in the absence of any bar in the Act, the Tribunal and for that reason any competent Court is entitled to award higher compensation to the victim of an accident.

20. Admittedly, there is no evidence on record to establish the actual income of the injured/appellant No.2 and as such, compensation would be awarded on the basis of notional income of the injured. Hon'ble Supreme Court in the case of **Laxmi Devi and others versus Mohammad Tabbar and another** [2008 (2) TAC 394 (SC)] has held that notional income to be Rs.3,000/- per month after deduction of 1/3rd personal expenses, the annual income shall come to Rs.24,000/-.

21. From the perusal of the records, it reflects that the age of the injured/appellant No.2, at the time of accident, was about 39 years and as such, as per Second Schedule of Section 163 A of the Motor Vehicles Act, multiplier of 16 is to be applied. Accordingly, applying the multiplier of 16, the total income shall be Rs.3,84,000/-. In addition to the said amount, claimants are also entitled to Rs.2,00,000/- for future medical expenses and other expenses.

22. In the result, the impugned judgment and award dated 31.10.2005 is modified and it is declared that the claimants/appellants shall be entitled to total compensation of Rs.5,84,000.00. He shall also be entitled to interest @ 6% per annum from the date of filing the claim petition till realization. The Oriental Insurance Company Ltd. is directed to pay the enhanced amount of compensation to the claimant/appellant with interest @ 6% within a period of three months from today in the form of a Demand Draft prepared in their name.

23. The appeal is allowed partly, in above terms.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.05.2013

BEFORE
THE HON'BLE RAJIV SHARMA, J.
Review Petition No. 190(Cons.) of 2008

Smt. Raj Kumari and Anr. ...Petitioners
Versus

D.D.C Faizabad ...Opposite Paties

Counsel for the Petitioners:
Sri Shiwa Kant Tewari
Sri D.C. Mukherjee and Sri Manoj Kumar Srivastava

Counsel for the Opposite parties:
Sri Vijay Bahadur Verma

Constitution of India,Art. 226- Power of Review-petition decided on basis of statement made by counsel-subsequently found that the statement in so called compromise itself based upon fraud by importer nothing preluded the High Court to exercise powers of review-to prevent miscarriage of justice-Review application allowed.

Held: Para-15
In view of the aforesaid legal proposition and the facts narrated hereinabove, there are genuine and reasonable grounds justifying invocation of powers of the review. Accordingly, the review petition is hereby allowed. The judgment and order dated 18.8.2008 passed in writ petition No.478 (Cons.) of 2007 Rajkumari and another versus Dy. Director of Consolidation and others, is hereby recalled. The writ petition is restored to its original number and the interim order is also revived.

Case Law discussed:
AIR 1963 1909; 1999(1) UPLBEC 396-FB

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

1. Heard Sri Shiva Kant Tewari, learned counsel for the petitioners and Sri Vijay Bahadur Verma, learned Counsel for the contesting respondents.

2. This Review Petition has been preferred against the judgment and order dated 18.8.2008 passed in Writ Petition No.478 (Cons.) of 2007 Rajkumari and another versus Deputy Director of Consolidation and others, whereby this Court dismissed the writ petition on the statement of the Counsel for the contesting respondents that consequent to compromise, the Settlement Officer (Consolidation) decided the appeal on 18.1.1994 and Revision preferred against the same was also dismissed by the Deputy Director of Consolidation.

3. In the instant Review Petition, learned Counsel for the applicants/petitioners contended that on 18.8.2008 when the case was dismissed, the counsel conducting the case, namely, Sri L. P. Ojha was suffering from viral fever and could not attend the Court. Therefore, the necessary and relevant facts could not be brought to the notice of this Court and the Counsel appearing on behalf of the respondents concealed the material facts resulting in grave injustice.

4. As regards the error in the judgment under review, Counsel for the petitioners has submitted that the petitioner No.2, namely, Smt. Saraswati Devi (now dead) was the owner of the property who transferred the land through a sale deed in favour of Smt. Raj Kumari, petitioner No.1. Therefore, after selling the property the petitioner No.2 has no right or authority to execute the alleged compromise deed dated 18.1.1994 in favour of contesting opposite parties. It is said that the opposite parties got executed a compromise deed dated 18.1.1994 through an impostor and on the said basis, Settlement Officer (Consolidation) disposed of the appeal in terms of the compromise vide order dated 18.1.1994. It has been pointed out that the private respondents were well aware of the fact that the petitioner No.1 has become the owner after execution of sale deed by the

petitioner No.2, but she was not impleaded as party in appeal.

5. It has been vehemently argued that on the date when the writ petition was dismissed, the counsel for the opposite parties were present, as would be apparent from the perusal of the impugned judgment, but they concealed the material and relevant facts deliberately resulting in ex parte dismissal of writ petition. It has been prayed that serious injustice would be caused if the aforesaid order is recalled.

6. On behalf of contesting opposite parties, it has been submitted that land of chak no.1028 and 1071 situated at village Kirkhauli, pargana Magalsi, Tehsil Sohaval, District Faizabad was recorded in the name of Smt. Saraswati Devi, W/o Harihar Singh in the basic year. On 30.11.1955, late Harihar Singh executed a Will in which he stated that the name of Smt. Saraswati Devi shall be recorded in the revenue records as Guzara-Dariya (Heen Hayati) and she shall have no right to transfer, mortgage, or sell her movable or immovable property and after her death, real brother Baksh Singh and his descendants shall be owners of the property. On the basis of the aforesaid Will, Sahab Baksh Singh filed a time-barred objection under Section 9-A (2) of U.P. Consolidation of Holdings Act, which was rejected by the Consolidation Officer, Maqbara vide order dated 10.9.1993. Thereafter, Sahab Baksh Singh preferred an appeal where late Smt. Saraswati Devi entered into compromise and the Settlement Officer (Consolidation) disposed of the appeal in terms of the compromise vide order dated 18.1.1994. Late Smt. Saraswati Devi and Raj Kumari Devi preferred revision but the Deputy Director of Consolidation dismissed it vide judgment and order dated 28.6.2007. Therefore, there is no error apparent in the impugned judgment and the Review Petition is liable to be dismissed.

7. Before dealing with the merits of the case, it is relevant to point out that during pendency of Review Petition, Smt. Saraswati Devi (petitioner No.2) died having no legal heirs, except the applicant/petitioner No.1 Smt Raj Kumari, who is the sole legal heir and representative of petitioner No.2. The application for substitution in this regard was allowed vide order dated 10.4.2009.

8. A perusal of the record shows that petitioners, namely, Smt. Raj Kumari and Smt. Saraswati Devi filed a writ petition No. 478 (Cons) of 2007 against the order dated 28.6.2007 passed by the Deputy Director of Consolidation in Revision No.591/484/235, Smt.Saraswati Devi and others versus Sahab Singh under Section 48 of Uttar Pradesh Consolidation of Holdings Act arsing out of order dated 18.1.1994 passed by the Settlement Officer (Consolidation) in Appeal No.3927 under Section 11 (1) of The Uttar Pradesh Consolidation Act, Sahab Singh versus State of U.P. and others by which the Deputy Director of Consolidation dismissed the revision preferred by the petitioners.

9. In the writ petition, there is a specific averment that the petitioner No.2 transferred the entire share in chak No.1071 and 1028 to petitioner No.1 by executing a sale deed dated 20.11.1992. The father of respondent nos.3 to 5 raised objection against the mutation proceeding initiated on the basis of sale deed. But

ultimately, vide order dated 2.11.1994, in case No.238 under Section 12 of the Uttar Pradesh Consolidation of Holdings Act, an order for mutation of name of petitioner No.1, in place of petitioner No.2, on the basis of sale deed dated 20.11.1992 was passed. It appears that Sahab Singh preferred an appeal bearing No.3927 under Section 11 (1) of the Act against an imaginary order dated 10.9.1993 passed by the Consolidation Officer in TB under Section 9 (A) (2) of the Act wherein the lower Court's file was summoned. The officer reported that no such file is available. However, without considering the report and on the basis of compromise, alleged to be executed by petitioner no.2, the Settlement Officer (Consolidation) passed the order dated 18.1.1994.

10. Petitioners have taken a specific plea in the writ petition that compromise was executed by some impostor and the Settlement Officer (Consolidation), without verifying the facts and taking into account the report of Consolidation Officer, disposed of the appeal in terms of the compromise. I find force in the submission advanced by the petitioners that when late Smt. Saraswati Devi had executed the sale deed in favour of petitioner No.1, there was no occasion for her to enter into a compromise in respect of the land of which she was no more the owner.

11. In order to verify the fact, record of consolidation authorities was summoned, but the relevant record could not be produced and a statement was made by the Standing Counsel that in view of the provisions of Appendix - I of U.P. Correction Manual, the records have been weeded out. Taking the serious view of the matter, this Court vide order dated 27.4.2010 directed the Consolidation Officer to conduct an enquiry. In the supplementary affidavit dated 22.3.2012, sworn by the Principal Secretary (Appointment), who was the erstwhile Consolidation Commissioner, mentioned in para 4 that the Deputy Director of Consolidation, Faizabad Sri R.N. Singh Yadav conducted an enquiry in furtherance of a previous enquiry dated 18.6.2010. In his report, he has stated that there is no evidence showing the decision of case No. TB under Section 9 (A) (2) of the Consolidation of Holdings Act; Ram Baksh Singh versus Saraswari Devi and others by the Consolidation Officer on 10.9.1993; rather, in Peshi Bahi (cause list) another case with the same title appears to have been decided on 20.2.1995. The Deputy Director of Consolidation has also given his opinion that the appeal has been filed against the imaginary and non-existing order dated 10.9.1993 and after getting the appeal decided falsely vide order dated 18.1.1994, an entry has been made in the weeding register in order to conceal the entire fraudulent and unlawful exercise, whereas the fact is that no such file of the Court of Consolidation Officer was available. The file of the appellate Court appears to have been weeded out before expiry of the prescribed period solely with the intention to cover up the entire forged and fraudulent act and exercise.

12. Thus, it is quite clear that the opposite parties did not bring the correct facts before the Court and on the contrary, concealed/suppressed the material facts resulting in miscarriage of justice.

13. At this juncture, I would like to refer the decision rendered by the Apex Court in **Shivdeo Singh and others Vs..**

State of Punjab and others, AIR 1963 SC 1909, wherein a five Judge Bench of the Hon'ble Supreme Court while examining the power of review of the High Court, held as under:

"There is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In entertaining B's petition the High Court thereby did what the principles of natural justice required it to do."

14. A Full Bench of this Court in the case of **Dinesh Kumar Gupta versus State of U.P.** 1999(1) UPLBEC 396-FB while considering the powers of review of the High Court, arising out of proceedings under article 226 of the Constitution, held as under:-

"We consider appropriate to remind ourselves as to what is the scope of review jurisdiction of this Court rising out of a proceedings under article 226 of the Constitution of India. This has already been answered by the Supreme Court through its two 5 judges, decisions and accordingly no longer res-integra. In Shivdeo Singh and other Vs State of Punjab and others, AIR 1963 SC 1909, it was held that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in very court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. In State of Gujarat Vs Sardar Begum and others, AIR 1976 SC 1695, it was held that if a patent error has crept in due to inadvertence the same could and should have been suo motu corrected by the High court in the exercise of its inherent jurisdiction even after the expiry of the ordinary period of limitation, if any prescribed for a review application".

15. In view of the aforesaid legal proposition and the facts narrated hereinabove, there are genuine and reasonable grounds justifying invocation of powers of the review. Accordingly, the review petition is hereby allowed. The judgment and order dated 18.8.2008 passed in writ petition No.478 (Cons.) of 2007 Rajkumari and another versus Dy. Director of Consolidation and others, is hereby recalled. The writ petition is restored to its original number and the interim order is also revived.

16. List the writ petition before the appropriate bench dealing with the Consolidation matters in the month of July, 2013 and it shall not be treated as tied up matter. As the old lady is litigating since 1993, the matter shall be listed within first ten cases of cause list.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.05.2013

BEFORE
THE HON'BLE BHARAT BHUSHAN, J.

Criminal Revision No. 251 of 2003

Jai Ram and Ors. ...Revisionists
Versus
State of U.P. and Anr. ...Opp. Parties

Counsel for the Revisionists:
Sri A.K. Sachan, Sri Ajay Kumar Srivastava
Sri Anand Priya Singh

Counsel for the Opp. Parties:
A.G.A., Sri D.P. Singh, Sri P.K. Dubey

Sri Siddharth Niranjan, Sri U.S. Chauhan
Sri Y.S. Sachan

Criminal Revision- against summoning order-second complaint on same allegation-earlier complaint on direction under section 156(3) Cr.P.C. rejected-became final-second complaint without disclosing earlier-proceeding even summoning order totally silent-second complaint not covered by exceptional circumstances-explained in Pramatha Nath Case-held-second complaint cannot be entertained.

Held: Para-17
Perusal of the impugned summoning order further indicates that the learned magistrate has not even considered that he was taking cognizance of the matter on the basis of second complaint on same set of facts. No exceptional circumstances have been mentioned in the impugned order. This court finds that the facts of both the cases are the same. Nothing new has been disclosed in the second complaint. In such situation no case is made out for summoning the revisionists as the allegations in both the complaints are identical. Therefore, the second complaint is not covered within exceptional circumstances explained in Pramatha Nath (supra). In that view of the matter the second complaint on same set of facts cannot be entertained.

Case Law discussed:
AIR 1962 SC 876; (2003) 1 SCC 734; (2012) 1 SCC 130; AIR 1982 SC 1238; Crl. Appeal No. 67 of 2013

(Delivered by Hon'ble Bharat Bhushan, J.)

1. By means of present revision, seven revisionists have challenged the impugned summoning order dated 30.11.2002 passed in Case No. 466 of 2002 (Mishri Lal Sachan Vs Jai Ram), under Section 147,506 IPC, P.S. Sajeti, District Kanpur Dehat whereby all the revisionists have been summoned by the learned Magistrate to face the trial for the said offences.

2. A lawyer of Kanpur Dehat, Mishri Lal Sachan has initiated criminal proceedings against seven revisionists stating that on 6.6.2001 at about 8 p.m. he was returning from Village Harbaspur with his advocate son Sunil Kumar Sachan. They were intercepted by the applicants near 'Banyan' tree at the gun point and were threatened by the applicants with dire consequences. Both the lawyers pleaded for mercy and revisionists let them off.

3. The police allegedly refused to register the F.I.R. On the intervention of the Magistrate, an FIR vide Case Crime No. 144 of 2001, under Section 147,506 was registered against the revisionists. Subsequent to the investigation, the Investigating Officer submitted the final report. Against the final report, protest petition was filed by the complainant which was rejected by the court below vide order dated 20.11.2001.Thereafter, opposite party/complainant preferred a criminal revision being Revision Petition No. 205 of 2001 before the Sessions Judge, Kanpur Dehat which was ultimately decided by Addl. Sessions Judge, Court No. 7, vide judgement and order dated 30.1.2002.

4. It is stated that after a lapse of more than six months another complaint on the same facts was filed on 7.7.2002 against the applicants. Learned Magistrate recorded the statements of the complainant and his witnesses under Section200/202 Cr.P.C and thereafter summoned the revisionists to face the trial for the offences under Sections 147,506 IPC vide order dated 30.11.2002, which is subject matter of challenge before this court in the present criminal revision.

5. Heard learned counsel for the revisionists, learned counsel for the informant and learned A.G.A. and have also perused the material on record.

6. It is submitted by learned counsel for the revisionists that once the revisionists have been let off by the court below up to revisional stage, second complaint for the same facts is not permissible in the eyes of law.

7. It is submitted by the learned counsel for the revisionists that the revisionists No. 1 & 2 are the Government servant and are working as Village Development Officer at Bhitar Gaon Block, revisionist No. 3 is a Sub Inspector posted at Aligarh, revisionists No. 4 & 5 are the witnesses in other case filed against the opposite party no. 2, revisionist no. 6 is the village pradhan and respondent no. 7 is the brother of the revisionist no. 6. They have been falsely implicated in a cooked up case due to village enmity and party bandi. It is further contended by learned counsel for the revisionists that the complainant and his son are practising Advocate at kanpur and they have been continuously harassing the revisionists by filing false cases with oblique motives just to create pressure and harass the revisionists.

8. In reply, it is submitted by learned counsel for the complainant that the revisionist have been rightly summoned by the court below on the basis of the statements of the witnesses recorded under Section 202 Cr.P.C. veracity of which can only be examined during trial. He, however, admitted that the complainant did not challenge the order dated 30.1.2002 passed by the learned Addl. Sessions Judge, Court No. 7 dismissing the revision petition filed by the complainant but at the same time he would argue that the complainant also has a remedy to file a complaint. Learned A.G.A. has also supported the order passed by the court below.

9. The short question involved in the present case is as to whether the second complaint in a criminal case on the same set of facts and allegations is maintainable or not, when the first FIR on same facts was closed on merits up to revisional stage by the courts below.

10. Learned counsel for the revisionists, very strongly submits that the second complaint filed by the complainant is nothing but verbatim reproduction of the earlier FIR filed by the opposite party no. 2 which is not legally sustainable in the eyes of law. Prosecution of the revisionists on the basis of such complaint is liable to be quashed by this Court.

11. There is no dispute regarding maintainability of second complaint as laid down in various pronouncements. Hon'ble Supreme Court in the case of **Pramatha Nath Talukdar and another vs. Saroj Ranjan Sarkar - (AIR 1962 SC 876**). has laid down thus:

"There is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under Section 203 of the Code of Criminal Procedure. As however, a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under Section 204(1) of the Code of Criminal Procedure, exceptional circumstances must exist for the

entertainment of the second complaint on the same allegations; in other words, there must be good reasons, why the Magistrate thinks that there is "sufficient ground for the proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under s. 203 of the Code of Criminal Procedure.

The question now is, what should be those exceptional circumstances ? In Queen Empress v. Dolagobind Dass (1), Maclean, C. J. said: "I only desire to add that no Presidency Magistrate ought, in my opinion, to rehear a case previously dealt with by a Magistrate of coordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice.".

12. In the same decision, the Apex Court also has laid down the test to determine the exceptional circumstances which are.--(1) manifest error; (2) manifest miscarriage of justice; and (3) new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings".

13. The Hon'ble Apex Court made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In the judgment of Pramatha Nath Talukdar and another (supra) the Hon'ble Apex Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. The Court very clearly held that it cannot be settled law which permits the complainant to place some evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence.

14. In **Mahesh Chand vs. B. Janardhan Reddy and another - (2003) 1 SCC 734**, the Hon'ble Apex Court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous case was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In Mahesh Chand (supra) the Hon'ble Apex Court relied on the ratio in Pramatha Nath (supra) and held that if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances as has been pointed out in Pramatha Nath (supra).

15. In **Shiv Shankar Singh Vs State of Bihar and another (2012) 1 SCC 130**, the Hon'ble Apex Court has held as under:

"It is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full

consideration of the case of the complainant on merit."

16. In the present case, what emerges from the pleading of the petition that earlier criminal case was initiated on the basis of the application 156(3) Cr.P.C. which was investigated by the police and after investigation, the Investigating Officer submitted the final report. Against the final report, protest petition was filed by the complainant which was rejected by the court below vide order dated 20.11.2001 after perusing the statements of the complainant and his witnesses. Thereafter, the revision petition filed against the said order was also dismissed by the learned Addl. Sessions Judge on merits. The order passed by the learned Addl. Sessions Judge in revision was not challenged by the complainant before this Court. Thus, the second complaint on similar facts is not maintainable.

17. Perusal of the impugned summoning order further indicates that the learned magistrate has not even considered that he was taking cognizance of the matter on the basis of second complaint on same set of facts. No exceptional circumstances have been mentioned in the impugned order. This court finds that the facts of both the cases are the same. Nothing new has been disclosed in the second complaint. In such situation no case is made out for summoning the revisionists as the allegations in both the complaints are identical. Therefore, the second complaint is not covered within exceptional circumstances explained in Pramatha Nath (supra). In that view of the matter the second complaint on same set of facts cannot be entertained.

18. The Hon'ble Apex Court in **Chandrapal Singh & Ors. v. Maharaj Singh & Anr., AIR 1982 SC 1238**, has held that it is equally true that chagrined and frustrated litigants should not be permitted to give vent to their frustration by enabling them to invoke the jurisdiction of criminal courts by cheaply invoking the jurisdiction of the criminal court. In such a fact-situation, the court must not hesitate to quash criminal proceedings.

19. In **Criminal Appeal No. 67 of 2013 (Ravinder Singh Vs. Sukhbir Singh & Ors) decided on 11.1.2013**, the Hon'ble Apex Court has held as under:-

"It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. Ex debito justitiae is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint."

20. In view of above, the revision petition is allowed. The impugned summoning order dated 30.11.2002 passed in Case No. 446 of 2002 (Mishri Lal Vs Jai Ram) under Section 147/50 IPC, P.S. Sajeti, District Kanpur Dehat, pending in the court of Addl. Civil Judge (JD) Court No. 1/Judicial Magistrate, Kanpur Dehat is hereby quashed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2013

BEFORE
THE HON'BLE MANOJ MISRA, J.

First Appeal No. 297 of 2007

State of U.P. and Anr. ...Petitioner
Versus
Ram Lal and Ors. ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
Sri N.C. Rajvanshi
Sri P.C. Shukla

(A)Land Acquisition Act, Section 23(2),28- entitlement of the benefit of amended provision-even though award made prior to amendment?held-'Yes'

Held: Para-10
In view of the law noticed above, it is clear that where the Reference Court passes its award after 24-9-1984 the amended provisions of sub-section (2) of section 23 and section 28, being already in the statute book, ought to be applied to provide benefit to the landloser, even though the Collector's award was passed before the introduction of the Amendment Bill in the House of the People. It is thus held that the claimant-respondent was entitled to the benefit of the amended provisions of Section 23(2) and Section 28 of the Act even though the award of the Collector was made much before the introduction of the Land Acquisition Act (Amendment) Bill, 1982, in the House of the People and the Reference Court's award was passed after the commencement of the Act No. 68 of 1984.

Case Law discussed:
(1990) 1 SCC 277; (2004)1 SCC 467; (2004) 12 SCC 430; (1995) 3 SCC 316; (1996) 4 SCC 533; (2005) 9 SCC 123; (2001) 4 SCC 181; (1999) 3 SCC 500; (2004) 1 SCC 328; (2011) 11 SCC 198

(B)Code of Civil Procedure-Section 151,152- Power of Review-whether can be exercised in garb of Review?-held-"No"-when final award made-if such legal position omitted-proper cause to either more review stricts under provision of Section 47 of the code on proper on appeal.

Held:Para-18
The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review. Similarly, in view of the decisions noticed above, the power under Section 151 CPC is not available to modify / alter / review a judgment / decree/ award, which has attained finality.

(Delivered by Hon'ble Manoj Misra, J.)

1. I have heard learned Standing Counsel for the appellant and Sri P.C. Shukla holding brief of Sri N.C. Rajvanshi for the claimant-respondents and perused the record.

2. This appeal, under Section 96 of the Code of Civil Procedure read with Section 54 of the Land Acquisition Act (hereinafter referred to as the Act), has been filed against the judgment and order dated 16.04.1988 passed by the District Judge, Muzaffarnagar in Misc. Case No. 243 of 1986 whereby the application of the claimant-respondents to modify the award dated 15.02.1985 passed in L.A.R. No. 164 of 1978 has been allowed and the award dated 15.02.1985 has been modified by increasing the awarded solatium from 15% to 30 % and the interest payable under Section 28 of the Act from 6% p.a. to 9% p.a.

3. The undisputed facts are that land acquisition proceedings were initiated vide notification dated 05.05.1976, under

Section 4(1) of the Act, followed by notification dated 06.05.1976, under Section 6(1) of the Act. Possession was taken on 29.06.1976 and 27.04.1977, followed by an award of the Special Land Acquisition Officer dated 30.03.1978. The claimant-respondent objected to the proposed compensation, consequently, a reference, under Section 18 of the Act, was made, which was registered as L.A.R. No. 164 of 1978. The reference Court, on 15.02.1985, passed an award thereby awarding Rs. 4,47,906/- as compensation along with 15% as solatium on the amount with proportionate cost and interest at the rate of 6% p.a. from the date of possession up to the date of payment or deposit in the Court. Later, on 22.09.1986, an application was filed by the claimant-respondent, purportedly, under Section 151 read with Sections 152 and 153 of the Code of Civil Procedure, for modification and amendment in the judgment and award dated 15.02.1985 on the ground that by virtue of the Amendment Act No. 64 of 1984, the claimant was entitled to solatium, under amended Section 23(2) of the Act, at the rate of 30% on the market value as also interest, under amended Section 28 of the Act, at the rate of 9%. The court below took the view that as the reference Court passed the award after the Act No. 68 of 1984 had come into force i.e. 24.09.1984, the claimant was entitled to the benefit of the amended provisions of Sections 23 and 28 of the Act and as, due to oversight, the benefit of the amended provisions was not provided to the claimant, the operative portion of the award required modification. Accordingly, the solatium was enhanced from 15% to 30% and the interest was enhanced from 6% p.a. to 9% p.a. As neither party could inform the Court, despite opportunity, whether any appeal was preferred against the award, accordingly, it is assumed that the award of the Reference Court attained finality.

4. The modification order dated 16.04.1988, has been challenged in this appeal on two grounds:

(a) that the award dated 15.02.1985 had become final, therefore, the same could not have been modified/altered in exercise of power under Sections 151, 152 and 153 CPC as such powers are exerciseable only when there is any clerical or arthmetical mistake arising from any accidental slip or ommission and it cannot be used to review/ modify a judgment or award, which has already become final; and

(b) that as the award of the Collector was passed on 30.03.1978 and that of reference Court on 15.02.1985, the benefit of the amended provisions of sub-section (2) of Section 23 and of Section 28 of the Act were not available, inasmuch as, by sub-section (2) of Section 30 of the Land Acquisition Amendment Act, 1984 (Act No. 68 of 1984), the benefit of the amended provisions were available only where the Collector's or Court's award was made after 30th day of April, 1982 and before the commencement of the Act No. 68 of 1984 i.e. 24.09.1984.

5. Per contra, the learned counsel for the claimant-respondent submitted that by several decisions of the Apex Court it has been settled that where proceedings are pending before the Reference Court on the date of commencement of the Act No. 68 of 1984, then the benefit of the amended provisions are available to the claimant and, therefore, the claimant-respondent is entitled to solatium at the rate of 30% and to interest at the rate of

9% as provided by amended section 23(2) and section 28 respectively. It was also submitted that since the Court, by mistake, did not take into consideration the amended provisions of the Act, at the time of passing of the award, it had full jurisdiction to correct/modify its award in exercise of power under Sections 151 and 152 of the Code of Civil Procedure.

6. Having considered the submissions of the learned counsel for the parties as also on perusal of record, two points arise for determination in this appeal: -

(1) whether the claimant-respondent is entitled to the benefit of the amended provisions of Section 23(2) and Section 28 of the Act even though the award of the Collector was made much before the introduction of the Land Acquisition Act (Amendment) Bill, 1982, in the House of the People and the Reference Court's award was passed after the commencement of the Act No. 68 of 1984; and

(2) whether the court below after passing of the award dated 15.02.1985 had become functus officio and had no jurisdiction to modify the award and increase the solatium from 15% to 30% and interest from 6% to 9% in exercise of power under Sections 151 and 152 of the Code of Civil Procedure.

POINT No.1

7. So far as the entitlement to the enhanced solatium, under the amended section 23(2) of the Act, as also the enhanced interest under the amended section 28 of the Act, is concerned, it is already settled by various decisions of the Apex Court that the benefit of the amended provisions would also be available where the reference was pending in the Reference Court at the time when the Act No. 68 of 1984 came into force, even though the award of the Collector might have been passed before 30.04.1982. The Apex Court had the occasion to interpret the provisions of Section 30(2) of the Act No. 68 of 1984 in the case of Union of India and others v. Filip Tiago De Gama of Vedem Vasco De Gama : (1990) 1 SCC 277, where, in paras 17 and 18 of the judgment, the Apex Court observed as follows:-

"17. Section 30(2) provides that amended provisions of Section 23(2) shall apply, and shall be deemed to have applied, also to, and in relation to, any award made by the collector or Court between 30 April 1982 and 24 September 1984, or to an appellate order therefrom passed by the High Court or Supreme Court. The purpose of these provisions seems to be that the awards made in that interregnum must get higher solatium inasmuch as to awards made subsequent to September 24, 1984. Perhaps it was thought that awards made after the commencement of the Amending Act 68 of 1984 would be taken care of by the amended Section 23(2). The case like the present one seems to have escaped attention by innocent lack of due care in the drafting. The result would be an obvious anomaly as will be indicated presently. If there is obvious anomaly in the application of law the Court could shape the law to remove the anomaly. If the strict grammatical interpretation gives rise to absurdity or inconsistency, the Court could discard such interpretation and adopt an interpretation which will give effect to the purpose of the legislature. That could be done, if

necessary even by modification of the language used. [See: Mahadeolal Kanodia v. The Administrator General of West Bengal, [1960] 3 SCR 578]. The legislators do not always deal with specific controversies which the Court decide. They incorporate general purpose behind the statutory words and it is for the courts to decide specific cases. If a given case is well within the general purpose of the legislature but not within the literal meaning of the statute, then the court must strike the balance.

18. The criticism that the literal interpretation of Section 30(2), if adhered to would lead to unjust result seems to be justified. Take for example two acquisition proceedings of two adjacent pieces of land, required for the same public purpose. Let us say that they were initiated on the same day--a day sometime prior to 30 April 1982. In one of them the award of the Collector is made on 23 September 1984 and in the other on 25 September 1984. Under the terms of Section 30(2) the benefit of higher solatium is available to the first award and not to the second. Take another example: the proceedings of acquisition initiated, say, in the year 1960 in which award was made on 1 May 1982. Then the amended Section 23(2) shall apply and higher solatium is entitled. But in an acquisition initiated on 23 September 1984, and award made in the year 1989 the higher solatium is ruled out. This is the intrinsic illogicality if the award made after 24 September 1984, is not given higher solatium. Such a construction of Section 30(2) would be vulnerable to attack under Article 14 of the Constitution and it should be avoided. We, therefore, hold that benefit of higher solatium under section 23(2) should be available also to the present case. This would be the only reasonable view to be taken in the circumstances of the case and in the light of the purpose of Section 30(2). In this view of the matter, the higher solutium allowed by the High Court is kept undisturbed."

8. In the case of **Panna Lal Ghosh and others v. Land Acquisition Collector and others : (2004) 1 SCC 467**, in paras 12, 13 and 14, the apex court observed as follows:-

"12. In Union of India V. Filip Tiago De Gama the issue was whether the amendment would apply to an award made subsequent to 24.9.1984 even though the acquisition proceedings had commenced prior to the date. This Court looked at the intention behind the retrospective effect to the amending section. If the literal interpretation is taken, it was held, it will result in anamoly. In order to avoid it, regard must be had to the purpose of Section 30(2). Consequently, this Court awarded higher solatium even though Reference Court made the award in 1985.

13. Again in K.S. Paripooran case this Court widened the restricted interpretation given in Raghubir Singh case. It held that the enhanced solatium would apply even to a case pending at the time the Act came into force.

14. Following this train of thought, the benefit of enhanced solatium would extend to the present case. During the period between 30.4.1982 and 29.9.1984, the reference was pending in the Reference Court. The court's award was passed in 1985. Following the above interpretation, the appellants are thus entitled to enhanced solatium @ 30% and interest under Section 23(2) of the Act."

9. In the case of **Communidade of Morombi-O-Pequeno v. State of Goa :**

(2004) 12 SCC 430, in para 9, the Apex Court observed as follows:-

"9. It was next submitted that the Reference Court was not right in awarding solatium under Section 23(2) and interest under Section 28 of the Land Acquisition Act, 1894. In support of this, reliance was placed upon the case of Union of India v. Raghuvir Singh and also upon Section 30(2) of the Land Acquisition (Amendment) Act, 1984. It was submitted that the notification was of 11-11-1977 and the award of the Collector had been passed on 23-3-1978. It was submitted that since this award was not between the period 30-041982 to 24-9-1984, retrospective effect could not have been given and these amounts could not have been awarded. We see no substance in this submission. The award of the Reference Court is dated 27-02-1990. When the Reference Court was considering this matter Sections 23(2) and 28 as amended were already on the statute-book. Therefore, the Reference Court was bound to take note of these provisions. In such a case no question arises of any retrospectivity. In Raghubir Singh case the notification had been issued on 13.11.1959, the award had been made on 30-3-1963 and the Reference Court award was of 10-6-1968. It was only the High Court's decision which was after the amendment i.e. on 6-12-1984. Therefore, question of retrospectivity had arisen in that case. In this case no such question arises."

10. In view of the law noticed above, it is clear that where the Reference Court passes its award after 24-9-1984 the amended provisions of sub-section (2) of section 23 and section 28, being already in the statute book, ought to be applied to provide benefit to the landloser, even though the Collector's award was passed before the introduction of the Amendment Bill in the House of the People. It is thus held that the claimant-respondent was entitled to the benefit of the amended provisions of Section 23(2) and Section 28 of the Act even though the award of the Collector was made much before the introduction of the Land Acquisition Act (Amendment) Bill, 1982, in the House of the People and the Reference Court's award was passed after the commencement of the Act No. 68 of 1984.

POINT No.2

11. Now the question that arises is whether the court below had the jurisdiction to provide the benefit of the amended provisions in purported exercise of its power under sections 151 and 152 CPC even though no appeal or review was filed, by either side, against the award of the Reference Court dated 15.02.1985. The record reveals that instead of filing an appeal or a review, within the period of limitation provided for the purpose, an application was filed, purportedly, under sections 151, 152 and 153 CPC, on 22.09.1986, for modification of the award. Although the provisions of Section 153 of the Code of Civil Procedure were also invoked but there is no doubt that the power under Section 153 is not exerciseable for modifing/ altering/ amending a judgment or an award that has attained finality. Therefore, the question which arises is whether the Court had jurisdiction to amend or modify its award, after it became final, and provide solatium and interest at a higher rate, by giving the benefit of the amended provisions, in exercise of its power under Sections 151

and 152 of the Code of Civil Procedure. This question has been a subject matter of adjudication in several decisions of the apex court and it no longer remains res integra.

12. In the case of **State of Maharastra v. Maharau Srawan Hatkar : (1995) 3 SCC 316,** the facts of the case were that under a Notification dated 13.08.1979, under Section 4 of the Land Acquisition Act, proceedings were initiated and an award was passed by the Land Acquisition Officer on 17.12.1981 and, on a reference under Section 18 of the Act, the Reference Court enhanced the compensation by its award dated 25.10.1983 against which no appeal was preferred. After Land Acquisition (Amendment) Act 68 of 1984 came into force, the claimant made an application to the Reference Court for awarding the enhanced solatium, additional compensation and interest payable under the Amendment Act. The Reference Court by its order dated 31.03.1986, allowed the application in exercise of its power under Sections 151 and 152 of the Code of Civil Procedure. Dissatisfied with the order passed by the Reference Court, the State preferred an appeal before the High Court which was summarily dismissed against which an appeal came before the Apex Court. The apex court, in paragraphs 3 to 9 of its judgment, observed as follows:-

"3. The only question that arises for consideration is whether the Civil Court has power and jurisdiction to award the benefits of the Amendment Act 68 of 1984. Shri Bhasme, the learned counsel for the State contended that the Civil Court gets jurisdiction to determine compensation under section 23(1) of the Act only on reference. On its making the award enhancing the compensation under sub-section (1) of section 23, it would be a decree under section 26(2). The Court thereafter has no power to amend the decree except in accordance with law. This is not either a clerical or arithmetical mistake for correction under section 152 of CPC or under section 13-A of the Act, but is an independent exercise of power. Unless the Court is empowered to do so by law, the civil court is devoid of Jurisdiction to give the benefits under the Amendment Act.

4. Shri G.K. Bansal, learned counsel, on the other hand, contended that since the CPC is made applicable to the proceedings of reference under Section 18, by operation of Section 53 of the Act, the civil court gets the inherent power under Section 151 CPC to grant the benefits and that, therefore, the court can pass fresh order giving the benefits under the Amendment Act.

5. We find no force in the contention of Shri Bansal. On receipt of reference under s. 18, the procedure prescribed under sectionss. 19 and 20 of the Act is required to be followed and the civil court determines the compensation in the manner indicated under sub-s.(1) of section 23 of the Act which envisages that in determining the amount of compensation to be awarded for the land acquired under the Act, the court shall take into consideration clauses first to sixthly mentioned thereunder while determining the compensation. Sub-section (1A) of section 23, which was brought by the Amendment Act, and sub-s.(2) of s.23 provide that:

"(1-A) In addition to the market value of the land, as above provided, the

Court shall in every case award an amount calculated at the rate of twelve per centum per annum on such market value for the period commencing on and from the date of the publication of the notification under section 4, sub-section (1), in respect of such land to the date of the award of the Collector or the date of taking possession of the land whichever is earlier.

(2) In addition to the market value of the land as above provided, the Court shall in every case award a sum of thirty per centum on such market value, in consideration of the compulsory nature of the acquisition"

Section 28 envisages that:

"28. Collector may be directed to pay interest on excess compensation ...If the sum which, in the, opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of nine per centum per annum from the date on which he took possession of the land to the date of payment of such excess into court:

Provided that the award of the Court may also direct that where such excess or any part thereof is paid into Court after the date of expiry of a period of one year from the date on which possession is taken, interest at the rate of fifteen per centum per annum shall be payable from the date of expiry of the said period of one year on the amount of such excess or part thereof which has not been paid into Court before the date of such expiry."

6. It would thus be seen that the additional amounts envisaged under sub-sections (1A) and (2) of section 23 are not part of the component of the compensation awarded under sub-section (1) of section 23 of the Act. They are only in addition to the market value of the land. The payment of interest also is only consequential to the enhancement of the compensation. In a case' where the Court has not enhanced the compensation on reference, the Court is devoid of power to award any interest under section 28 or the spreading of payment of interest for one year from the date of taking possession at 9% and 15% thereafter till date of payment into the court as envisaged under the proviso.

7. Section 26 of the Act envisages that:

"(1) Every award under this Part shall be in writing signed by the Judge, and shall specify the amount awarded under clause first of sub- section (1)of section 23, and also the amounts (if any) respectively awarded under each of the other clauses of the same sub-section, together with the grounds of awarding each of the said amounts.

(2) Every such award shall be deemed to be a decree and the statement of the grounds of every such award a judgment within the meaning of s.2, clause (2), and section 2, clause (9), respectively, of the Code of Civil Procedure, 1908 (5 of 1908)."

8. Thus, it would be seen that a decree having been made under section 26(2), the civil court is left to correct only either clerical or arithmetical mistakes as envisaged expressly under section 13-A of the Act or under section 152 CPC. Though section 151 CPC gives inherent power to the Court, it is intended only to

prevent abuse of the process of the court or to meet the ends of justice. The present is not a case of such nature. Further, since section 23 is an express power under which the civil court has been conferred with the jurisdiction to determine compensation, and in addition to the market value certain percentage of the amount is directed to be awarded as envisaged under section 23(1A) and 23(2) and the interest component under section 28, the invocation of section 151 CPC by necessary implication stands excluded.

9. Thus, we hold that the civil court had inherent lack of jurisdiction and it was devoid of power to entertain the application to award additional benefits under the Amendment Act. The order thereby is clearly a void order. The High Court has not applied its mind to this crucial consideration but summarily dismissed the appeal."

13. The aforesaid judgment was followed by the Apex Court in the case of **Bai Shakriben (dead) by Natwar Melsingh and others v. Special Land Acquisition Officer and another : (1996) 4 SCC 533**, wherein in paragraph 6 of the report, it was observed as follows:-

"....................But having allowed the decree to become final, the question emerges whether it would be open to the executing Court or the reference court to go behind the decree which become final to amend the self-same decree by exercising the power under Order 47 rule 1 and Section 151 CPC. We feel that the executing Court cannot go behind the decree. It would have been appropriate for the claimants to have gone in appeal and have the matter corrected, but unfortunately they did claim of the appellate remedy and allowed the decree to become final. The omission to award additional amounts under section 23(1-A), enhanced interest under section 28 and solatium under Section 23(2) are not clerical or arithmetical mistake crept in the award passed by the reference Court but amounts to non-award. Under those circumstances, the reference Court was clearly in error in entertaining the application for amendment of the decree and is devoid of power and jurisdiction to award the amounts under Sections 23(2), 23(1-A) and 28 of the Act."

14. Likewise, in the case of **Union of India v. Swaran Singh and others : (1996) 5 SCC 501,** in para 8, it was observed as follows:-

"8. The question then is whether the High Court has power to entertain independent applications under Sections 151 and 152 and enhance solatium and interest as amended under Act 68 of 1984. This controversy is no longer res integra. In State of Punjab vs. Jagir Singh & Ors. [1995 Supp.(4) SCC 626] and also in catena of decisions following thereafter in Union of India & Ors. vs. Pratap Kaur (dead) through LRs. & Anr. [(1995) 3 SCC 263]; State of Maharashtra vs. Maharau Srawan Hatkar [JT 1995 (2) SC 583]; State of Punjab & Anr. vs. Babu Singh & Ors. [1995 Supp. (2) SCC 406]; Union of India s Anr. etc. vs. Raghubir Singh (Dead) by Lrs. etc. [(1989) 2 SCC 754]; and K.S. Paripoornan vs. State of Kerala & Ors. [(1994) 5 SCC 593], this Court has held that reference Court or High Court has no power or jurisdiction to entertain any applications under Sections 151 and 152 to correct any decree which has become final or to

independently pass an award enhancing the solatium and interest as amended by Act 68 of 1984. Consequently, the award by the High Court granting enhanced solatium at 30% under Section 23 (2) and interest at the rate of 9% for one year from the date of taking possession and thereafter at the rate of 15 % till date of deposit under Section 28 as amended under Act 68 of 1984 are clearly without jurisdiction and, therefore, a nullity. The order being a nullity, it can be challenged at any stage. Rightly the question was raised in execution. The executing Court allowed the petition and dismissed the execution petition. The High Court, therefore, was clearly in error in allowing the revision and setting aside the order of the executing Court."

15. In **Jaya Chandra Mahapatra v. Land Acquistion Officer, Rayagada (2005) 9 SCC 123**, the apex court in similar fact situation, took a liberal view. In paragraph 8 of its judgment, the apex court observed that in law there is no bar in filing applications for review successively if the same is otherwise mantainable in law. It observed that it is one thing to say that the omission to award additional amount under Section 23(1-A), enhanced interest under Section 28 and solatium under Section 23(2) may not amount to clerical or arithmetical mistake in relation whereto an executing court will not be entitled to grant relief but it is another to say that the grant thereof would be impermissible in law even if the Reference Court on an appropriate application made in this behalf and upon application of its mind holds that the statutory benefits available to the claimant had not been granted to him and pass an order in that behalf by directing amendment of decree. In a case of former nature, an executing court may not have any jurisdiction to pass such an order on the ground that it cannot go behind the decree, but in law there does not exist any bar on a Reference Court to review its earlier order if there exists an error apparent on the face of the record in terms of Order 47 Rule 1 of the Code of Civil Procedure.

16. In the case of **Jayalakshmi Coelho v. Oswald Joseph Coelho : (2001) 4 SCC 181**, the Apex Court had occasion to deal with the power of a Court under Section 152 of the Code of Civil Procedure and it observed that in a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits some thing which was intended to be otherwise, that is to say, while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. The court further held that the facts and circumstances may provide clue to the fact as to what was intended by the court but unintentionally the same does not find mention in the order or the judgment or something which was not intended to be there stands added to it. It was also held that the power of rectification of clerical, arithmetical errors or accidental slip does not empower the court to have a second thought over the matter and to find that a better order or

decree could or should be passed. There should not be re-consideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. It was held that on a second thought court may find that it may have committed a mistake in passing an order in certain terms but every such mistake does not permit its rectification in exercise of Court's inherent powers as contained under Section 152 C.P.C., which is to be confined to something initially intended but left out or added against such intention.

17. Similar view has been expressed in the case of **Dwaraka Das v. State of M.P and another : (1999) 3 SCC 500**, wherein in paragraph 6, it was observed as follows:-

"6. Section 152 C.P.C. provides for correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the provisions of Sections 151 and 152 of the CPC even after passing of effective order in the lis pending before them. No Court can under the cover of the aforesaid sections modify, alter or add to the terms of its original judgment, decree or order."

17. Reiterating the view expressed in **Dwaraka Das case (supra), in the case of State of Punjab v. Darshan Singh (2004) 1 SCC 328**, explaining the power of a Court under section 152 CPC, the apex court observed, in paragraph 12, as follows:

"12. Section 152 provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein.

The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review or even said to clothe the court concerned under the guise of invoking after the result of the judgment earlier rendered, in its entirety or any portion of it. The corrections contemplated are of correcting only accidental omissions or mistakes and not all omissions and mistakes which might have been committed by the court while passing the judgment, decree or order...."

In a recent decision after examining the entire law on this point, including the law laid down in Dwaraka Das Case (supra), the Apex Court in the case of **Sarup Singh and another v. Union of India and another: (2011) 11 SCC 198, in para 31**, observed as follows:-

"31. In the light of the aforesaid settled position of law, when we examine the facts of the present cases it is patently obvious that the reference case and the matter of payment of compensation to the appellants became final and binding after the award was passed and the judgment was pronounced by the reference court and further by the High Court and thereafter, no appeal having been filed in this Court. Such a judgment and decree which has become final and binding could not have been reopened by the High Court on the basis of revision applications filed under Section 151 and 152 of C.P.C."

18. Taking a conspectus of the various decisions of the apex court noticed hereinabove, it is settled that the power under section 152 of CPC is to be exercised to correct arithmetical or clerical mistakes arising out of accidental slip or omission. In a matter where it is clear that something which the Court intended to do but the same was accidentally slipped or any mistake creeps in due to clerical or arithmetical mistake it would only advance the ends of justice to enable the Court to rectify such mistake. But before exercise of such power the Court must be legally satisfied and arrive at a valid finding that the order or the decree contains or omits some thing which was intended to be otherwise, that is to say, while passing the decree the court must have in its mind that the order or the decree should be passed in a particular manner but that intention is not translated into the decree or order due to clerical, arithmetical error or accidental slip. There should not be re-consideration of merits of the matter to come to a conclusion that it would have been better and in the fitness of things to have passed an order as sought to be passed on rectification. The Court's inherent powers as contained under Section 152 C.P.C., are confined to something initially intended but left out or added against such intention. After the passing of the judgment, decree or order, the same becomes final subject to any further avenues of remedies provided in respect of the same and the very court or the tribunal cannot and, on mere change of view, is not entitled to vary the terms of the judgments, decrees and orders earlier passed except by means of review, if statutorily provided specifically therefor and subject to the conditions or limitations provided therein. The powers under Section 152 of the Code are neither to be equated with the power of review nor can be said to be akin to review. Similarly, in view of the decisions noticed above, the power under Section 151 CPC is not available to modify / alter / review a judgment / decree/ award, which has attained finality.

19. Coming to the facts of the instant case, the Reference Court, presided over by 1st Additional District Judge, Muzaffarnagar, passed its award on 15.02.1985 providing solatium @ 15% and interest @ 6%. From a perusal of the Reference Court's award it cannot be inferred that the Reference Court had intended to award solatium at the rate of 30% and interest at the rate of 9% but due to arithmetical or clerical mistake in the judgment/ award, arising from any accidental slip or omission, lower rate was incorporated in the judgment/ award. The application, purportedly, under sections 151, 152 and 153 of the CPC, was filed, on 22.09.1986, with a prayer that the mistake in granting lower solatium and interest be rectified and corrected in the original judgment and decree with necessary consequences. This application came to be decided by a Court presided over by the District Judge, Muzaffarnagar, who had not passed the original award. The Court, without recording any finding that the Reference Court had intended to award solatium and interest at the higher rate but due to arithmetical or clerical mistake, arising from an accidental slip or omission, lower rate was provided, which required rectification, allowed the application and provided higher rate. Seen in light of the settled law, the court below had no jurisdiction to amend/ alter/ modify the award, which had otherwise become final, in exercise of its power under Sections 151 and 152 of the Code of Civil Procedure. Thus, the order of the court below is liable to be set aside.

20. The proper course for the claimant-respondent was either to appeal against the award or to have filed a review application under Order 47 Rule 1 of the Code of Civil Procedure read with section 53 of the Act, as observed by apex court in **Jaya Chandra Mohapatra's case (supra).** But, in the instant case, even if the application of the claimant-respondent, under Sections 151 and 152 CPC, is assumed to be a review application, the same having been filed beyond the period of 30 days from the date of the award of the Reference Court, was barred by the limitation provided under Article 124 of the Schedule of the Limitation Act and, as such, not entertainable, in absence of any application to condone the delay. Therefore, viewed from any angle, the court below had no jurisdiction to entertain the application and modify the award.

21. Although it would be a hard case for the claimant-respondent but, as it is said that hard case must not make bad law, this Court, for the reasons detailed above, has no other option than to allow the appeal. The appeal is, accordingly, **allowed.** The judgment and order dated 16.04.1988 passed by the District Judge, Muzaffarnagar in Misc. Case No. 243 of 1986 is hereby set aside. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.05.2013

BEFORE
THE HON'BLE S.K.SINGH, J.
THE HON'BLE B.K. SRIVASTAVA, J.

Second Appeal No. 1301 of 2012

Dhani Ram ...Petitioner
Versus
Chief Engineer, Rajghat Project & Anr. ...Respondents

Counsel for the Petitioner:
Sri Bhoopendra Nath Singh

Counsel for the Respondents:
Sri Subodh Kumar

<u>Constitution of India, Art. 226-</u> Alternative Remedy-writ petition entertained in 2000-after exchange of C.A. and R.A.-dismissed on ground of alternative remedy-in absence of Counsel-as he could not mark the case-recall application also rejected-held-once petition entertained and remain pending for long time ought to have decided on merit-single Judge failed to consider this aspect-order set-a side-direction to decide writ petition on merit given.

<u>Held: Para-25</u>
We are already over burdened with the cases practically in all the Courts right from bottom to top, and therefore, if we keep the matter pending in this Court for good number of years then unless there is exceptional circumstance there has to be a decision on merits, i.e. allow, dismiss or remand. Technicality is not to be permitted over the equity. Restrain in accepting the matter is to be at the first instance but once that is cleared there has to be discussion on merits. It has been throughout said that relegation on the ground of alternative remedy is a self imposed restriction and therefore, if one is to be thrown out on that ground then that is to be in the beginning so that during long interval he may be able to cross over the hurdles so as to reach this court and therefore, dismissal at the time of hearing on that very ground will be taking away long years of the litigant and he is to be placed at the same place where he was.

<u>Case Law discussed:</u>
(2008)12 SCC 675; AIR 1969 SC 556; AIR 1971 SC 33; (1996) 2 UPLBEC 1056 ; 2009(9) ADJ 670; (1998) 2 UPLBEC 1154; Spl. Appeal No. 1672 of 2011

(Delivered by Hon'ble S.K.Singh, J.)

1. Heard Sri Bhupendra Nath Singh, learned Advocate in support of this appeal and Sri Subodh Kumar, learned Advocate who appeared for respondents.

2. This special appeal is directed against the judgment of the learned Single Judge dated 16.03.2012 passed in Civil Misc. Writ Petition No. 28744 of 2000.

3. To appreciate the issue some basic facts will be necessary.

4. Writ petition was filed by the appellant against the orders of the competent authority dated 17.5.2000 by which he was removed from service.

5. Appellant was serving as a Gateman in the Raj Ghat Project,Betwa River Board, Nandanpura, Jhansi. He applied for earned leave w.e.f. 1.4.2000 to 20.4.2000 on medical ground for his treatment and thereafter leave was extended by moving leave extension application dated 20.4.2000. He having been declared fit to resume duties, finally he joined his duties on 26.5.2000 upon which he was handed over with a letter dated 17.5.2000 stating his removal on the ground of unauthorized absence from duty.

6. Writ petition was filed by the appellant which was entertained and respondents were called upon to file response upon which pleadings completed. On 20.7.2009 the case was listed. On that date office of the learned Advocate states that case was not marked by the clerk and in absence of counsel writ petition was dismissed on the ground of alternative remedy.

7. On coming to know about the order the application for recall was filed along with application for condonation of delay. Ground for condonation is the mistake of the office of the learned

Advocate in not marking the case and thus his absence but the recall has been rejected on 16.3.2012.

8. In the appeal the sole ground is that the writ petition having been entertained on merits in the year 2000 and pleadings having been completed it should not have been dismissed after about nine year on the ground of alternative remedy.

9. Submission is that on adjudication of the case on merits and on consideration of various aspects if the court was to record a finding that various factual issues are to be decided it could have taken a view to dismiss the writ petition on the ground of availability of alternative remedy but straightway dismissal for that reason is not at all justified.

10. Be as it may, parties having agreed, we are to decide the appeal on merits.

11. At the start of the argument learned counsel for the respondents, as maintained in the writ petition raised a ground of dismissal of the appeal on the ground of alternative remedy for which writ petition was dismissed. The argument is that once petition is entertained and respondents are called upon to file response do not prohibit the court not to dismiss the same on the ground of alternative remedy. If this is made a rule then it will be neither sound nor appropriate and sometimes it may be able of being misused. Reliance has been placed on the judgment given by the Apex Court in case of **State of Uttar Pradesh and another Vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti and others reported in (2008) 12 SCC 675.**

12. To the contrary, learned counsel for the appellant placed reliance on certain decisions of this court and that of the Apex Court to submit that after entertaining the petition on merits and completion of pleadings, after such long, unless there are serious triable factual issue, petition is not to be dismissed on the ground of alternative remedy.

13. In a decision given by the Apex Court in case of **M/s Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad reported in AIR 1969 SC 556** following observations were made-

"It is a well-established proposition of law that when an alternative and equally efficacious remedy is open to a litigant he should be required to pursue that remedy and not to invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of a statutory remedy does not affect the jurisdiction of the High Court to issue a writ. But, as observed by this Court in Rashid Ahmed v. The Municipal Board, Kairana,1950 SCR 566==(AIR 1050 SC 163), "the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs" and where such a remedy exists it will be a sound exercise of discretion to refuse to interfere. in a writ petition unless there are good grounds therefore. But it should be remembered that the rule of exhaustion of statutory remedies before a writ is granted is a rule of self imposed limitation, a rule of policy, and discretion rather than a rule of law and the court may therefore in exceptional cases issue a writ such as a writ of certiorari notwithstanding the fact that the statutory remedies have not been exhausted. In The State of Uttar Pradesh

v. Mohammad Nooh, 1958 SCR 595, 605= (AIR 1958 SC 86,93), S.R. Das, C.J., speaking for the Court, observed:

"In the next place it must be borne in mind that there is no rule, with regard to certiorari as there is with mandamus, that it will lie only where there is no other equally effective remedy. It is well established that, provided the requisite grounds exist, certiorari will lie although a right of appeal has been conferred by statute. (Halsbury's Laws of England, 3rd Ed., Vol. II, p. 130 and the cases cited there). The fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in ' arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily the superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party. had other adequate legal remedies. In the King v. Postmaster-. General Ex parte Carmichael [1928 (1) K.B. 291] a certiorari was issued although the aggrieved party had and alternative remedy by way of appeal. It has been held' that the superior court will readily issue a certiorari in a case where there has been a denial of natural justice before a court of summary jurisdiction. The case of Rex v. Wandsworth Justices Ex parte Read [1942 (1) K.B. 281] is an authority in point. In that case a man had been convicted in a court of summary jurisdiction without giving him an opportunity of being heard. It Was held that his remedy was not by a case stated or by an appeal before the quarter sessions but by application to the High Court for an order of certiorari to remove and quash the conviction."

14. In another decision given by the Apex Court in case of **L. Hirday Narain Vs. Income Tax Officer, Bareilly reported in AIR 1971 SC 33** following observations were made-

" An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by s. 33A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under s. 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition which was entertained and was heard on the merits.

15. There is another decision of the Apex Court given in case of **Dr. Bal Krishna Agarwal Vs. State of U.P. and others reported in (1996) 2 UPLBEC 1056** in which following observations were made-

"10.Having regard to the aforesaid facts and circumstances, we are of the

view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy under Section 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor under Section 68 of the Act it is bound to be agitated in the court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy. We, therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and Respondents 4 and 5. We may, in this context, mention that Respondent 4 has already retired in January 1994."

16. After considering several Apex Court decisions the Division Bench of this Court in case of **Roshan Lal Vs. State of U.P. and others reported in 2009(9) ADJ 670** made following observations-

"7. It is well settled that existence of alternative remedy does not bar the jurisdiction of this Court. It is a matter of discretion and not jurisdiction. It is self imposed discipline, wherein when an Act provides for a complete machinery for seeking redress, the writ Court declines to interfere in the matter and relegate a litigant to the remedy provided under the Statute. Power under Article 226 of the Constitution is not intended to circumvent statutory procedure but it is not an absolute bar and merely a factor, which requires consideration while exercising the power. Dismissal of the writ petition on the ground of alternative remedy long after its filing and exchange of pleadings, may lead to shutting the door of alternative remedy itself. Provisions of alternative remedy in many of the cases provide for limitation and in case writ petitions are dismissed after exchange of pleadings after a long time, the damage cannot be countenanced.

`8. In the present case, we proceed on an assumption that the petitioner has alternative remedy, but the question which falls for determination is as to whether in the facts of the present case, wherein the writ petition filed on 27.11.2001 was entertained and respondents and petitioner granted time to file counter affidavit and rejoinder and they having exchanged the pleadings, the learned Judge was right in dismissing the writ petition on 24.07.2009 on the ground of alternative-remedy.

9. Having given our anxious consideration to the question involved, we are of the opinion that the learned Judge erred in dismissing the writ petition on the ground of existence of alternative remedy at such a distance of time. The point in issue is no more res integra, as the Supreme Court had the occasion to consider the same in the case of L. Hirday Narain Vs. Income-Tax Officer, Bareilly, AIR 1971 SC 33, in which it has been held as follows:-

"12. An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not

entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the.merits."

(Underlining ours)

10. The Supreme Court had also considered this issue in the case of Durga Enterprises (P) Ltd. & Anr. Vs. Principal Secretary, Govt. of U.P. & Ors., (2004) 13 SCC 665 in which, in categorical terms, it has been held that the High Court having entertained the writ petition in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit. Relevant portion of the judgment of the Supreme Court in this regard, reads as follows:-

"2. By the impugned order the writ petition, which was pending for a long period of thirteen years, has been summarily dismissed on the ground that there is remedy of civil suit. The dispute between the parties was concerning exercise of the respondents' alleged right of re-entry on the disputed property in accordance with sub-rules (2) and (3) of Rule 5 of the Land Acquisition (Companies) Rules, 1963. The aforesaid Rules contain a mechanism for adjudication of a dispute relating to the alleged breach of terms of the agreement and the manner in which it is to be resolved.

3. The High Court, having entertained the writ petition, in which pleadings were also complete, ought to have decided the case on merits instead of relegating the parties to a civil suit.

4.We, therefore, set aside the impugned order of the High Court and remit the matter to it for taking a decision on merits, after hearing the parties, within the earliest possible period." (Underlining ours).

17. A Division Bench of this Court had also the occasion to consider this question in the case of **Diwakar Dutt Bhatt Vs. Life Insurance Corporation of India & Anr., (1998) 2 UPLBEC 1154**, in which it has been held that the bar of alternative remedy is nothing but a matter of self-imposed discipline and in a case in which the petition was entertained and pleadings have been exchanged, it would be inexpedient to dismiss the writ petition on the ground of alternative remedy. Paragraph 12 of the judgment, which is relevant for the purpose, reads as follows:-

18. As far as the first ground is concerned the writ-petition was filed on 29.10.1997. The petition was entertained and the respondents were directed to file the counter-affidavit. The counter affidavit has been filed. The rejoinder affidavit has also been filed. The case was heard today. No doubt the administrative instructions provide for filing of an appeal but the question which remains to be decided is, as to whether, on the ground of availability of an alternative remedy the writ-petition, which has been entertained can be thrown out and the petitioner be relegated to the appellate authority. The bar of the alternative remedy is nothing but a matter of self-imposed discipline which the Courts

have imposed upon themselves for the reason that the jurisdiction of Article 226 of the Constitution of India, should be invoked after exhausting the alternative remedies available to an aggrieved person."

19. This question also fell for consideration before a learned Single Judge of this Court in the case of Indra Narain Tripathi Vs. Union of India & Ors., (2006) 1 UPLBEC 1012, in which it has been held that after exchange of pleadings and four years of presentation of the writ petition, it would not be appropriate to throw out the petition on the ground of alternative remedy. Relevant portion of the said judgment reads as follows:-

"3. Learned Counsel for the respondent has raised a preliminary objection that a statutory revision lies against the impugned orders and in fact the petitioner has alleged that he had preferred the revision on 24.5.2001, therefore, the petition is not maintainable. The respondents in their counter affidavit have denied that any memo of revision was received by the Competent Authority. The appeal of the petitioner was decided after about a decade of the removal order. This petition has remained pending for the last about 4 years and pleadings have been exchanged between the parties. Thus, on these facts it would not be appropriate to throw out the petition on the ground of alternative remedy."

20. Same view has been taken by this Court in the case of Lokman Singh Vs. Deputy General Manager U.P.S.R.T.C. Meerut & Ors., 2006 (8) ADJ 646, in which dismissal of the writ petition after exchange of pleadings after long distance of time on the ground of alternative remedy under the Industrial Disputes Act, was found to be unsustainable. Paragraph 4 of the judgment, which is relevant for the purpose, reads as follows:-

"4. No doubt, the petitioner has a remedy of raising a dispute under the U.P. Industrial Disputes Act. However, since the petition was entertained in the year 1997 and counter and rejoinder affidavits have been exchanged, it would not be proper for the Court to relegate the petitioner to an alternative remedy under the Industrial Disputes Act at this stage, and that too, after a period of almost 10 years. Consequently, the preliminary objection made by the learned Counsel for the respondents is rejected."

21. Bearing in mind the aforesaid principle, when we consider the facts of the case, we are of the opinion that the learned Judge, after having entertained the writ petition, directed the parties to file counter and rejoinder affidavits and that having already been done, at such a distance of time, ought not to have dismissed the writ petition on the ground of alternative remedy.

We hasten to add that after exchange of pleadings, the Court may not be in a position to decide the disputed question of fact, for the reason that for deciding the same, evidence may be required to be laid, and in such circumstance the writ petition cannot be dismissed on the ground of alternative remedy but on the ground that the issue of fact cannot be decided in a writ petition."

22. After following the decision given by this Court in case of Roshan Lal (Supra) , recently **Special Appeal No. 1672 of 2011 was allowed by this Court**

on 10.1.2013. The order passed in the Special Appeal, referred above, is hereby quoted-

"We have heard learned counsel for the appellant, learned counsel for the State and the learned counsel representing the respondent no. 5 and the legal representatives of the deceased respondent-no.4.

The case is squarely covered by the decision of a Division Bench of this Court in the case of Roshan Lal Vs. State of U.P. & others, reported in 2009(9) ADJ-670.

Following the said Division Bench decision the impugned order of the learned Single Judge passed in the writ petition is set aside.

The matter is remitted back to the learned Single Judge for reconsideration on merits.

The appeal is accordingly allowed as above."

23. The decision given in the case of State of U.P. (Supra) as relied by learned counsel for the respondents has no application to the facts of the present case.

24. We are here to observe that litigation that may be of any nature takes usually long time in its maturity and then its disposal from stage to stage. If there is a stage prior to this Court then that is to be certainly exhausted. But here in the writ we exercise extraordinary powers where in the interest of justice, in the fitness of things, on finding apparent error in the impugned order, on finding violation of Principle of Natural Justice, we can always entertain petition straightway without feeling any impediment and thus if the Court was satisfied to entertain then the same Court if after ten years on completion of everything at the time of final hearing instead of deciding the claim on merits, proposes to dismiss the petition by relegating the litigant to a lower stage then one may feel answerable to the loss of ten years time which the litigant counts day to day. That can certainly embrass the Court besides feeling it to be unjust, inequitable for variety of reasons.

25. We are already over burdened with the cases practically in all the Courts right from bottom to top, and therefore, if we keep the matter pending in this Court for good number of years then unless there is exceptional circumstance there has to be a decision on merits, i.e. allow, dismiss or remand. Technicality is not to be permitted over the equity. Restrain in accepting the matter is to be at the first instance but once that is cleared there has to be discussion on merits. It has been throughout said that relegation on the ground of alternative remedy is a self imposed restriction and therefore, if one is to be thrown out on that ground then that is to be in the beginning so that during long interval he may be able to cross over the hurdles so as to reach this court and therefore, dismissal at the time of hearing on that very ground will be taking away long years of the litigant and he is to be placed at the same place where he was.

26. It can be a situation where this court in the light of the pleadings is not able to reach to a conclusion giving a final shape to the issue then having no option remittal will be a need.

27. At this stage, we are to notice that one of ground taken is that writ petition was

decided ex-parte and therefore, arguments were on the restoration application on the grounds given therein but learned Single Judge maintained the order by dismissing the application without considering that aspect.

28. Be as it may, it happens to be a case of poor litigant who was engaged as Gateman in a project and for the alleged authorized/unauthorized absence of hardly two months he was removed from service and his writ was entertained in 2000 and was dismissed on the ground of alternative remedy in the year 2009 in absence of his counsel and thus we are satisfied that it is a fit case where order of learned Single Judge is to be set aside.

29. Accordingly, the appeal succeeds and is allowed. The order of the learned Single Judge dated 16.03.2012 is hereby set aside. The matter is remitted back to the learned Single Judge for reconsideration of the claim of parties on merits.

30. Office is to list the writ petition before appropriate Court under appropriate Head in the first week of July, 2013.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2013

BEFORE
THE HON'BLE RAKESH TEWARI, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

First Appeal from Order No. 1334 of 2011

Northern Coalfields Ltd. Petitioner
Versus
The Aluminium Industries Ltd. Respondent

Counsel for the Appellant:
Sri Greeshm Jain, Sri Shakti Dhar Dubey
Sri Neeraj Dubey

Counsel for the Respondents:
Sri Hari Ram Mishra, Sri Ashok Srivastava
Sri R.P. Mishra

Arbitration and Conciliation Act, 1996-Section 2 (1)(e)-Court means-Principal Civil Court e.g. Distt. Judge and not the A.D.J.-order passed under section 34 of the Act by the A.D.J.-held-without jurisdiction-set-a-side-Distt. Judge to decide the case within 3 month.

Held: Para-19
In view of the aforestated discussion we are in full agreement with ratio given by an Hon'ble Single Judge of this Court in the case of M/s I.T.I., Allahabad (supra) and hold that the Court of Additional District Judge is not the Principal Civil Court for the purpose of Section 2(1)(e) of the Act and the District Judge can not transfer the case under the Arbitration and Conciliation Act, 1996 to the Court of Additional District Judge by invoking the provisions of either Section 8(2) of Bengal, Agra and Assam Civil Courts Act or Section 24 of Code of Civil Procedure, therefore, the court of Additional District Judge no jurisdiction to dispose of objections u/s 34 of the Act. The impugned order thus being without jurisdiction cannot be sustained. The appeal succeeds and is allowed. The impugned order is set aside and the matter is remitted back to the District Judge, Sonebhadra with the request to dispose of the case expeditiously preferably within three months from the date of receipt of certified copy of this order. The interim order dated 3.5.2011 is vacated. The parties would bear their own costs.

Case Law discussed:
AIR 1998 Allahabad 313; 2002(1) Arb. L.R. 530 (Karnataka); 2002(2) Arb. L.R. 246(SC); C.O. No. 2285 of 2002; 2004(1) Arb. L.R. 560; 2007(2) Arb. L.R. 363; A.P. A.I.R. 1989 SC 335.

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

1. Challenge in this appeal u/s 37 of Arbitration & Conciliation Act, 1996 (to be referred as the 'Act' hereinafter) read with Order XLIII Rule 1 and Section 104 Code of Civil Procedure is to the order dated 28.3.2011 passed by Addl. District Judge (Court No.1), Sonebhadra in Misc. Case no. 12 of 2009 filed u/s 34 of the Act in respect of award dated 25.8.2007.

2. At the time of hearing of appeal a preliminary jurisdictional objection was raised on behalf of the appellant contending that the Court of Additional District Judge is not a 'Court' within the definition of Section 2 (1) (e) of the Act, therefore, it has no jurisdiction to dispose of objections u/s 34 of the Act filed by the appellant before the District Judge, Sonebhadra against the impugned award dated 25.8.2007. In these circumstances, presently we are confined only to this issue and are not dealing with the merits of the case. Reliance has been placed by the appellant on the case of **M/s I.T.I. Ltd. Allahabad Vs. District Judge, Allahabad and others AIR 1998 Allahabad 313**. Per contra learned counsel for the respondent fairly conceding that the view of this Court in the above noted case is contrary to the findings of trial Court has valiantly tried to contend that the Court of Additional District Judge in a district is not inferior to the Court of District Judge and thus the impugned order does not suffer from any jurisdictional error.

3. It is not disputed that the appellant, a Government company engaged in the mining operation for extraction of coal in the States of M. P. and U. P. awarded a contract worth Rs. 29,73,31,100.00 and works & services for Rs. 18,35,59,000.00 to the respondent company for construction of 4-million ton per year capacity Coal Handling Plant at Khadia District Sonebhadra (U.P.) on turn key basis. The contract was. The schedule period of completion of plant was 24-months from the date of handing over the site i.e. 22.11.1993. However, agreed revised date of completion was fixed as 25.6.1994 due to delay in handing over of site by the appellant. Later on by way of mutual agreement the plant was divided in two phases. After completion of both phases it was mutually agreed to conduct the performance guarantee test of total place from 2.3.1998 to 31.3.1998. A committee of officers was constituted and test was completed on 31.3.1998. The committee thereafter recommended to take over the total plant for commercial operation w.e.f. 1.4.1998. The respondent was however, given time to remove short comings and complete balance work within one year i.e. up to 31.3.1999.

4. As per agreement above the balance work/deficiencies which remained unattended within one year may be dealt as per contract on risk and cost of respondent or adjustment of cost price available in the contract. However, due to financial crisis the respondent could not complete the balance work/deficiencies within guarantee period of one year and the appellant decided to take up work on risk and cost of respondent from cost price available in the contract. The appellant also encashed bank guarantee of the respondent and imposed penalty due to delay in completion of work. The respondent approached this Court by way application dated 7.3.2000 for appointment of sole Arbitrator to resolve the dispute as per the arbitration clause contained in the contract. Consequently vide order dated 8.2.2001 Justice R. M.

Sahai, Former Judge Supreme Court was appointed sole Arbitrator. The parties participated in the arbitration proceedings and the award u/s 31 of the Act was pronounced on 25.8.2007. The operative part of the said award is as under:

(1) The claimant is entitled to reduction of liquidated damages levied by the respondent by 50%.

(2) The claimant shall, further be entitled to the amount found due on recalculation of interest, on extra ordinary advance. The exercise shall be completed within one month from 25.8.2007, the date the award is being made.

(3) The claimant shall be entitled to refund on final accounting after recalculation of interest in the manner indicated while dealing issue no.5.

(4) The claimant shall be entitled to interest under Section 31(7)(a) of the Arbitration and Conciliation Act, 1997 on the amount found due in paragraph 2 and 3 of this order to be payable at the rate of 10% from 16.4.2001 i.e. the date of Arbitrator took cognizance of these proceedings till 25.8.2007 the date when the award is being made.

(5) The claimant shall be entitled to interest under Section 31(7)(b) of the Arbitration and Conciliation Act, 1997 at the rate of 12% from 25.8.2007 the date of award till the date of payment.

(6) In view of divided success the parties shall bear their own cost."

5. On 15.12.2007 the appellant filed objections u/s 34 of the Act in this Court, which were subsequently withdrawn on 29.5.2009. The appellant then filed instant objections u/s 34 of the Act before the District Judge, Sonebhadra on 1.7.2009, who vide order dated 24.9.2009 excluded the period from 15.12.2007 to 29.5.2009 in computation of limitation in filing objections u/s 34 of the Act. After exchange of objections/rejoinder etc. the District Judge heard arguments of counsel for the appellant on 28.4.2010 and 25.5.2010 and after few adjournments the case was transferred by the District Judge to the Court of Additional District Judge, Court no. 1 on 5.10.2010. The Presiding Officer of the transferee Court asked the parties' counsel whether this Court has jurisdiction to hear the objections u/s 34 of the Act since both the counsel agreed that the Court has jurisdiction, so the case was fixed for argument on 1.12.2010. Thereafter arguments were heard by the Additional District Judge but could not be concluded and then on 4.3.2011 the appellant filed application for transfer of the case to the Court of District Judge on the strength of case law reported in **ITI Ltd., Allahabad Vs. District Judge, Allahabad AIR 1998 All 313.** Similar application was also filed by the appellant in the Court of District Judge for stay of the proceedings. However, after hearing the parties counsel, the trial Court through impugned order has dismissed the appellant's objections u/s 34 of the Act. Aggrieved, they have come up in appeal.

6. We have heard arguments of parties' counsel at length regarding jurisdictional issue raised before us as also perused the law cited at the Bar.

7. Learned counsel for the appellant has argued that in view of the provisions of Section 2(e) & 42 of the Act of 1996 and Section 3(17) of the General Clauses Act, the Additional District Judge has no jurisdiction to decide the application under Section 34 of the Act of 1996, for the reasons that as per Section 2(e) of the Act of 1996 the "Court" means the

Principal Civil Court of the district and as per Section 3(17) of General Clauses Act the District Judge is the Judge of a Principal Civil Court and in view of Section 42 when any application with respect to an arbitration agreement is filed before the District Judge, he or she has no authority to transfer the said application and District Judge has to decide the application. Reliance has been placed on the case of I.T.I., Allahabad (supra) in support of their contention.

8. Per contra learned counsel for the respondent countering the above argument submits that the appellant's counsel has acquiesced to the jurisdiction of the Additional District Judge at the initial stage of the proceeding, thereafter they now cannot take a u-turn to contend that the Court of Additional District Judge lacks jurisdiction in deciding the application u/s 34 of the Act. He further submitted that the Additional District Judge has been authorized to discharge any of the functions of a District Judge, including the functions of Principal Civil Court of original jurisdiction which the District Judge may, by general or special order, assign to him and in the discharge of such functions he shall exercise the same powers as of the District Judge. Therefore, the District Judge has rightly transferred the case to the Additional District Judge for disposal according to law. Learned counsel counsel for the respondent has relied upon the following cases:

i) Valliappa Software Tehnological Park (Pvt.) Ltd., Banglore Versus C. Sundaram and others 2002 (1) Arb. L.R. 530 (Karnataka);

ii) I.T.I. Ltd. Vs. Siemens Public Communications Network Ltd. 2002(2) Arb.L.R. 246 (SC);

iii) Macro Tech India & others Vs. Uma Roy C.O. No. 2285 of 2002 decided on 29.11.2002;

iv) Globsyn Technologies Ltd., Calcutta Vs. Eskaayecee Infosys, Visakahapatnam 2004(1) Arb.L.R. 560;

v) Fountain Head Developers Vs. Maria Arcangela Sequeira with Western Maharashtra Infrastructure Pvt. Ltd. Vs. Kolhapur Municipal Corportation 2007(2) Arb.L.R. 363;

vi) Madhya Pradesh State Electricity Board & Another Vs. ANSALDO Energia, S.P.A. And another AIR 2008 MP 328;

vii) Nand Contractors and Engineers through G. D. Ahuja Vs. Northern Coalfield Limited and another 2012 (9) SCC 494.

9. In order to appreciate the rival contentions, it is necessary to have a quick look on the relevant provisions regarding the point in issue. Section 2 (1) (e) of the Act defines 'Court as under:

"Court" means the Principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any Civil Court of a grade inferior to such Principal Civil Court, or any Court of Small Causes.

Thus, the definition of 'court' in section 2(1)(e) is narrower than the ordinary definition of 'court'. It is both inclusive and exclusive. It defines 'court' to mean the principal civil court of original jurisdiction in a district. The definition specifically includes the High Court in exercise of its ordinary original civil jurisdiction within its ambit but excludes 'civil courts of a grade inferior to

such principal civil court' and Court of Small Causes. Thus under the Act, 'court' means and includes the district court and High Court in exercise of its ordinary original civil jurisdiction. The only condition is that it should have jurisdiction to decide the questions forming the subject matter of the arbitration if the same would have been the subject matter of a suit. In the case of **Mahalakshmi Oil Mills Vs. State of A. P. AIR 1989 SC 335,** the Apex Court has observed as under:

"*By using the words 'means, 'includes' and 'does not include' in section 2(1)(e) of the Act, the Parliament has exhaustively explained the meaning of the term 'court' in that the words 'means' is a term of restriction, while the word 'includes' is a term of enlargement and when the words 'means' and 'includes' are used together to define a thing, the intendment of the legislature is to supply restricted meaning to the terms.*"

Section 3(17) of the General Clauses Act, 1897 defines the term "District Judge" as 'the Judge of a principal civil court of original jurisdiction but shall not include a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction'. Thus the definition of Court of 'District Judge' and 'Principal Civil Court of original jurisdiction are similar and there is no distinction between the two. The Courts of Civil Judges Senior and Junior Division may also be civil court of original jurisdiction, but none of them can be termed as principal civil court of original jurisdiction for the purposes of the Act.

10. It is not in dispute that the Court of an Additional District Judge is, a class of civil court as enunciated by Section 3 of the Bengal, Agra and Assam Civil Court Act, 1887, and it exercises the same power as the District Judge in relation to the functions assigned to it by the District Judge under Section 8(2) of the aforesaid Act but that by itself, would not invest it with the trapping of the principal civil court of original jurisdiction in a district. Section 8 of the afore-stated Act reads as below :

"8. Additional Judges (1) when the business pending before any District Judge requires the aid of Additional Judges for its speedy disposal. State Government may, having consulted High Court, appoint such Additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions they shall exercise the same power as the District Judge."

The word 'principal' means; the first in importance : chief, main ; and the word "grade" used in Section 2(e) of the Act signifies status and importance and it does not refer to a, class or particular class inasmuch as the grade of a Court depends on the pecuniary or other limitations of the jurisdiction of the particular Court.

Section 42 of the Act of 1996 envisages that:

42. Jurisdiction - Notwithstanding anything contained elsewhere in this part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent

applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court.

Thus, Section 42 of the Act is an overriding provision and it provides that in respect of arbitration proceedings a single court shall have exclusive jurisdiction. The words 'court' must be read in the context in which it is used in the statute and it would not be proper for the Courts to give a liberal meaning to it. Therefore, a conjoint reading of Sections 2 (1) (e) & 42 of the Act, leaves no manner of doubt that the Legislature intended to make only one Court the Principal Civil Court of original jurisdiction or, as the case may be, the High Court in exercise of its ordinary original jurisdiction, whichever Court is approached earlier, as the venue for all matters connected with an arbitration agreement; and award, and all arbitral proceedings. Sections 2(e) & 42 of the Act in simple language, would mean that, any application with respect to an arbitration agreement will have to be filed in the Principal Civil Court of original jurisdiction in a district, or, as the case may be, in the original civil jurisdiction of the High Court, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit and that Court alone to which the application is filed shall have the jurisdiction over the entire arbitral proceedings to the exclusion of any other Court, having jurisdiction to decide the questions forming the subject-matter of arbitration.

11. This Court in the case of I.T.I, Allahabad (supra) taking note of Section 3(17) of General Clauses Act, 1897 which defines 'District Judge' as 'the judge of Principal Civil Court of original jurisdiction' also considered the provisions of Section 8(2) of the Bengal, Agra and Assam Civil Courts Act, 1897 under which the District Court was constituted. It was held that in para-12 as under:

"As a result of the foregoing discussion and on regard being had to the definition of the term "Court" as elucidated in Section 2(e) and the overriding effect of Section 42 of the Act, I am persuaded to the view that the Court of the Additional District Judge is shorn of jurisdiction to entertain an application under Section 34 of the Act and the District Judge cannot, by invoking the provisions contained in Section 8(2) of the Bengal, Agra and Assam Civil Courts Act, 1887, transfer the application for its disposal to the Court of an Additional District Judge. An application for setting aside an award under Section 34 of the Act is as much an application "with respect to an arbitration agreement" as it is for "setting aside the arbitral award" and it is a matter of statutory compulsion that such application is made to the principal civil court of original jurisdiction in a district 'or' the High Court in exercise of its ordinary original civil jurisdiction' having jurisdiction to decide the questions forming the subject-matter of arbitration if the same had been the subject-matter of a suit and it is again a matter of statutory mandate that the Court to which the application is made 'alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement', and the arbitral proceedings shall be made in that Court and in no other Court except the appellate court being in seisin over the matter. The power to transfer/assign the application to any other Court, otherwise having jurisdiction to decide the questions forming the subject-matter of arbitration had it been the subject-matter of a suit, has been impliedly taken away by Section 42 of the Act which is couched in a language fraught with overriding effect. I am conscious of the fact

that the view I am taking, may result in adding burden to the District Judge but the plain or unambiguous words of the statute, i.e., words which are reasonably susceptible to only one meaning will have to be given effect 'irrespective of consequences'-- See Nelson Motis Vs. Union of India, AIR 1992 SC 1981."

The facts of the aforesaid case are quite similar to the instant case. An application u/s 34 of the Act was filed in the Court of the District Judge for setting of the award. After entertaining the application, the District Judge transferred the same to the Court of III Additional District Judge, Allahabad for disposal. An objection was raised before the transferee Court that it has no jurisdiction to entertain the application. The Additional District Judge over-ruled the objections holding that the expression 'but does not include any Civil Court of a grade inferior to such Principal Civil Court or any Court of Small Causes' used in Section 2(e) of the Act, implies that in addition to the District Judge there may be other Prinicipal Civil Courts of original jurisdiction in a district and Additional District Judge not being inferior in grade to the District Judge comes within the purview of the term 'Court' as defined under Section 2(e) of the Act. Then an application was filed before the District Judge stating that as the application u/s 34 of the Act was originally presented in the Court of the District Judge, therefore, in view of provisions section 42 of the Act, that Court alone should deal with arbitral proceedings and transfer of the said application from the Court of District Judge to the Court of III Additional District Judge was not proper. The said objection was over-ruled. It is against the said order, the matter was taken to this Court.

12. The Karnataka High Court in the case of **Valiliappa Software Technological Park (Pvt.) Ltd., Banglore** case (supra) distinguished the case of M/s ITI Industries (supra) on the premise that pursuant to the orders of the High Court, the Principal City Civil Court Judge has allotted all the arbitration proceedings filed in the City Civil Court of Banglore to the 6th Additional City Civil Judge. It was not a case of Principal City Civil Judge entertaining the application u/s 9 of the Act and then transferring the same to the Court of 6th Additional City Civil Judge. .

13. The core question in the case of **ITI Ltd. Vs. Siemens Public Communications Network Ltd., (supra)**, before the Apex court was whether a revision under Section 115 Civil Procedure Code lies to the High Court as against an order made by a Civil Court in an appeal preferred under Section 37 of the Act against an interim order made by the arbitral tribunal? The definition of 'Court' provided in section 2 (1)(e) of the Act was not in issue before the Apex Court.

14. Before Calcutta High Court in the case of **Macro Tech India and others (supra), the decision of this Court in M/s ITI, Ltd**. Allahabad (supra) was not pressed into service. Even the statement of objects and reasons viz- 'to minimise the supervisory role of Courts in arbitral process' as given in the Arbitration and Conciliation Bill, 1995 was not considered, which was instrumental in narrowing down the definition of 'Court' in the Act of 1996 as given in the Arbitration Act, 1940.

15. The Andhra Pradesh High Court in the case of **Globsyn Technologies Ltd.**, Calcutta (supra) although took note of the case of **M/s ITI Ltd., Allahabad**

(supra) but without considering the provisions of General Clauses Act or Bengal, Agra and Assam Civil Courts or the provisions of Section 42 of the Act and their joint impact on the jurisdictional issue took a different view.

16. The Full Bench of Bombay High Court in the case of **Fountain Head Developers** (supra) opined that the principal civil court of original jurisdiction in a district for the purpose of a petition under Section 34 of the Act is a District Court and does not include any other Court inferior to the District Court. In this case the Court was considering whether Court of Civil Judge Senior Division is inferior to principal civil court of original jurisdiction in a district i.e. District Judge or not? The full bench found itself in agreement with the view expressed by Hon'ble Single Judge of this Court in the M/s I.T.I., Allahabad (supra).

17. In the case of **Madhya Pradesh State Electricity Board** (supra) a division bench of Madhya Pradesh High Court as noted in para-22 of the report observed that as far as Madhya Pradesh is concerned, the Additional District Judge is equated with the Principal Civil Court of original jurisdiction. Section 21(1)(e) does not include any civil Court of grade inferior to such Principal Civil Court or any Court of Samll Causes. It means that the verdict has been squeezed to the territory of Madhya Pradesh only.

18. The case of **Nand Contractors and Engineers through G. D. Ahuja** (supra) does not deal with the controversy in hand as the issue involved in the case was with regard to award of interest.

19. In view of the aforestated discussion we are in full agreement with ratio given by an Hon'ble Single Judge of this Court in the case of **M/s I.T.I., Allahabad (supra)** and hold that the Court of Additional District Judge is not the Principal Civil Court for the purpose of Section 2(1)(e) of the Act and the District Judge can not transfer the case under the Arbitration and Conciliation Act, 1996 to the Court of Additional District Judge by invoking the provisions of either Section 8(2) of Bengal, Agra and Assam Civil Courts Act or Section 24 of Code of Civil Procedure, therefore, the court of Additional District Judge no jurisdiction to dispose of objections u/s 34 of the Act. The impugned order thus being without jurisdiction cannot be sustained. The appeal succeeds and is allowed. The impugned order is set aside and the matter is remitted back to the District Judge, Sonebhadra with the request to dispose of the case expeditiously preferably within three months from the date of receipt of certified copy of this order. The interim order dated 3.5.2011 is vacated. The parties would bear their own costs.

RIVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.05.2013

BEFORE
THE HON'BLE ADITYA NATH MITTAL, J.

Criminal Revision No. 1728 of 2010

Shammi ...**Petitioner**
Versus
State of U.P. and Anr. ...**Respondents**

Counsel for the Petitioner:
Sri Raghuraj Kishore
Sri S.M. Abbas Naqvi

Counsel for the Respondents:
A.G.A.

Criminal Revision- Against the summary order passed under section 319-main thrust of argument that in case of allegations of SC/ST Act-under section 7 of the Rules 1995-I.O. should not be below the rank than Dy.S.P.-charge sheet submitted by Senior S.I. without jurisdiction-held-misconceived-applicant has been summoned under Section 319 and not an basis of investigation-application rejected.

Held: Para-10

In the present case, it is also relevant to mention that the accused persons are facing trial on the basis of their summoning under Section 319 Cr.P.C. and not on the basis of charge-sheet submitted by the investigating officer. No gross injustice or violation has been proved while the first application has already been rejected on merits, the subsequent application on the same grounds was also not maintainable.

Case Law discussed:

AIR 2000 SC 870

(Delivered by Hon'ble Aditya Nath Mittal,J.)

1. Heard Sri S.M. Abbas, learned counsel for the revisionist, learned AGA and perused the record.

2. This criminal revision has been filed against order dated 5.2.2010 passed by Fast Track Court No.1 District Saharanpur in Sessions Trial No.707 of 2006 under Sections 323, 324, 504, 506 IPC and Section 3(1)10 SC ST Act.

3. Learned counsel for the revisionist has submitted that as per provisions of Rule 7 of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, the offence committed under this Rules shall be investigated by a police officer not below the rank of Deputy Superintendent of Police. It has further been submitted that in the present matter the investigation has been done by a Senior Sub Inspector who had no jurisdiction to do the investigation therefore, the impugned order is against the law.

4. Learned AGA has defended the impugned order.

5. Section 7 of the Scheduled Castes & the Scheduled Tribes (Prevention of Atrocities) Rule, 1995, provides as under :-

"7. Investigating Officer.- (1) An offence committed under the Act shall be investigated by a police officer not below the rank of a Deputy Superintendent of Police. The investigating officer shall be appointed by the State Government, Director General of Police, Superintendent of Police after taking into account his pass experience, sense of ability and justice to perceive the implications of the case and investigate it along with right lines within the shortest possible time.

(2) The investigating officer so appointed under sub-rule (1) shall complete the investigation on top priority within thirty days and submit the report to the Superintendent of Police who in turn will immediately forward the report to the Director General of Police of the State Government.

(3) The Home Secretary and the Social Welfare Secretary to the State Government, Director of Prosecution the officer-in-charge of Prosecution and the Director General of Police shall review by the end of every quarter the position of all

investigations done by the investigating officer."

6. Perusal of the aforesaid Rules reveals that the investigating officer may be appointed by the State Government, Director General of police or the Superintendent of Police after taking into account his past experience, sense of ability and justice to perceive the implications of the case. Perusal of the impugned order reveals that previously also the accused persons had moved an application 160-Kha on 6.1.2010. It has also been mentioned in the impugned order that initially the investigation was started by Deputy Superintendent of Police but after referring the Government Order, the investigation was transferred to Senior Sub Inspector Chanya Swaroop after which it was transferred to Sub Inspector Mahendra. The charge sheet was submitted on 16.3.2006. The Government Order clarifies the position that the investigation under Scheduled Caste and Scheduled Tribes Act may be done by a police officer of the rank of Sub Inspector. Furthermore, it was relevant that the accused persons who had moved an application for discharge were summoned under Section 319 Cr.P.C. because they were not arrayed as accused persons on the basis of charge sheet filed by the investigating officers. The order under Section 319 Cr.P.C. was challenged before this Court in Criminal Revision No.3350 of 2008 which was rejected and at that time no such objection of Rule 7 was taken therefore, the order passed under Section 319 Cr.P.C. has become final. After it the statements of two witnesses were also recorded and the application 160-Kha was rejected on the merits. Therefore, I am in agreement with the findings of learned trial Court that the Sessions Judge had no jurisdiction to review its own order.

7. Furthermore, Hon'ble the Apex Court in State of M.P. and others Vs. Ram Singh AIR 2000 SC 870, State Inspector of Police Vs. Surya Sankaram Karri MANU/SC/8834/2006 and State of M.P. Vs. Ramesh Chandra Sharma MANU/SC/2574/2005 has held that a defect or illegality in the investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial.

8. In the State of M.P. Vs. Ramesh Chandra Sharam (supra), Hon'ble the Apex Court has held as under :-

"The question then requires to be considered whether and to what extent the trial which follows such investigation is vitiated. Now, trial follows cognizance and cognizance is preceded by investigation. This is undoubtedly the basic scheme of the Code in respect of cognizable cases. But it does not necessarily follow that an invalid investigation nullifies the cognizance or trial based thereon. Here we are not concerned with the effect of the breach of a mandatory provision regulating the competence or procedure of the court as regards cognizance or trial. It is only with reference to such a breach that the question as to whether it constitutes an illegality vitiating the proceedings or a mere irregularity arises."

9. Hon'ble the Apex Court has further held as under:-

"The Court after referring to Parbhu v. Emperor MANU/PR/0035/1944 : AIR 1944 PC 73: 46 Cri LJ 119 and Lumbhardar Zutshi v. R AIR 1950 PC 26: 51 Cri LJ 644, held that if cognizance is in fact taken on a police report initiated by the breach of a mandatory provision relating to investigation, there can be no

doubt that the result of the trial, which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice and that an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial. This being the legal position, even assuming for the sake of argument that C.B.I. committed an error or irregularity in submitting the charge-sheet without the approval of C.V.C., the cognizance taken by the learned Special Judge on the basis of such a charge-sheet could not be set aside nor could further proceedings in pursuance thereof be quashed. The High Court has clearly erred in setting aside the order of the learned special Judge taking cognizance of the offence and in quashing further proceedings of the case."

10. In the present case, it is also relevant to mention that the accused persons are facing trial on the basis of their summoning under Section 319 Cr.P.C. and not on the basis of charge-sheet submitted by the investigating officer. No gross injustice or violation has been proved while the first application has already been rejected on merits, the subsequent application on the same grounds was also not maintainable.

11. For the facts and circumstances mentioned above, I do not find any error of law or perversity in the impugned order.

12. The revision is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2013.

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No.1832(S/S) of 2008
alongwith
W.P. No.8100 (S/S) of 2009, W.P. No.4688 (S/S) of 2008 ,
W.P. No.4788 (S/S) of 2008 , W.P. No.6451 (S/S) of 2008,
W.P. No.8048 (S/S) of 2010 , W.P. No.7346 (S/S) of 2008 ,
W.P. No.7990 (S/S) 2007 , W.P. No.3449 (S/S) of 2007
W.P. No.1980 (S/S) of 2008 and W.P. No.1909 (S/S) of 2008

Satyendra Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Dr. L.P. Misra , Sri P.K. Mishra and Sri Sharad Pathak

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226-Cancellation of selection-class 4th employee-on ground malafide arbitrariness-challenged on ground for misdeed of employee-petitioners not to suffer-while in pursuance of selection list working for considerable period and drawing salary-Interview of 1817 candidates in Single day not humanly possible-apart from it Dr. Pandey drawn two days salary of all candidates in cash-against the rule of government by which payment of salary by cash prohibited-itself speaks about malafide-cancellation of entire selection-held proper.

Held: Para-20
In view of above stated facts and arguments of both the parties and after a keen observation of records Court is of the view that the selection in question is liable to be quashed on the grounds of various illegalities.

Case Law discussed:

2007(25) LCD 460; 1991 (4) SCC 555; 2008 (4) SCC 619; 2011(1) ALJ 61; (1997) 9 SCC 527;

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Dr. L. P. Mishra, learned counsel for the petitioners and learned Standing counsel for the opposite parties. Valuable assistance has been provided by Ms. Twishi Srivastava, Law Trainee of this Court.

2. This is a bunch of writ petitions, the leading being the writ petition No.1832 (S/S) of 2008. These writ petitions have been filed against the order dated 10/6/2007 and inquiry report dated 8/6/2007 by which appointment of petitioners on class IV post has been declared void by opposite party no 2. To test the legality of impugned order it becomes necessary to narrate the facts of the case which are as follows:

3. The Director(Administration) Medical and Health Services,U.P., opposite party no 2vide letter dated 25/9/2006 communicated the permission granted by State Government for appointment on class IV post in Hospitals, District Hospitals and Regional Offices etc of Faizabad and Devipattan Divisions, this letter is annexed as Annexure no CA 1 to the counter affidavit. Immediately after issuance of this letter, Director(Administration) issued another letter dated 27/9/2006 directing officers concerned that while making appointments pursuant to the letter dated 25/9/2006, the Government Order, Rules as well as the Directions issued from time to time shall be strictly adhered to and the procedure of selection be adopted with specific care. It was further directed that the reservation criteria as prescribed under the rules shall also be strictly followed. In the letter dated 25/9/2006 a time table was prescribed for undertaking the exercise for making recruitment on class IV post, pursuant to this letter, the Additional Director, Medical Health and Family Welfare, Faizabad Division, Faizabad, opposite party no 4, circulated the same to all the Chief Medical Officers / Chief Medical Superintendents, District Hospitals and Medical Superintendents of District Women Hospital of Faizabad Division through an endorsement dated 30/10/2006 made in the said letter. In this endorsement it was specifically directed by the Additional Director that the entire exercise shall be done after lifting of the Election Code of Conduct.

4. It is interesting to note here that the then Chief Medical Officer of Ambedkar Nagar namely Dr. V. P. Pandey before receiving formal direction of recruitment on class IV post , on 9/10 /2006 i.e. prior to 30/10/2006 date on which letter was circulated for recruitment on class IV post, issued an advertisement for filling up the vacancies of class IV post. However after receiving formal directions of letter dated 25/9/2006, Dr. V.P.Pandey, opposite party no 5 cancelled the advertisement dated 9/10.2006. Subsequent advertisement was published in the newspaper on 9/11/2006,fixing thereby 24/11/2006 to be the date of interview.

5. In the meantime, a complaint was made by one Sri Ram Murti Verma before the then Minister, Medical,Health and Family Welfare against Dr. V.P.Pandey, on the ground that Dr. V.P.Pandey has accepted bribe from several candidates. On receiving the complaint, the then

Minister of the Ministry concerned directed the Principal Secretary, Medical,Health and Family Welfare, U.P. to inquire into the matter. State Government opposite party no1 while taking cognizance of the said complaint, containing serious allegations of accepting bribe against the Chief Medical Superintendent of Ambedkar Nagar Dr. V.P.Pandey, vide an order dated 22/11/2006 stayed the proceedings of selection till further order of the State Government. Thereafter, Director General, Medical and Health Services U.P., opposite party no2, vide an order dated 23/11/2006 directed the Additional Director, Medical Health and Family Welfare, Faizabad Division, Faizabad, opposite party no 4, to conduct the inquiry into the matter. opposite party no 4 vide its report dated 25/11/2006 recorded a finding that the selection was being made by Dr. V. P.Pandey as per rules and copy of report was also sent to State Government.

6. Although this report stated that there was no irregularity in selection procedure, yet the selection process stayed by the State Government vide order dated 22/11/2006 remained stayed. This stay order dated 22/11/2006 was with respect to the district Ambedkar Nagar only, however the State Government by a general order dated 29/11/2006 stayed the selection process of class IV post in the entire State of U.P.

7. Against the order dated 22/11/2006 one Smt Rajkumari along-with several other persons preferred a writ petition bearing no 9880(S/S) of 2006 in which this court vide its judgment dated 23/3/2007 directed that in case the inquiry regarding the selection stood concluded and a report had been submitted to the State Government and complaints have been found to be baseless, the respondent may proceed with the selection in accordance with law.

8. In the garb of report submitted by Additional Director opposite party no4 on 25/11/2006 and order of this court dated 23/3/2007, Dr. V.P.Pandey sought legal opinion from the District Government Council (Civil), Ambedkar Nagar, regarding stay of selection dated 22/11/2006, who in response opined vide letter dated 29/5/2007 that now the selection can be proceeded with.

9. In the mean time, Additional Director opposite party no4 vide letter dated 28/5/2007 advised Dr. V.P.Pandey that the purpose of filling of the backlog vacancies pertaining to the reserved categories of SC,ST and OBC and while making such selection the orders and directions issued by the State Government from time to time in the matter of said appointment be strictly adhered to. Inspite of these specific directions Dr. V.P.Pandey conducted selection proceedings in violation of these directions and interviewed 1817 candidates in a single day i.e. on 29/5/2007. After interviewing such a huge number of candidates in a single day, astonishingly, on the very next day i.e. on 30/5/2007, appointment letters of 62 selected candidates were also issued. These candidates were given joining on the same very day i.e. on 30/5/2007. Dr. V. P. Pandey went out of way to ensure payment of salary to the petitioners. He withdrew the salary of selected candidates for 2 days i.e. 30/5/2007 and 31/5/2007 through a bearer cheque from the State Bank Of India, branch Ambedkar Nagar

on 8/6/2007 in violation of rules of State Government. Rules expressly prohibit the payment of salary in cash to employee. On the same date opposite party no4 by taking cognizance vide letter dated 8/6/2007,addressed to Chief Treasury Officer, Ambedkar Nagar, requested to stop the payment of the salary of 62 selected candidates, as annexed in Annexure no CA6.

10. In the light of aforesaid illegalities committed by Dr. V.P.Pandey and several other employees, an FIR was lodged against him as well a against 62 selected candidates on 9/6/2007 i.e. the next day. It was registered as case crime no 245/2007undr section 419/420/466/468/471 of Indian Penal Code 1860, police station kotwali Akbarpur, district Ambedkar Nagar. On 10/6/2007 the then Additional Director of Division concerned directed Dr. V.P.Pandey that the Director General, Medical and Health Services U.P.,opposite part no 2 has declared 62 appointments made by Dr. B.P. Pandey to be void and the said employee may be restrained from working and from signing the register. Letters dated 8.6.2007 and 10.6.2007 are annexed as Annexure nos. C.A. 11 & 12. On 8.6.2007 Additional Director Faizabad Division was directed by Principal Secretary, Department of Medical Health and Family Welfare, U.P. to inquire in to the matter and on the same day Additional Director submitted its report as annexed in C.A. 13 to the writ petition, containing categorical findings regarding the corruption in selection to State Government. By taking cognizance of the said report State Government and Director (Administration), Directorate of Medical and Health Services, U.P. vide order dted 9.6.2007 placed all the persons involved in said illegal selection under suspension. On 11.6.2007 District Magistrate, Ambedkar Nagar constituted a committee comprising of Chief Development Officer, Ambedkar Nagar, Additional District Magistrate (F&R) Ambedkar Nagar and Soil Conservator, Ambedkar Nagar to conduct an inquiry in the matter regarding the said appointment. This committee submitted its report on 16.6.2007 as contained in C.A. 15 wherein it reveals a large scale illegalities and irregularity committed in selection proceedings.

11. Petitioners have taken a contention that action of opposite parties in not permitting the petitioners to discharge their duties is patently arbitrary and malafide, particularly when no reasons have been assigned by the opposite parties for restraining the petitioners from discharging their duties inspite of the fact that the petitioners have not only submitted their joining in terms of their appointment order but have also worked on the said post and received salary against it. Petitioners have further argued that since petitioners have joined duties and worked on their posts, a right has accrued in favour of petitioners, hence impugned action of the opposite parties in declaring the appointment of the petitioners is void as no opportunity of hearing was given to the petitioners and it amounts to violation of principles of natural justice.

12. In counter to these arguments, opposite parties have argued that since the whole selection in question was void, therefore, there was no requirement to give opportunity of hearing to the petitioners prior to declaring their services to be void. Opposite parties have placed

their reliance on para no. 12 of the judgment reported in (2002) 3 Supreme Court Cases 146 (Union of India and others vs. O. Chakradhar). Paragaraph no. 12 of the aforesaid judgment is being quoted herein below:

"12. As per the report of CBI the whole selection smacks of mala fides and arbitrariness. All norms are said to have been violated with impunity at each stage viz. right from the stage of entertaining applications, with answer-sheet while in the custody of Chairman, in holding typing test, in interview and in the end while preparing the final result. In such circumstances it may not be possible to pick out or choose a few persons in respect of whom alone the selection could be cancelled and their services in pursuance thereof could be terminated. The illegality and irregularity are so intermixed with the whole process of the selection that it becomes impossible to sort out the right from the wrong or vice versa. The result of such a selection cannot be relied or acted upon. It is not a case where a question of misconduct on the part of a candidate is to be gone into but a case where those who conducted the selection have rendered it wholly unacceptable. Guilt of those who have been selected is not the question under consideration but the question is could such selection be acted upon in the matter of public employment? We are therefore, of the view that it is not one of those cases where it may have been possible to issue any individual notice of misconduct to each selectee and seek his explanation in regard to the large scale, widespread and all -pervasive illegalities and irregularities committed by those who conducted the selection which may of course possibly be for the benefit of those who have been selected but there may be a few who may have deserved selection otherwise, but it is difficult to separate the cases of some of the candidates from the rest even if there may be some. The decision in the case of Krishan Yadav applies to the facts of the present case. The Railway Board's decision to cancel the selection cannot be faulted with. The appeal therefore deserves to be allowed."

13. Opposite parties have further argued that a detailed inquiry was conducted to check the illegality of selection in question and inquiry report has established the fact of gross illegality committed in selection procedure. Since a speaking order has been passed by the opposite parties, the action of opposite parties is neither arbitrary nor malafide.

14. Opposite parties have also argued that interview of 1871 candidates in a single day is highly improbable and this fact itself prima facie establishes that selection procedure was farce and mockery. In support of his contentions, opposite parties have placed reliance upon para 19 of Lalit Kumar and others Vs. King George's Medical University, Lucknow and others, 2007 (25) LCD 460 which reads as under:-

"*19. In Raj Kumar V. Shakti Raj, reported in (1997) 9 SCC 527, the Hon'ble Apex Court has held that it is not practically possible to interview so many candidates and if interview held it will be a fare and mockery. Thus the interview was mere a farce and mockery and humanly impossible to interview more than six hundred candidates in two days. In the instant case, as per the Rule 5(4) (a) it specifically provides that a number of candidates to be called against the number of vacancies but in the instant case, more than six hundred candidates*

appeared and had been interviewed on the aforesaid two days. Admittedly, no marks have been awarded for academic qualification as required under Rule 5(1) (I) to (iii) of Rules 2003 but cent per cent marks have been reserved for interview."

15. In counter to this petitioners have argued that interview was for class IV posts which need not much time to be spent for interview. Class IV post does not require immense knowledge hence within a short span of time, candidates for class IV posts can easily be interviewed. In support of this contention petitioners have relied upon para 6 of Sardara Singh Vs. State of Punjab and others, 1991 (4) SCC 555 and 619 which reads as under:-

"6. It is next contended that there was no proper opportunity given to the appellants in the interview. Only 15 hours were spent to interview 821 candidates and the selection, therefore, is a farce. This contention also was not raised before the High Court, but raised In these appeals for the first time. In the counter filed in this Court, it was refuted. It was stated that they had spent 35 hours in total at the rate of 7 hours per day. That means they spent 5 days in selecting the candidates. The selection is for the Patwaris in the Class III service. The ratio in Ashok Kumar Yadav V. State of Haryana has no application to the facts in this case. Therein the selection was to the Class I service of the State service and sufficient time was required to interview each candidate. In this case, on calculation, we found that on an average three minutes were spent for each candidate for selection. Rule 7 of the Rules provides the qualifications, namely, pass in the Matriculation or Higher Secondary Examination; knowledge in Hindi and Punjabi up to the Middle Standard and good knowledge of rural economy and culture. The educational qualifications are apparent from record and need no interview in this regard. It could be seen that candidates normally hailing from rural backgrounds had presumptively good knowledge of rural economy and culture. Therefore, there is no need for special emphasis to ascertain their knowledge of the rural economy or culture. Under those circumstances much time need not be spent on each candidate for selection except asking some questions on general knowledge and aptitude for work as Patwari etc."

16. The petitioners have further relied upon para 42 of the judgment of Hon'ble Supreme Court in the case of Sadanand Halo and others Vs. Momtaz Ali Sheikh and another, 2008 (4) SCC 619 which is quoted as under:-

"42. To sum up, these were the interviews for the post of constables and the minimum educational standard was prescribed as 7th Class pass. There were no requirements of testing the administrative or management capacity of the candidates and/or any other quality which is required for the higher posts. All that was necessary was firstly to see their physical fitness in terms of physical endurance, their smartness in appearance and further to test their intelligence level as required for the post of constable including their general knowledge. We cannot ignore that thousands of candidates had turned up and what we find from the guidelines was, firstly these candidates had to fulfill physical standards in terms of height, etc. as also the minimum educational qualification. Obviously all the candidates could not have had those physical standards."

17. The petitioners have taken another contention that even if it is presumed that whole selection was illegal petitioners are not at fault as petitioners are duly qualified for the post and they have been appointed after they have passed the interview. Petitioners have also argued that since liability of such illegality of selection in question has been fixed upon the Dr. V. P. Pandey and other employees by inquiry report, they should only suffer for their fault. Petitioners have participated in bonafide manner in selection procedure and they should not be allowed to suffer for the fault of another person.

18. Petitioners have further argued that since there has been no strict action against Dr. V. P. Pandey, who is solely responsible for illegal selection in question, his burden of liability can not be shifted at the petitioners. If Dr. V. P. Pandey has not been proceeded against, it clearly gives impression that opposite parties are admitting the legality of selection procedure.

19. In counter to these arguments opposite parties have stated that the moment cognizance about such illegal selection was taken, Dr. V. P. Pandey and other employees were suspended at that very moment. Opposite party has further stated that exoneration of delinquent does not absolve the illegality committed in selection procedure. To support this contention the opposite parties have placed reliance upon para 32 of Rakesh Kumar Kanaujia Vs. State of U.P., 2011 (1) ALJ 61 which reads as under:-

"32. The third issue relates to exoneration of Dr. P. N. Shukla in the disciplinary inquiry. The disciplinary inquiry was initiated against Dr. P. N. Shukla, the then Chief Medical Officer alleging irregularity and illegality in the selection. The State Government has exonerated the Chief Medical Officer from the charges. The exoneration of Dr. P. N. Shukla, Chief Medical Officer from the charges and holding that no misconduct was committed by the Chief Medical Officer (Dr. P. N. Shukla) cannot be treated to be affirmation of the process of selection and appointment made by Dr. P. N. Shukla. Dr. P. N. Shukla may not be found guilty of misconduct but mere exoneration from misconduct cannot be treated to be affirmation of the selection process undertaken by him."

20. In view of above stated facts and arguments of both the parties and after a keen observation of records Court is of the view that the selection in question is liable to be quashed on the grounds of various illegalities.

21. Firstly, inquiry report as contained in annexure No.CA-15 has itself established the illegality of selection procedure. Court has gone through inquiry report in an exhaustive manner and the Court is fully convinced that inquiry report has proved the illegality of selection in question.

22. Secondly, interview of 1817 candidates in a single day is beyond human imagination. This view of the Court gets support from ratio of Hon'ble Apex Court in the case of Raj Kumar V. Shakti Raj, reported in (1997) 9 SCC 527 in which, Hon'ble Apex Court has held that it is not practically possible to interview so many candidates and if interview held it will be a farce and

mockery. Thus the interview was mere a farce and mockery and humanly impossible to interview more than six hundred candidates in two days. In the instant case, as per the Rule 5(4) (a) it specifically provides that a number of candidates to be called against the number of vacancies but in the instant case, more than six hundred candidates appeared and had been interviewed on the aforesaid two days. Admittedly, no marks have been awarded for academic qualification as required under Rule 5(1) (I) to (iii) of Rules 2003 but cent per cent marks have been reserved for interview.

23. Petitioners have supported their contention by relying on Sardara Singh and others (supra) and Sadananda Halo and others (supra) but ratio of both the cases finds no application in the instant case. In the case of Sardara Singh (supra) only 821 candidates were interviewed that too for five days spending seven hours per day, whereas in the instant case 1871 candidates, more than twice of 821 candidates were interviewed that too in a single day. Thus, this factual situation itself speaks non-application of ratio of Sardara Singh (supra) in present case.

24. Petitioners have further relied upon Sadanand Halo's case specifically upon para 42(supra).

25. The plain reading of this para suffices to establish that ratio is not applicable in the present case because in Sadanand Halo's case decisive factor for selection was physical endurance for which an exhaustive test was already conducted. There were not many candidates to be interviewed. Interview was merely for the purpose to check whether interviewee falls within prescribed physical fitness or not ? If he falls then only he was to be interviewed. Para 44 says that this case itself demonstrated the same.

26. Petitioners have also drawn the attention of this Court towards para 41 of this case which is quoted as under:-

"41. The question of large number of candidates appearing for the selection process again came up before this Court in Joginder Singh v. Roshan Lal. A complaint was made in this case that 323 candidates appeared for the test in two days and on that basis a select list was prepared by the Departmental Promotion Committee. The High Court called this selection process as a farce on the ground that fair chance was never given to the candidates to show their worth. The Court observed in para 5 as under:-
(SCC pp. 766-67)

"5. On the facts on record we see no justification for the High Court to have come to this conclusion. The High Court in exercise of its jurisdiction under Article 226 of the Constitution is not supposed to act as an appellate authority over the decision of the Departmental Selection Committee. If the Committee has been properly constituted, as in this case, and the post is advertised and a selection process known to law which is fair to all, is followed, then the High Court could have no jurisdiction to go into a question whether the Departmental Selection Committee conducted the test properly or not when there is no allegation of mala fides or bias against any member of the Committee. Merely because there were a large number of candidates who appeared on two days, cannot ipso facto lead to the conclusion that the process of selection

was a farce and fair chance was not given. Normally experienced persons are appointed as members of the Selection Committee and how much time should be spent with a candidate would vary from person to person. Merely because only two days were spent in conducting the interviews for the selection of Class IV posts cannot lead to the conclusion that the process of selection was not proper."

27. In this para Hon'ble Apex Court itself has stated that "if the committee has been properly constituted, as in this case, and the post is advertised and a selection process known to law which is fair to all, is followed, then the High Court could have no jurisdiction to go into a question whether the Departmental Selection Committee conducted the test properly or not when there is no allegation of mala fides or bias against any member of the Committee." Unlike this case, in the present case no advertisement was there, selection committee was not properly constituted, no fair selection process was adopted and also there was an element of bias and mala fide. These all factors were proved by inquiry report in detail.

28. Apex Court has also stated that "normally experienced persons are appointed as members of the Selection Committee and how much time should be spent with a candidate would vary from person to person. Merely because only two days were spent in conducting the interviews for the selection of Class IV posts cannot lead to the conclusion that the process of selection was not proper."

29. It becomes here important to show the figures of candidates in cited case and in the instant case. In the cited case, in the District of Dhubri, 3722 candidates were interviewed for nine days i.e. approx. 414 candidates per day. In the District of Barpeta 5540 candidates were interviewed i.e. approx. 616 candidates per day. In District Sonitpur approx 500 candidates were interviewed per day. In the present case 1817 candidates were interviewed in a single day which is almost thrice of figures stated above.

30. Even if it is presumed that the interview was conducted since morning to night, as stated by the petitioners, maximum 16 hours in a day can be spent. Even if 1817 candidates are interviewed, although this figure is too improbable, then too maximum approx. 31 seconds are spent on a single candidate. And astonishingly this time also includes period of preparing appointment letter on the basis of result of this interview. In nutshell, this single day include, interview of 1817 candidates, then result of this interview, then preparation of appointment letter.

31. This whole transaction is beyond human imagination and it is so preposterous that it becomes itself evidence against it for the glaring illegalities committed therein.

32. Ordinarily, Courts can not question the competency of selection committee or decide what time should be spent on a single candidate but in the event selection suffers from bias, mala fide, absence of duly constituted committee or the illegality committed in selection is apparent on the face of it, Courts are bound by law to check the legality.

33. Hence, in view of above facts, ratio of the case of Sadanand Halo's (Supra) is not applicable in the present case.

34. Thirdly, whole selection procedure suffers from mala fide. This mala fide can be established by conduct of Dr. V. P. Pandey. First of all, Dr. V. P. Pandey issued an advertisement dated 9.10.2006 for recruitment of class IV post which is much prior to the date of receiving of official letter for such selection in question i.e. dated 30.10.2006. Although this advertisement was withdrawn and a fresh advertisement was issued on 9.11.2006 but this factor can not deny the absence of mala fide.

35. After issue of advertisement showing his extraordinary human approach, which a person of ordinary prudence would never be able to do, Dr. V. P. Pandey interviewed 1871 candidates in a single day and issued appointment letter on the very next day.

36. Further showing his utter concern to selected employees, Dr. V. P. Pandey withdrew the salary of these employees for two days through a bearer cheque. Although there are specific rules of State Government that salary will not be paid to employees in cash. But Dr. V. P. Pandey preferred to violate the Rules of the State Government then to make suffer selected candidates for non-payment of salary for two days and he paid the salary to employees in cash.

37. This whole transaction is self-speaking about the mala fide contained in it.

38. The petitioners have taken contention that in the event selection is presumed to be illegal, Dr. V. P. Pandey should only suffer from it and if he is not being given any punishment even after fixing his sole liability it means selection procedure made by him is valid. This contention was rebutted in the case of Rajesh Kumar Kanaujia (supra). In view of this precedent the Court is of the view that fixing liability and quantum of punishment all two different facets. Facts which are taken into consideration for fixing liability, not necessarily are considered while imposing punishment and vice versa. Thus, 'minimum punishment or no punishment'. This factor can not lead to conclusion that there was no liability at all. No amount of punishment does not absolve the liability. Hence, even if Dr. V. P. Pandey is exonerated it will not change the nature of selection in question from illegal to legal. Although it has been informed to the Court by opposite parties that Dr. V. P. Pandey has been placed under suspension and proceedings against him are going on.

39. An important legal plea has been raised by the petitioners that the opposite parties have declared the selection void on 8.6.2007 but inquiry to test the alleged illegality in selection has been initiated subsequently i.e. on 10.6.2008. The petitioners have argued that when opposite parties declared the selection void, there was no inquiry and a subsequent inquiry can not validate the act of opposite parties.

40. Court is of the view that in this case inquiry is not validating act of opposite party but it is of corroborative value here. Due to such glaring illegalities the opposite parties have rightly acted in declaring the selection void. The decision taken by the opposite parties was not based on inquiry report but on series of circumstances which are self-speaking about its illegalities. Inquiry was

conducted not to check illegalities but to fix the liabilities as who was responsible for such a large scale illegalities in selection. Since evidentiary value of inquiry report was corroborative and not substantive, plea of petitioners is not maintainable.

41. In view of what has been discussed hereinabove, the writ petitions are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2013

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

Civil Misc. Writ Petition No.2063 of 2006

Nand Kishore Seth ...Petitioner
Versus
Additional Commissioner and Ors. ...Respondents

Counsel for the Petitioner:
Shri Arun Kumar Verma
Sri B.B. Jauhari

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling Act 1960-Section 10(2)- **Res-judicate once proceeding in pursuance of notice became final-and 0.28 acre land declared surplus by order dated 26.07.1976-subsequent notice 14.10.1997-indicating earlier cut of date 08.06.1973-not maintainable-unless as a result of succession, transfer or by prescription in adverse possession there-even than notice u/s 29/30 required and not under section 10(2)-both authorities committed great illegality-quashed.**

Held: Para-9 & 13

9. Case of the petitioner is that he had not acquired any land after 18.12.1976 nor he is in possession of excess land. Moreover notice dated 14.10.1997 itself indicates that cut off date was mentioned therein is 8.6.1973. The Prescribed Authority as well as appellate authority have proceeded to decide the case afresh in the proceedings pursuant to the notice under section 10(2) of the Act. The issue of res judicata raised by the petitioner was not adverted to and both the authorities below had proceeded on the ground that petitioner has failed to show that land in dispute is the same land with respect of which proceedings were concluded earlier. This approach of the prescribed authority as well as appellate authority shows total non-application of mind and non consideration of provision of the Act.

13. For the reasons given above, the orders passed by the ceiling authorities cannot be sustained on any count. The entire proceedings reinitiated on the basis of the second notice under section 10(2) were, therefore, vitiated. The impugned orders being illegal are hereby quashed. The writ petition succeeds and is allowed.

Case Law discussed:
2007(4) AWC 3789; 2005(3) AWC 2565; 2003 (3) AWC 1876; 1979 All.L.J. 43

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

1. This writ petition has been directed against the order dated 30.7.2005 passed by the Additional Commissioner, Bareilly Mandal, Bareilly and order dated 28.2.1998 passed by the Prescribed Authority (Ceiling) Shahjahanpur.

2. The facts of the case as narrated in the writ petition are that notice under section 10(2) of U.P. Imposition of Ceiling on Land Holdings Act, 1960(hereinafter referred to as the Act) was served upon the petitioner along with one Shri Laxman Swaroop Seth. By order dated 26.7.1976 passed by the Prescribed

Authority(Ceiling) Sadar, 1.24 acres land of the petitioner and 1.33 acres (irrigated) land of the share of Shri Laxman Swaroop Seth in the joint holdings possessed by them was declared surplus. Both the tenure holders separately assailed the order of the Prescribed Authority by filing separate appeal under section 13 of the Act. Both the appeals were decided together by judgment and order dated 18.12.1976 passed in Civil Appeal no. 261 of 1976(Ceiling)(Shri Nand Kishore Seth Vs. State of U.P.).The surplus area in the share of the petitioner Nand Kishore Seth was declared 0.28 acres(irrigated). After proceedings for ceiling initiated against the petitioner came to an end by judgment and order dated 18.12.1976 passed by the appellate authority, second notice under section 10 (2) of the Act was issued on 14.10.1996. Copy of the notice has been annexed as annexure S.A.-2 to the supplementary affidavit filed on 1.10.2006.The assertions in the notice are to the effect that details with regard to the surplus land possessed by the petitioner on 8.6.1973 has been prepared under section 10 (1) of the Act. Petitioner was further required to explain as to why said details be not treated as correct. He was further required to file his objection to the said notice. Petitioner filed his objection on 14.7.1997 and stated therein that he has no land beyond ceiling limit and after decision dated 18.7.1976 in appeal no. 261 of 1976 filed by the petitioner, there is no change in the ceiling limit of the petitioner. He had not purchased or acquired any land thereafter. The petitioner further got his statement recorded on 17.9.1997 and asserted that he does not hold land beyond ceiling limit after proceedings with regard to surplus land had become final. The fresh proceedings initiated against the petitioner by way of notice dated 14.10.1996 is illegal.

3. The prescribed authority registered a case no.319 and framed four issues. Issue no. 2 whether petitioner had land beyond ceiling limit, Issue no. 3 whether the proceedings are barred by res judicata and issue no. 4 was as to whether any land of the petitioner is to be declared surplus. Issues no. 2,3 and 4 were decided together and the prescribed authority though recorded a finding that earlier proceedings under the ceiling Act were initiated against the petitioner. However decided the issue of res judicata against the petitioner on the ground that copy of the order passed in the previous proceedings were not filed by him and petitioner had failed to prove that situation has not changed since after the judgment and order dated 18.12.1976. The issues were decided on the basis of statement of Naib Tehasildar(ceiling)recorded and the Prescribed authority did not give any independent finding of its own.

4. The order was challenged in the appeal which was registered as appeal no. 17/98. The Appellate authority, however, proceeded to examine the case on merit and on issue of res judicata it has recorded that certified copy of the order passed by the court below in earlier proceedings were not produced, therefore, it can not be ascertained that land in question in both the proceedings are same. However, it further concluded that order passed by the prescribed authority is incorrect to the extent that plot no. 134 was declared surplus though it was sold by the appellant/petitioner in the year 1971 and is in possession of purchaser. It has further recorded that land already sold by

the petitioner could not have been declared surplus. The appeal was dismissed and the matter was remanded back to the prescribed authority to determine the surplus land under section 12-A(D) of the Act after excluding plot no. 134 with the direction that after determination of surplus land, possession of the same should be delivered to the State Government.

5. Learned counsel for the petitioner raises legal question before this court that once the ceiling proceedings initiated against him were finalised by order dated 18.7.1976,the subsequent notice dated 14.10.1996 under section 10(2) of the Act is illegal.

6. Learned counsel for the petitioner contended that no notice whatsoever could have been issued under section 10(2) of the Act for reopening the ceiling proceedings against the petitioner. He drew attention of the court to section 13 and 13-A of the Act and submits that once appeal is disposed of by the appellate court the decision thereon shall be final and conclusive and be not questioned in any of Court of law. Redetermination of surplus land in certain cases as provided under section 13-A of the Act is limited to the extent to rectify any mistake apparent on the face of the record within a period of two years from the date of the notification issued under section 14(4) of the Act. Ceiling proceedings in the present case culminated by order dated 18.12.76 passed by the appellate authority, land declared as surplus was duly notified in the Official gazette in pursuance of section 14(8) of the Act.

7. He further submits that only course open for the authorities concerned to issue notice under section 29/30 of the Act that too on the ground of any subsequent acquisition of land by the petitioner mentioned in section 29/30 of the Act. The cut off date for issuance of notice under section 29/30 of the Act cannot be 8.6.1973. The cut off date in the notice issued under section 29/30 of the Act would be the date on which the tenure holder subsequently acquired the land due to any of the reason mentioned therein.

8. Having heard learned counsel for the parties and perused the record.

9. Case of the petitioner is that he had not acquired any land after 18.12.1976 nor he is in possession of excess land. Moreover notice dated 14.10.1997 itself indicates that cut off date was mentioned therein is 8.6.1973. The Prescribed Authority as well as appellate authority have proceeded to decide the case afresh in the proceedings pursuant to the notice under section 10(2) of the Act. The issue of res judicata raised by the petitioner was not adverted to and both the authorities below had proceeded on the ground that petitioner has failed to show that land in dispute is the same land with respect of which proceedings were concluded earlier. This approach of the prescribed authority as well as appellate authority shows total non-application of mind and non consideration of provision of the Act.

10. A combined reading of sections 13, 13-A, 14, 29 and30 of the Act makes it clear that provisions regarding redetermination of ceiling area of tenure holders is clear,once the ceiling areas of tenure holders is determined by issuing notice under section 10 (1) of the Act, it can only be redetermined by issuing

notice under section 29/30 of the Act on the grounds mentioned in the said provision. The condition as laid down under section 29/30 of the Act of which notice could have been issued to the petitioner, if he has come to hold any land under a decree or order of any court, or as a result of succession or transfer or by prescription in consequence of adverse possession after 8.6.1973 and the land so acquired by him together with the land earlier held by him exceeds the ceiling limit.

11. On the other hand, in the present case subsequent notice issued under section 10(2) of the Act dated 14.10.1996 i.e. after period of almost 20 years after culmination of earlier proceedings itself is bad as authorities below proceeded to determine the land on 8.6.1973.

12. Moreover there is no finding in the order passed by the prescribed authority as also the appellate authority with regard to any of ingredients and circumstances enumerated under section 29 of the Act. Reference may be taken in decision in ***2007 (4) AWC 3789(Noorullah Vs. Additional Commissioner, Meerut Division, Meerut and others), 2005(3) AWC 2565 (Indra Pal Mishra alias Raju Vs. Special Judge(E.C. Act), Banda and others), 2003 (3) AWC 1876 (Udai Raj Vs. State of U.P. and others) and 1979 ALL.L.J. 43 (Bija Vs. State of U.P. and others)*** wherein this court held that after previous ceiling proceedings had culminated by the order of the ceiling authority determining the surplus areas of the petitioner, ceiling authority cannot ignore the order passed by them and proceed by giving second notice under section 10(2) of the Act. The bar against the res judicata as provided under section 38 (B) of the Act will be only after enforcement of the said section. Section 38 (B) provides that any order passed before the enforcement of said section shall be ignored and shall have no effect upon the rights of the parties. Section 38-B has been inserted by the U.P. Act No. 20 of 1976 with effect from 10th October, 1975. In the present case order dated 18.6.1976 was passed by the appellate authority. Thus the said order operates as res-judicata between the parties.

13. For the reasons given above, the orders passed by the ceiling authorities cannot be sustained on any count. The entire proceedings reinitiated on the basis of the second notice under section 10(2) were, therefore, vitiated. The impugned orders being illegal are hereby quashed. The writ petition succeeds and is allowed.

14. It shall however be open for the authorities to proceed in accordance with the provisions of Act by issuing fresh notice under section 29/30 of the Act, if any of the conditions mentioned therein exist.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2013

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

Civil Misc. Writ Petition No.2553 of 2013

L.K. Tripathi ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh

Counsel for the Respondents:
C.S.C.
Sri V.P. Mathur

Constitution of India-Art. 226- Punishment-allegation against petitioner not proved-as per enquiry report-on similar charges of 3 other, exonerated petitioner singled out on ground of suspension without indication of specific rule- mere saying " Same where same mistake occurred" can not be basis for punishment-order quashed.

Held: Para-10
Thus, on a consideration of the report of the Inquiry Officer and the order of the disciplinary authority and the other documents on record, we are of the considered opinion that the petitioner has been made a scapegoat and punished by the impugned penalty order dated 26.11.2012 even though (as noted above) the Inquiry Report at page 63 of the writ petition records all the findings in favour of the petitioner. We thus find that there is no evidence on record to point the finger of accusation at the petitioner and that the punishment has been awarded to the petitioner only on the ground of suspicion because 'somewhere some mistakes have occurred.' Where the mistakes have occurred and who is responsible for the same has not been pin pointed.

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

1. Heard Sri G.K. Singh, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the record.

2. The petitioner in this writ petition is challenging the order dated 26.11.2012 imposing the penalty of censure as well as withholding of one increment with cumulative effect.

3. The case of the petitioner is that while he was working as District Excise Officer, Mirzapur an incident occurred in which 11 persons died between 17.9.2010 and 18.9.2010 and two more persons died on 19.9.2010 as a result of consumption of spurious liquor. Accordingly a charge sheet was issued to the petitioner on 22.10.2010 by the State Government. The Additional Excise Commissioner (Administration) was appointed as Inquiry Officer. The allegation against the petitioner was that while functioning as District Excise Officer, he did not take effective steps to see that no spurious liquor was sold in the District but the fact that 13 persons had died between 17.9.2010 to 19.9.2010 as a result of consumption of spurious liquor went to show the incompetence and lack of interest on the part of the petitioner in performing his duties. It was also alleged that no effective steps had been taken by the petitioner for stopping the illegal sale of countrymade spurious liquor in the District. The charges against the petitioner were supposed to be proved on the basis of three documents, namely;

(i) Letter of the District Magistrate, Mirzapur dated 17.9.2010.

(ii) Letter dated 21.9.2010 of the Joint Excise Commissioner, Varanasi.

(iii) Letter dated 22.9.2010 written by the Deputy Excise Commissioner, Mirzapur.

4. The petitioner submitted his reply to the charge sheet on 16.12.2010 stating that he had taken all effective steps to check the trade and sale of spurious liquor in his area. It was also pointed out that he had conducted a raid on the Farm House of one Sri Jeet Singh alias Guddu Singh on 26.6.2010 which had resulted in the seizure of a huge quantity of spurious

countrymade liquor. The petitioner had also lodged an F.I.R. against the said Jeet Singh and proceedings were initiated against him for cancellation of his licence for the sale of countrymade liquor. He also referred to other raids carried out by him and measures taken by him to check the trade and sale of spurious countrymade liquor in his area.

5. According to the petitioner the first date of enquiry was 20.1.2011, on which date the petitioner appeared but nothing happened and no one was present on behalf of the prosecution to prove the charges. On the other hand, the Inquiry Officer enquired from the petitioner as to what he wanted to say in his defence. The petitioner stated all the steps and measures were taken by him and the raids carried out by him to check the sale of spurious countrymade liquor in his area.

6. The case of the petitioner further is that no other date was fixed for the enquiry and thereafter simply relying upon the reply submitted by him to the charge sheet and the various queries of the Inquiry Officer answered by the petitioner on 20.1.2011, the Inquiry Officer proceeded to submit his Inquiry Report on 12.5.2011.

7. The case of the petitioner is that in the Inquiry Report, the Inquiry Officer has in fact recorded a finding that the petitioner had not been negligent or careless in the discharge of his official duties in checking the sale of spurious liquor and he had never shown unwillingness or lack of desire in performing his official duties. The Inquiry Officer has in fact held that the petitioner has taken all necessary steps to maintain a high standard of efficiency in the discharge of the official duties even of the staff working under him and has not acted in a mere cursory manner or by way of formality. It has however been noted at page 63 of the writ petition (internal page 6 of the Inquiry Report) that the reasons given by the petitioner in his reply to the charge sheet has force as despite the alertness and utmost care taken by the petitioner, 11 persons have died as a result of consumption of spurious liquor. In such a manner, the Inquiry Officer has fastened the blame on the petitioner only on the ground that 'somewhere some mistakes have occurred.'

8. We have considered the report of the Inquiry Officer and in our opinion, having noted all the findings in favour of the petitioner the Inquiry Officer has proceeded to indict him on the charges mentioned in the charge sheet simply because 'somewhere some mistakes have occurred' without pin pointing as to who is responsible for this mistake. The petitioner has not been held liable for failure or negligence or devotion in the discharge of his duties. It is also interesting to note that along with petitioner three other persons, namely, (i) Sri Udai Pratap Verma, Excise Inspector (Enforcement), (ii) Sri Anand Singh, Head Constable (Enforcement), (iii) Sri Ashish Singh, Head Constable (Enforcement) were also issued similar charge sheets and disciplinary proceedings were also held against them but they have been exonerated and Udai Pratap Verma was let off with a warning. Similarly one Sri Shyam Bihari, Constable (Enforcement) has also been exonerated by order dated 31.1.2011. Thus, in spite of the report of the Inquiry Officer being in his favour, the petitioner has been held guilty of the charges only on the ground of suspicion and because the Department could not pin point as to

who was responsible for the trade and sale of spurious countrymade liquor in the area which resulted in the death of 11 persons.

9. In the counter affidavit filed by the learned Standing Counsel the specific averments made by the petitioner with regard to Udai Pratap Verma, Anand Singh, Ashish Singh and Shyam Bihari Constable have not been denied and in fact the averments with regard to Shaym Bihari Constable made in para 20 of the writ petition have been admitted in para 13 of the counter affidavit.

10. Thus, on a consideration of the report of the Inquiry Officer and the order of the disciplinary authority and the other documents on record, we are of the considered opinion that the petitioner has been made a scapegoat and punished by the impugned penalty order dated 26.11.2012 even though (as noted above) the Inquiry Report at page 63 of the writ petition records all the findings in favour of the petitioner. We thus find that there is no evidence on record to point the finger of accusation at the petitioner and that the punishment has been awarded to the petitioner only on the ground of suspicion because 'somewhere some mistakes have occurred.' Where the mistakes have occurred and who is responsible for the same has not been pin pointed.

11. For reasons stated above, the impugned order dated 26.11.2012 cannot survive and is accordingly quashed.

12. Writ petition is allowed. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.06.2013

BEFORE

THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No. 3052(S/S) of 2004
alongwith
W.P. No.3244 (S/S) of 2004,
W.P.No.3246 (S/S) of 2004,
W.P. No.3261 (S/S) of 2004, W.P. No.3271 (S/S) of 2004and
W.P.No.3149 (S/S) of 2004.

Brij Kumar and Ors. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioners:
Sri U.N Mishra , Sri Kshemendra Shukla and Sri Sameer Kalia

Counsel for the Respondents:
C.S.C. , Sri Ms.Aprajita Bansal
Sri Raghvendra Singh , Sri Sanjay Saran and Sri Ujjawal Singh

Constitution of India, Art. 226- Cancellation of appointment-Petitioners working on daily wages/contractual basis-on class 4th post-as per govt. policy after facing selection process-instead of regular-given appointment on fresh contractual basis-considering ban on regular appointment-when ban lifted-instead of giving regular status-selection itself canceled-no allegation of malpractices of irregularities in selection-appointing raw handed persons-outing experienced hand-held shocking-no reason to divest them at this stage-petition allowed.

Held: Para-22
There is no case of malafide or any bungling in the selection process and there is no allegation of any corruption, bribe or unfair selection. No candidate has come forward with any case of malpractice being adopted in the selection. The State itself allowed these persons to continue for more than three years. Naturally, the experience of these people with the passage of time must have enhanced. To throw them out and bring in raw hand in

the institution, which is very sensitive and needs well oiled machinery to cope with the process of electioneering, will not be justified. It has been informed that the petitioners are working till date. Initially, a stay order was passed in favour of the petitioners. I find no good reason to deviate from that finding. The stay order was never vacated by any other Court.

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri Upendra Nath Mishra, learned counsel for the petitioners and Ms. Aprajita Bansal for opposite party No.s 2, 3 and 4 while learned Standing counsel appears for opposite party No.1.

2. The petitioners have challenged the impugned order dated 26.5.2004 passed by the Secretary, U.P. State Election Commission, Lucknow as are collectively contained in annexure No.1 to the writ petition. There are number of petitioners and each has been served with a separate order whereby his services have been dispensed with. In fact, the orders for cancellation of appointment orders of the petitioners dated 23.7.2001 has been passed by the appointing authority himself. Now the petitioners have prayed that they be allowed to continue to work on class IV posts in the office of the State Election Commission, U.P. Lucknow as before and to pay them salary and other consequential benefits.

3. Certain facts will be necessary for adjudication of the matter hence narration of facts is as follows:

4. The petitioners were engaged on class IV posts on daily wage basis/consolidated pay for working in the office of State Election Commission, U.P. between 1994 to 2001. The Commissioner of the State Election Commission issued a circular dated 23.3.1996 providing therein that existing class IV posts shall be filled up from amongst such employees who have earlier worked as daily wagers/contract basis in the Commissioner's office during previous elections of U.P. Legislative Assembly/Panchayati Raj Elections/Local Bodies. Copy of the circular No.962/Ra-Ni-Aa Anubhag-I, issued by Sri R. D. Sonkar, Rajya Nirvachan Ayukta, U.P. Copy of the aforesaid circular has been annexed by the petitioners as annexure No.4 to the writ petition.

5. A ban was imposed on fresh recruitment by the State Government. No appointment on regular selection of class IV post was made. However, on 30.1.2001 a notification was issued laying down procedure for recruitment of Group 'D' posts in Commission. By this notification the Secretary of the Commission was made the appointing authority and the selection on Class IV posts were to be made a recommendation of duly constituted selection committee. Consequent to this notification the appointing authority issued a circular on 15.6.2001 inviting applications from the persons who had working experience on class IV posts in the Commission. However, persons were to be appointed on contract basis instead of regular basis in view of existing ban on regular appointment. Since the petitioners were having working experience in the Commission they applied for appointment on Group 'D' posts before the appointing authority. On 30.6.2001 the appointing authority issued another circular whereby two selection committees were constituted for recruitment between 1.7.2001 to 4.7.2001. The petitioners appeared for interview before the selection committee and they were selected by the committee.

On 23.7.2001 the appointment orders were issued by the appointing authority. The appointment orders were issued by the then respondent No.4 in favour of the petitioners. In the appointment order the appointing authority instead of appointing the petitioners on regular basis has appointed them on consolidated pay on contract basis in view of prevailing ban on fresh recruitment.

6. The petitioners submit that for all practicable purposes the appointing authority and the Commission have already treated the petitioners as regular employees but did not afford other service benefits like leave benefits, pension etc. as is admissible to regular employees. On 16.7.2002 the ban/restriction order dated 3.11.1997 was diluted by the State Government when it was lifted for filling up the reserved backlog vacancies. On 28.8.2002 the petitioners submitted representations praying to issue regular appointments at least in favour of those petitioners who belong to reserved categories in view of the relaxation order dated 16.7.2002. In July, 2003 the State Government further lifted the said ban on fresh recruitment, as a result of which number of departments started making regular selection on the existing Group D vacancies. On 15.1.2004 the ban on fresh recruitment was finally lifted by the State Government. On 3.2.2004 the petitioners submitted a detailed representation to the appointing authority for issuance of regular appointment order in their favour. One more representation was filed on 16.4.2004 to the Deputy Commissioner of State Election Commission, U.P., Lucknow. On 26.5.2004 the impugned orders cancelling the appointment orders of the petitioners dated 23.7.2001 was issued which is under challenge before this Court.

7. The main argument of the petitioners is to the effect that no show cause notice or opportunity of hearing was given to the petitioners by respondent No.4 prior to issuance of the impugned cancellation orders of appointment dated 23.7.2001, which were issued by the Commission after carrying out regular selection. The impugned order of cancellation suffers from the vice of non-application of mind and arbitrariness. The same violates the principles of natural justice as well as the provisions of Article 14 and 16 of the Constitution of India.

8. It has been further argued that rights of regular appointment created in favour of petitioners vide appointment orders dated 23.7.2001 could not have been taken away by respondent No.4 without issuing any show cause notice or without giving any opportunity of hearing. The petitioners were divested of the vested rights for regular appointment which had already accrued by issuance of appoint order dated 23.7.2001 and the impugned order can not, therefore, be sustained in the eyes of law. It has also been stressed that cancellation of appointment after several years on the allegations of procedural mistake or irregularities is not permissible, especially when no concealment of fact or fraud was committed by the candidates.

9. The petitioners have further submitted that the procedure for appointment was specifically laid down by the State Election Commission through a gazette notification dated 30.1.2001 and the said procedure was held valid by the Secretary, State Election Commission i.e. appointing authority by issuing a circular dated 15.6.2001 and 30.6.2001 and also by holding interview of the candidates

including the petitioners by the selection committee.

10. The appointment orders have been issued in favour of the petitioners by the appointing authority himself i.e. Secretary, State Election Commission and it was specifically mentioned that the said appointments were made on the basis of selections held by the Commission through a process of interview which was required as per gazette notification dated 30.1.2001. The selection of petitioners were held by the State Election Commission practically for regular appointment against substantive vacancies but merely because of imposition of government ban on fresh recruitment, which was prevailing at that time, the said appointment of the petitioners was made on consolidated salary instead of regular pay. Petitioners have argued that in view of aforesaid fact, it was absolutely unjustified on the part of the respondent No.4 to have suddenly issued an order of cancellation of appointment of the petitioners on 26.5.2004 i.e. after three years of working of the petitioners and also after the ban on fresh recruitment was finally lifted by the government vide notification dated 15.1.2004 instead of adhering to the promise/assurance of regular appointment orders to the petitioners, which was mentioned in the order dated 23.7.2001.

11. In the instant case, the petitioners' appointment were made on 23.7.2001 and they continued to work as such, till passing of impugned order and are continuing even till date. The impugned cancellation order was passed in May, 2004 i.e. after three years and it is surprising to note that in January, 2004 the ban on fresh recruitment was finally lifted by the State Government, where after it had become incumbent on the part of respondent No.4 to have issued regular appointment orders in favour of the petitioners as per the terms and conditions of the orders of appointment of the petitioners. Respondent No.4 could not have cancelled the said appointment of the petitioners in May, 2004 without any valid and cogent reason.

12. Counter affidavit has been filed on behalf of opposite party Nos. 2 to 4. It has been submitted that appointment of the petitioners on contract was made despite complete ban on the appointments imposed by the State Government through government order dated 3.11.1997. The State Government had made Group -D Employees Service Rules, 1985 by which any appointment to the post of Group-D has to be made according to the provisions of this rule. However, the State Election Commission also made provisions for the procedure of recruitment on the post under Group-D for its office and district offices, vide its Executive Order dated 30.1.2001 as no service rules were framed for recruitment to Group-D under the State Election Commission and its district offices. The said provisions show that recruitment for any vacancy which has to be filled up, would be made after notifying the vacancies to the Employment Exchange Office and the persons may only apply for the vacancy which has been notified to Employment Exchange after his name has been registered in Employment Exchange. The said procedure in the instant case of the petitioners, was not followed. It has further been submitted that the appointing authority ought to have published/advertised the said vacancies on the notice board and in any local news

papers. This was also not done by the appointing authority.

13. It has been further submitted in the counter affidavit that clause 3 of the procedure for recruitment as given in Executive Order lays down the procedure for the constitution of the selection committee, in the instant case of the petitioners the said Rule was not followed, as prescribed. The appointing authority had constituted two selection committees, which under relevant provisions was not permissible. In the instant case, the appointing authority was not present in both the selection committees but was present in only one selection committee and hence the constitution of the selection committee was not done as prescribed and was not legal. Therefore, the selection made by irregular selection committee is void abinitio. The selection which was made is also bad in the eyes of law as the relevant reservation rules were also not followed. The quota of physically handicapped, ex-servicemen and dependents of freedom fighter was not given/filled up.

14. According to the opposite parties, the appointment of the petitioners was made on contractual basis and they were given appointments on a consolidated pay of Rs.3000/- per month. In the appointment orders which were issued to the petitioners, the tenure of the contract, which is against public policy and is bad in the eyes of law. It is a well settled principle of law that no person under the contract can claim a right to enforce the contract for indefinite period, even if tenure of contract has not been given. A contract of service without any specified tenure is simply terminable at will. It is well settled that any appointment made dehors the rules is void and for terminating such appointments observance of natural justice is not obligatory.

15. I have heard counsel for both the parties and considered the rival arguments.

16. The opposite parties have stressed a lot on the issue of ban imposed by the State Government vide its order dated 30.11.1997. It has not been successfully argued whether the ban issued by the State Government will be affecting autonomous bodies like the Election Commission, which have been given maximum independence by the Constitution of India. It is but natural that the agency which is vested with the powers of conducting fair and free elections in the State should have independent powers to make arrangements for such an election. The Court is not convinced that the State Government can issue a blanket ban on all appointments including the Election Commission which will make it handicapped in performance of its duties. Elections in India after independence have to be held at various levels. Initially, elections of Parliament and State Legislatures are held once in five years. Lateron, with the development of democracy, Election Commission is being called upon to perform the duties intermittently. Elections of other institutions apart from Parliament and State Legislatures are being bestowed upon the Election Commission. It is understandable that earlier temporary staff was recruited at the time of elections and the force was disbanded after its job was over but subsequently, the need for permanent staff arose with the increase of working in the Election Commission.

17. It is an irony that the tenure of the governments have increasingly become unstable leading to the need of stability in the Election Commission. A fully equipped and well oiled machinery ever-ready and geared up to hold elections anywhere any time is the need of the hour for an Election Commission. In the present case, the Secretary of the Election Commission, who has been vested with the power of appointment of Class IV posts, has felt the need of having a stable team of regular staff, which can be entrusted with various activities involved in the process of electioneering. For this purpose, in his own wisdom, the Secretary of the Election Commission thought it proper that experienced hands may be regrouped and their appointments may be safeguarded so that their interests and loyalty towards the Election Commission may be guaranteed. The Secretary of the State Election Commission has not appointed any rank outsider through any back door entry. The office order dated 23.7.2001 issued by the Secretary is very clear. Only those persons have been invited for regular appointments who have already worked in the department and have experience of elections of Panchayat and local bodies. Since the purpose of appointment was directly connected to the experience of the employee hence the general advertisement to a common man was not issued. Reference to the employment exchange would have been antithetical to the very idea of garnishing a team of experienced employees. Therefore, applications were invited only from those employees, who had already worked with the department from time to time. That intention and action of the Secretary of State Election Commission appears to be justified and there is no violation of Article-14 or 16 of the Constitution of India. Reasonable classification on the basis of experience will be wholly permissible in the circumstances of the case. If sufficient number of experienced persons are available and willing to offer their services, it will be violative of principals of rule of law by equating the equals with the unequals.

18. A ground has been taken that two selection committees were made for selection in the instant case.

19. Stress has been laid on the fact that in one selection committee, the Secretary himself was the Chairman while in other committees some other members were included. It is a strange argument wherein it has been insisted that the Chairman should be member of every Board. The selection committee was appropriately constituted by the Secretary, who was the appointing authority himself. It is but natural that if there are a large number of candidates, the Chairman of the selection committee can not be expected to examine large number of candidates personally. Even in Union Public Service Commission and the State Public Service Commissions, different boards are constituted for interviews. In written examinations all the copies are not evaluated by one single person. Different bunch of copies are sent to different examiners. Different groups of applicants are interviewed by different selection committees/boards. This is compulsion of the process; a necessity which can not be done away with. If the law provides for "a" selection committee, it does not mean that there has to be necessarily one single committee. It is natural that the Chairman will be member of one such committee and he will constitute equivalent

committees if there are large number of people, which will depend on the exigency of the situation. The number of selection committees/panel/boards will depend on the strength or the number of candidates. If the candidates are far and few, of course, one selection committee will be sufficient but in case the number of candidates is large, constitution of the second or the third committee/panel/board will not vitiate the process. In the present case, it can not be said that that the selection committees were irregularly constituted. Both the selection committees were constituted by the Secretary of the Commission and the validity of both can be upheld. The argument of counsel for opposite parties will lead to ridiculous situation wherein candidates selected by the panel in which the Secretary himself was present will be valid and the candidates selected by the other panel or board will be invalid because as per their own argument the Secretary was available in one of the committees personally. The argument of the opposite parties is totally unacceptable.

20. Another argument raised by the opposite parties is to the effect that no tenure was mentioned in the contract. The Court feels that this argument is also misconceived. An agreement can not become bad only because specific date has not been mentioned as the date of expiry of the contract. In case, the contract is terminable in the event of a particular incident likely to happen in future, it can not be said that the agreement was eternal. The agreement clearly mentions that it will come to an end as soon as the ban is lifted. It has been made determinable on the happening of a certain event. The term of the contract has thus become determinable. If we see this contract in the background of whole situation we come to the conclusion that the Commission wanted to recruit experienced hands and since it felt obligated to respect the ban imposed by the State Government, it developed a methodology and adopted a procedure which would give the desired result, which may have nexus to the purpose of selection. Hence, a valid contract was entered into. A reasonable amount was fixed which would not exceed the pay scale of class IV employees and would ultimately secure regular appointment to the experienced hands. Advertising through employment exchange and inviting applications from fresh hands to compete with the experienced one would have defeated the purpose of Election Commission.

21. Even otherwise, in a democratic set up, government should not easily be allowed to interfere with the working and independence of the Election Commission. There is no case of unsuitability. A selection committee was held and recruitment was made of competent persons only. It is not the case of the opposite parties that each and every person who was working in the Commission has been absorbed en masse. It is not a case of absorption of all the temporary employees. It was a contract selection but with the total preference to the working experience of handling various elections. Since there were sufficient number of experienced candidates, it would have been totally unwise to have flooded the selection committee with thousands of applications moved by totally inexperienced persons.

22. There is no case of malafide or any bungling in the selection process and there is no allegation of any corruption,

bribe or unfair selection. No candidate has come forward with any case of malpractice being adopted in the selection. The State itself allowed these persons to continue for more than three years. Naturally, the experience of these people with the passage of time must have enhanced. To throw them out and bring in raw hand in the institution, which is very sensitive and needs well oiled machinery to cope with the process of electioneering, will not be justified. It has been informed that the petitioners are working till date. Initially, a stay order was passed in favour of the petitioners. I find no good reason to deviate from that finding. The stay order was never vacated by any other Court.

23. Accordingly, the impugned orders of cancellation of appointment individually issued against the petitioners and collectively annexed as annexure No.1 to the writ petition, is quashed. Respondent No.4 is directed to issue necessary orders for treating the petitioners' services as regular service in pursuance of the direct selection held in July, 2001 and in continuation of the petitioners' appointment orders dated 23.7.2001. All consequential benefits of regular appointment of Class IV posts may also be conferred on the petitioners.

24. The petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.06.2013

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No.3592 of 2013

Mukund Ram Mishra ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Bhupal Singh Rathore

Counsel for the Respondents:
C.S.C., Sri Rajiv Singh Chauhan

U.P. Basic Education (Teachers) Service Rules-1981-Rule 29- Retirement of Basic Education teacher-date of birth of petitioner is 01.07.1951-accordingly retired on 30.06.14-no question of the benefit of academic session-petitioner dismissed.

Held: Para-13
Keeping in view the abovesaid facts, the position of law as well as the fact of the present case that the date of birth of the petitioner is 01.07.1951 as well as Rule 29 of the Rules, I do not find any illegality or infirmity in the impugned retirement notice dated 13.03.2013 (Annexure No. 1) passed by O.P.No. 3/Basic Shiksha Adhikari, Sitapur by which the petitioner is sought to be retired from service after attaining the age of superannuation on 30.06.2013.

Case Law discussed:
1987 UPLBEC 566; 1986(4)SCC 59; 2008 (2) SCC 639; 1993(2) UPLBEC 1128; [1989 Supp. 2 SCC 486]; 1986 (4) SCC 59; AIR 1986 SC 1948; 2010 (28) LCD 1730.

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

1. Heard Sri Bhupal Singh Rathore, learned counsel for petitioner, Sri A.N. Trivedi, learned Additional Chief Standing Counsel and Sri Rajiv Singh Chauhan on behalf of respondents and perused the record.

2. By means of the present writ petition, the petitioner has challenged the impugned retirement notice dated 13.03.2013 (Annexure No. 1) passed by District Basic Education Officer, Sitapur by which the petitioner is sought to be

retired after attaining the age of superannuation (62 years) on 30.06.2013.

3. Sri B.S. Rathore, learned counsel for petitioner while assailing the impugned order submits that the petitioner was initially appointed on the post of Assistant Teacher in Primary Pathshala Naseerpur Kodar, Rewsa, Sitapur on 18.07.1985. Presently, he is working as Headmaster, Senior Basic School, Ramipur, Gondwa, Sitapur.

4. He further submits that the date of birth of the petitioner is 01.07.1951, so keeping in view the said fat as per the provisions as provided under Rule 29 of the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as the Rules) which is amended by Uttar Pradesh Basic Shiksha (Teachers) Service Rules 15 Amendment Rules, 2012 dated 31.08.2012, the action on the part of O.P. No. 3 to issue the impugned notice of retirement dated 13.03.2013 (Annexure No. 1) that the petitioner is to retire on 30.06.2013 is arbitrary in nature and contrary to the said rule, as he is entitled to get the service benefit till the end of academic session i.e. to work and discharge his duties till 30.06.2014, hence the same is liable to be set aside. In support of his argument, he placed reliance in the case of **Ram Lal Prasad Vs. State of U.P. and others, 1987 UPLBEC 566.**

5. Sri A.N. Trivedi, learned Additional Chief Standing Counsel and Sri Rajiv Singh Chauhan, learned counsel appearing on behalf of opposite parties while defending the impugned notice under challenge in the present case submit that in view of the provisions as provided under Rule 29 of the Rules, there is no illegality or infirmity in the impugned notice by which the petitioner is sought to be retired on 30.06.2013 after attaining the age of 62 years. In support of their argument, reliance has been placed on the judgment given by Hon'ble the Apex Court in the case of **Prabhu Daya Sesma Vs. State of Rajasthan and another, 1986 (4) SCC 59.**

6. I have heard learned counsel for parties and gone through the record.

7. In the state of U.P., the basic Schools are governed by the Uttar Pradesh Basic Education Act, 1972 (U.P. Act No. 34 of 1972) hereinafter referred to as the 1972 Act. Under this Act, U.P. Board of Basic Education has been constituted.

8. Section 13 of the 1972 Act empowers the State Government to control the Board and issue directions from time to time. Section 19 empowers the State Government to make rules for carrying on the purposes of the Act which includes the power to make rules in regard to the recruitment and the conditions of service of the persons appointed to the post of officers, teachers and other employees of the schools.

9. In pursuance of the powers given under Section 19 of the 1972 Act U.P. Basic Education (Teachers) Service Rules, 1981 have been framed. Rule 29 of these Rules provide for the age of superannuation of teachers. Rule 29 is quoted below:-

"29 Every teacher shall retire from service in the afternoon of the last day of the month in which he attains the age of 60 years:

Provided that a teacher who retires during an academic session (July 1 to

June 30) shall continue to wok till the end of the academic sessions that is, June 30 and such period of service will be deemed as extended period of employment."

10. In the case of **Achhaibar Maurya Vs. State of U.P. and Ors, 2008 (2) SCC 639**, where the facts are that the petitioner (Sri Achhaibar Maurya) was born on 1st of July, 1943 and appointed as Assistant Teacher on 21st of July, 1975 in a Primary School known as Kisan Purva Madhyamak Vidyalay, Itally Gazna, Jaunpur and his service conditions are governed by the Uttar Pradesh Basic Education Act, 1972 and the Rules known as Uttar Pradesh Basic Education Teachers) Service Rules, 1981 has challenged his order of retirement on the ground that he should be given a session benefit, by filing a writ petition before this Court at Allahabad, dismissed. Subsequently, the Special Appeal filed by him was also dismissed. Aggrieved by the said fact, he (Achhaibar Maurya) approached Hon'ble the Supreme Court for redressal of his grievances. And in the said matter, after taking into consideration the provisions as provided under Rule 29 of the Rules as well as earlier law laid down by the Apex Court in the case of **Khan Chandra Madhu Vs. Deputy Director of Education, 3rd Division, Bareilly and Ors, 1993 (2) UPLBEC 1128, S. Benerjee v. Union of India & Ors. [1989 Supp.2 SCC 486], Prabhu Daya Sesma Vs. State of Rajasthan and another, 1986 (4) SCC 59**, held as under:-

"As the appellant was born on 1st July, 1943, he would retire on 30th June, 2003. The question as to whether he would obtain the benefit of extended period of service upto 30th June and the next year will depend upon the situation as to whether the teacher retires on or after 1st July or not.

9. In Khan Chandra Madhu (supra), the learned Judge proceeded on the basis that the academic session starts on 2nd July and ends on 30th June. A benefit of getting an extended period of service must be conferred by a statute? The Legislature is entitled to fix a cut off date. A cut off date fixed by a statute may not be struck down unless it is held to be arbitrary. What would, therefore, be an employees last working date would depend on the wordings of the Rules. It may seem unfortunate as some people may miss the extended period of service by a day; but therefor a valid provision may not be held to be invalid on the touchstone of Articles 14 or 16 of the Constitution of India. A statute cannot be declared unconstitutional for conferring benefit to a section of the people. We, therefore, do not agree with the view taken in Khan Chandra Madhu (supra).

10. In S. Benerjee v. Union of India & Ors. [1989 Supp.2 SCC 486], whereupon reliance has been placed, the fact situation obtaining was completely different. In that case, the appellant filed an application for voluntary retirement which was accepted from the forenoon of 1st January, 1986. In that view of the matter, he was found to be entitled to the benefit of paragraph 17.3 of the recommendations of the Pay Commission. It was urged that the appellant was entitled to a hearing as the matter relating to retirement from service depended upon the statutory provisions. A person retires automatically on the day when he completes the age of superannuation. Principles of natural justice, therefore, cannot be said to have any application in a

case of this nature. A person attains a specified age on the day next before the anniversary of his birthday or in other words on the day preceding that anniversary. [See Re Shurey Savory v. Shurey (L.R. (1918) 1 Ch.263) and Rex v. Scoffin (L.R. (1930) 1 KB 741)].

*11. This Court in**Prabhu Daya Sesma Vs. State of Rajasthan and another, AIR 1986 SC 1948** held :*

In calculating a persons age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding the anniversary of his birthday.

12. It is interesting to note, however, that the common law rule stated in Re Shurey Savory (supra) in respect of anniversaries has been abrogated by virtue of the Family Law Reform Act, 1969. The effect of the change is that, in respect of anniversaries falling after 1 January, 1970, the time at which a person attains a particular age expressed in years is the commencement of relevant anniversary of the date of his birth. [See Halsburys Laws, 4th Edition Reissue, Page 209]. We do not have such statute. We have, therefore, to determine the cases on the touchstone of statute operating in the field and in absence thereof by common law principle.

13. For the reasons aforementioned, we do not find any merit in this appeal. It is dismissed accordingly. However, as nobody has appeared on behalf of the Respondent-State, there shall be no order as to costs".

11. Hon'ble the Supreme Court in the case of **Prabhu Daya Sesma (Supra)** while interpreting the Rule 11-B of the Rajasthan State State and Subordinate Services (Direct Recruitment by Competitive Examination) Rules, 1962 held as under:-

"Rule 11-B of the Rules provides:

11-B. Age. Notwithstanding anything contained regarding age limit in any of the service Rules governing through the A agency of the Commission to the posts in the State Service and in the Subordinate Service mentioned in Schedule I and in Schedule II respectively, a candidate for direct recruitment to the posts to be filled in by combined competitive examinations conducted by the Commission under these Rules must have attained the age of 21 years and must not have attained the age of 28 years on the first day of January next following the last date fixed for receipt of application. "

It is plain upon the language of r. l l-B that a candidate 'must have attained the age of 21 years and must not have attained the age of 21 years on the first day of January next following the last date fixed for receipt of application'. Last day fixed for receipt of application in his case, was January 1, 1983. First day of January next following that day would be January 1, 1984. The object and intent in making r. 11-B was to prescribe the age limits upon which the eligibility of a candidate for direct recruitment to the Rajasthan Administrative Service and other allied services is governed. At first impression, it may seem that a person born on January 2, 1956 would attain 28 years of age only on January 2, 1984 and not on January 1, 1984. But this is not quite accurate. In calculating a person's age, the day of his birth must be counted as a whole day and he attains the specified age on the day preceding, the anniversary of his birth

day. We have to apply well accepted rules for computation of time. One such rule is that fractions of a day will be omitted in computing a period of time in years or months in the sense that a fraction of a day will be treated as a full day. A legal day commences at 12 o'clock midnight and continues until the same hour the following night. There is a popular misconception that a person does attain a particular age unless and until he has completed a given number of years. In the absence of any express provision, it is well-settled that any specified age in law is to be computed as having been attained on the day preceding the anniversary of the birth day.

In Halsbury's Laws of England. 3rd edn., vol. 37, para 178 at p. 100, the law was stated thus:

"In computing a period of time, at any rate, when counted in years or months, no regard is generally paid to fractions of a day, in the sense that the period is regarded as complete although it is short to the extent of a fraction of a day Similarly, in calculating a person's age the day of his birth counts as a whole day; and he attains a specified age R on the day next before the anniversary of his birth day."

We have come across two English decisions on the point.

In Rex v. Scoffin, LR [1930] 1 KB 741 the question was whether the accused had or had not completed 21 years of age. S. l0(I) of the Criminal Justice Administration Act, 1914 provides that a person might be sent to Borstal if it appears to the court that he is not more than 21 years of age. The accused was born on February 17, 1909. Lord Hewart, CJ held that the accused completed 21 years of age on February 16,1930 and that he was one day more than 21 years of age on February 17, 1930 which was the Commission day of Manchester Assizes.

In Re. Shurey, Savory v. Shurey, LR [1918] I Ch. 263 the question that arose for decision was this: Does a person attain a specified age in law on the aniversary of his or her birthday, or on the day preceding that anniversary? After reviewing the earlier decisions, Sargant, J. said that law does not take cognizance of part of a day and the consequence is that person attains the age of twenty-one years or of twenty-five years, or any specified age, on the day preceding the anniversary of his twenty-first or twentyfifth birthday or other birthday, as the case may be.

From Halsbury's Laws of England, 4th edn., vol 45, para 1143 at p. 550 it appears that s. 9 of the Family Law Reforms Act, 1969 has abrogated the old common law rule stated in Re. Shurey, Savory v.Shurey (supra).

It is in recognition of the difference between how a person's age is legally construed how it is understood in common parlance. The Legislature has expressly provided in s. 4 of the Indian Majority Act, 1875 that how the age of majority is to be computed. It reads:

"4. Age of majority how computed- In computing the age of any person, the day on which he was born is to be included as a whole day, and he shall be deemed to have attained majority, if he falls within the first paragraph of s. 3, at the beginning of the twenty-first anniversary of that day, and if he falls within the second A paragraph of s. 3, at

the beginning of the 18th anniversary of that day."

12. A Full Bench of this Court in the case of **Smt. Sumitra Dhulia Vs. Director of Education and others, 2010 (28) LCD 1730,** held as under:-

The object of giving benefit of extension of service beyond the prescribed age of superannuation to the teachers upto end of the academic session i.e. 30th June uniformally, without any reference of individual case, except in case of unsatisfactory work and failing health, is to maintain the continuity in teaching work in educational institutions. In order to ensure that the students do not suffer, on account of the change of teachers in the middle of the academic session, the teachers teaching regular subjects are given extension of service upto the end of academic session commonly known as sessions benefit. The teaching of any subject and the incomplete academic session, are the twin requirements for allowing the benefit of extension of service to such teachers. If any of these requirements are missing, the teacher is not getting the benefit of the policy, to continue beyond the age of superannuation."

13. Keeping in view the abovesaid facts, the position of law as well as the fact of the present case that the date of birth of the petitioner is 01.07.1951 as well as Rule 29 of the Rules, I do not find any illegality or infirmity in the impugned retirement notice dated 13.03.2013 (Annexure No. 1) passed by O.P.No. 3/Basic Shiksha Adhikari, Sitapur by which the petitioner is sought to be retired from service after attaining the age of superannuation on 30.06.2013.

14. Further, the petitioner cannot derive any benefit from the law as laid down by this Court in the case of **Ram Lal Prasad (Supra)** in view of the facts state hereinabove.

15. In the result, writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2013

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 3933 of 2012

Om Prakash Umar ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri A.N. Pandey

Counsel for the Respondents:
C.S.C.

Indian Stamp Act, 1899-Section 17, 2(14)- Demand of Stamp duty-document executed before notary-by which-rights and title given to petitioner-relating to a landlord-for consideration of Rs. 50,000/-held within definition of document under Section 2(14)-demand of stamp duty-proper.

Held: Para-9
In view of the aforesaid facts and circumstances, in my opinion, the authorities below have not erred in law in holding the document dated 14.12.2009 as chargeable to stamp duty and to direct for realizing stamp duty on the market value of the property purported to have been transferred therein.

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

1. Heard learned counsel for the parties.

2. Pleadings have been exchanged and, therefore, the writ petition is being finally decided.

3. A document before the Notary was executed on 14.12.2009 by Mahadeo and others by which they withdrew their rights on the abadi land measuring 80ft x 70 ft and transferred them in favour of the petitioner for a consideration of Rs.50,000/- only. The aforesaid document was written on a stamp paper of Rs.150/- only. The Additional Commissioner (Stamp) vide order dated 18.4.2011 held the above document to be an instrument of conveyance and assessing its market value determined the deficiency in stamp duty and imposed a penalty also. The appellate authority has affirmed the aforesaid order vide its order dated 25.11.2011.

4. The above two order dated 25.11.2011 and 18.4.2011 are under challenge in this writ petition.

5. The submission of learned counsel for the petitioner is that the aforesaid document is simply a compromise. It is not registered and, therefore, does not purports to transfer any rights in favour of the petitioner. Therefore, he cannot be made to pay stamp duty on it.

6. Section 17 of the Indian Stamp Act, 1899 (hereinafter referred to as "the Act") provides that all instruments chargeable with duty and executed by any person in the India shall be stamped before or at the time of execution. Therefore, stamp duty on an instrument is payable at the time of execution of the instrument. The moment an instrument is executed stamp duty is payable on it. The validity of its execution or its non-registration has nothing to do with its execution and consequently the payment of stamp duty.

7. An instrument as defined under Section 2(14) of the Act includes every document and record by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. The above document executed before the Notary, with whatever name it may be called, creates rights in the land in favour of the petitioners, after extinguishing those of the Mahadeo and others therein. It is, therefore, undoubtedly, an instrument as defined under Section 2(14) of the Act.

8. In view of the aforesaid facts and circumstances, as the aforesaid document dated 14.12.2009 is an 'instrument' within the meaning of Section 2(14) of the Act and its execution is not denied, it is chargeable to stamp duty. The validity of the transfer made in favour of the petitioner is not a relevant criteria so as to exempt it for payment of stamp duty as it would be antithesis of Section 17 read with Section and 2(14) of the Act.

9. In view of the aforesaid facts and circumstances, in my opinion, the authorities below have not erred in law in holding the document dated 14.12.2009 as chargeable to stamp duty and to direct for realizing stamp duty on the market value of the property purported to have been transferred therein.

10. The writ petition is devoid of merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2013

BEFORE
THE HON'BLE KALIMULLAH KHAN, J.

Criminal Misc. Habeas Corpus Writ Petition No. 11846 of 2013

Saroj Devi and Ors. ...Petitioners
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Pradeep Kumar Singh

Counsel for the Respondents:
A.G.A.
Sri M. Shahanshah Khan

Constitution of India, Art. 226- habeas corpus petition-by mother on behalf of two minor children of two years and other-one of five months-respondent no. 4 and 5 being father and grand mother of children-considering welfare of those children-petitioner no. 1 allow to take custody of those-infant liberty given to the Respondent no. 4 and 5 to get the company of those children from 10 to 2 pm on first Sunday of every month-petition allowed.

Held: Para-5
Respondent nos. 4 and 5 are directed to hand over Prithwi Singh petitioner no.2 and Priya Singh petitioner no.3 to the custody of their mother Smt. Saroj Devi petitioner no.1 who is directed to take full care and protection of the children. She is at liberty to seek maintenance for herself and for her children from respondent no.4 in accordance with law. At this stage respondent nos. 4 and 5 have handed over the children (both the corpus) to their mother petitioner no.1 in the court itself. Fact is observed accordingly.

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

1. Heard learned counsel for the petitioner, learned A.G.A. appearing for respondent nos. 4 and 5 and perused the record.

2. This writ of habeas corpus under Article 226 of the Constitution of India has been filed by Smt. Saroj Devi petitioner no.1 with the averments that her marriage was solemnized with respondent no.4 Rajesh Singh on 9.2.2010 and from this wedlock two issues were born. Prithwi Singh petitioner no.2 is aged about 2 years and Priya Singh petitioner no.3 is aged about 5 month. Respondent no.4 and his mother respondent no.5 Smt. Aruna Devi adopted torturing and practicing cruelty upon petitioner no.1 Smt. Saroj Devi in connection with demand of dowry. The relation between the parties interse became strained. The climax is that on fine morning respondent nos.4 and 5 forcibly ousted the petitioner no.1 from their house after snatching aforesaid two minor children from her lap. She was compelled to leave the house of her in laws. She lodged an F.I.R. under section 498A IPC and Dowry Prohibition Act against the respondent nos. 4 and 5 which is pending trial. As a matter of counter blast respondent no.4, the husband of petitioner no.1 filed a criminal complaint case against petitioner no.1 and her entire maternal family under section 452, 323, 504, 506 R/W 34 I.P.C. wherein process under section 204 Cr.P.C. was issued on 15.9.2012. The petitioner visited several time to the house of respondent no.4 to see her minor children but she was not allowed by respondent no.4 and 5 to meet her children. She ran from pillar to post seeking police intervention and protection but all in vain. Contrary to it respondent no.4 threatened

her for dire consequence in case she claims the children.

3. Respondent no.4 and 5 being mother and son have filed no counter affidavit rather in pursuance of the order of this Court they produced both the children in the court and on query by the court they expressed no objection if the children are given to their mother petitioner no.1. It is known to all concern that immediate welfare of the infants is of prime consideration but being completely innocent and of tender age there was no point in putting any question to them. Both of them had a completely innocent look . None can deny the fact that it is misfortune for the children who have been deprived by the love, affection, care and close contact of their mother, petitioner no.1. Considering their age no one other than the mother petitioner no.1 can bestow extreme affection and warmth love which spontaneously flow from the mother who gave birth to the children. The welfare of these two infants children lies there being handed over to their mother in preference to their father respondent no.4 or grand mother respondent no.5 who cannot be expected to bestow at present or in the years to come that affection and care which the two infant children are entitled to get from their mother. In the facts and circumstances of the case it is essential and beneficial even for the health of the mother to have her children of these age and feed them her natural milk from her breast which is beneficial to the health of both the corpus as well.

4. It is also in the interest of two infants corpus that their father Rajesh Singh respondent no.4 and their grand mother respondent no.5 Smt. Aruna Devi may have access to see their infants to bestow their love and affection and to know their welfare at intervals.

5. Respondent nos. 4 and 5 are directed to hand over Prithwi Singh petitioner no.2 and Priya Singh petitioner no.3 to the custody of their mother Smt. Saroj Devi petitioner no.1 who is directed to take full care and protection of the children. She is at liberty to seek maintenance for herself and for her children from respondent no.4 in accordance with law. At this stage respondent nos. 4 and 5 have handed over the children (both the corpus) to their mother petitioner no.1 in the court itself. Fact is observed accordingly.

6. Respondent nos. 4 and 5 are restrained from making any kind of interference in the peaceful custody of the children with their mother Saroj Devi petitioner no.1.

7. However, respondent nos. 4 and 5 are given liberty to approach the place where petitioner no.1 presently resides along with her children (corpus) on the 1st Sunday of each calendar month in between 10.00 A.M. to 2.00 P.M. Petitioner no.1 is directed to allow them to see and meet with both the corpus and to play with them if they so desire. In the event of any problem or hurdle in this regard aggrieved party may apply to this court for a direction or clarification.

8. Writ of habeas corpus stands allowed accordingly. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.05.2013

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 12367 of 2010

Arvind Mehrotra ...Petitioner
Versus
M/S Shervani Industrial Syndicate Ltd. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Shesh Kumar

Counsel for the Respondents:
C.S.C.
Sri P.K. Mukherjee

Constitution of India, Art.-226- **Workman-whether includes officers grade III-Area manager-Tribunal rightly rejected the return as the petitioner fail to reply the quarry regarding status-that being so-question of fact can not be interfered under writ jurisdiction-petition dismissed.**

Held: Para-15
Since the Tribunal, in the facts of the case, has held that Arvind Mehrotra did not answer the definition of workmen within the meaning of the word under the Industrial Disputes Act, it has rightly come to the conclusion that reference itself was not competent. It is settled law that if a Tribunal has no jurisdiction to examine the dispute, then no order of the writ Court can confer such jurisdiction.

Case Law discussed:
1985 UPLBEC 789; 1986 UPLBEC 38

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

1. Heard learned counsel for the parties.

2. Petitioner before this Court was employed with M/s. Shervani Syndicate Ltd., Allahabad. His services were put to an end on 12.05.1995.

3. Not being satisfied with termination of his service, petitioner filed Civil Misc. Writ Petition No. 24520 of 1995. In the said writ petition, an objection was raised that the petitioner had the remedy before the Industrial Court under the Industrial Disputes Act, 1947. The writ Court dismissed the petition after recording that the petitioner may pursue his alternative remedy under the provisions of the U.P. Industrial Disputes Act, 1947 and the Industrial Employment Standing Orders Act, 1946.

4. Against the said order, the petitioner filed Special Appeal No. 1051 of 2001 which was dismissed on 11.09.2006 and the petitioner was relegated to the remedy as aforesaid.

5. Accordingly, the petitioner raised an industrial dispute which was referred under notification dated 23.11.2007 to the Industrial Tribunal I, U.P., Allahabad. Before the Industrial Tribunal an objection was raised that the petitioner did not answer the description of workman as he had been promoted on the post of Area Sales Manager in the month of October, 1989 and that the duties which were being discharged by the petitioner as Area Sales Manager were purely managerial and supervisory in nature. It was also pointed out that the salary of the petitioner on the relevant date was more than Rs. 4000/-.

6. The petitioner filed reply to the said objection of the employers and stated that he was performing the duties as assigned to him under the control of the Administrator of the Company which were neither managerial nor supervisory in nature.

7. The Labour Court framed an issue for deciding as to whether the petitioner answers the description of workman or not. Evidence was led by the parties on the said issue. The Labour Court after considering the evidence brought on record has held that the petitioner does not answer the description of workman. He was working as Officer of the Company exercising managerial and supervisory powers, therefore, the provisions of the Industrial Disputes Act will not be attracted. It is against this Award of the Industrial Tribunal that the present writ petition has been filed.

8. Counsel for the petitioner vehemently contended that the petitioner was basically refused to promote the sales of the Company and that the Labour Court has failed to consider that the nature of job assigned was not supervisory or managerial and, therefore, he was a workman. (Reference paragraph nos. 31 and 32 of the writ petition).

9. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

10. The Labour Court under the order impugned has referred to the order of promotion of the petitioner as Officer dated 01.10.1989 (Exhibit E-1) whereunder the petitioner was promoted as Officer Grade-III and thereafter designated as Area Sales Manager. It has also referred to the circulars which were issued by the Company between 1990 to 1992 (Exhibits 4 and 5) which demonstrated that the Area Sales Manager were authorized to engage staff including Sales Representative, Supervisor, Clerk and Peon as well as to supervise the work assigned to each of them. It has been found as matter of fact that Arvind Mehrotra was engaged as an Officer Grade-III. The duties assigned to him were managerial and supervisory in nature. It has been recorded that the petitioner could not dislodge the contention of the Employer which was based on the evidence brought on record. Accordingly, it has been held that the reference itself was not competent.

11. This Court may notice that in paragraph nos. 31 and 32 of the writ petition, there are only vague allegations for suggesting that the petitioner actually did not discharge any supervisory/managerial duties. It is worthwhile to reproduce paragraph nos. 31 and 32, which read as follows :

"31. That the Labour Tribunal while deciding the adjudication case on preliminary issue has also failed to consider the most material and relevant fact that as per nature of job assigned to the petitioner it is clear that the petitioner was not assigned any Supervisory or managerial work. Therefore, petitioner is a workman within the meaning of Industrial Disputes Act.

32. That while considering the status of the employees as workman it is the nature of duty or work assigned has to be considered and not designated and from the nature of duties assigned to the petitioner, it is clear that the petitioner was not assigned any supervisory or managerial work, therefore, the petitioner is a workman and finding to the contrary by the Labour Tribunal is absolutely perverse, arbitrary and unsustainable in law.?

12. This Court finds that there is hardly any challenge worth consideration to the findings of fact recorded by the Tribunal qua the petitioner being not a workman. The findings recorded by the Tribunal are based on the evidence led by the employers. No interference under writ jurisdiction is called for against the said finding of fact.

13. Counsel for the petitioner has placed reliance upon the Division Bench judgment of this Court in the case of **Dr. Surendra Kumar Shukla vs. Union of India and others reported in 1985 UPLBEC, 789** and the judgment of the Apex Court in the case of **Arkal Govind Raj Rao vs. Ciba Geigy of India Ltd., Bombay reported in 1986 UPLBEC, 38.**

14. This Court may record that the Labour Tribunals are Tribunals with limited jurisdiction as per the Statute. Their power to adjudicate the dispute is confined by the statutory provisions. Under Section 4-K of the U.P. Industrial Disputes Act, 1947 and under Section 10 of the Industrial Disputes Act, 1947 only references in respect of workmen can be adjudicated upon by the Tribunal.

15. Since the Tribunal, in the facts of the case, has held that Arvind Mehrotra did not answer the definition of workmen within the meaning of the word under the Industrial Disputes Act, it has rightly come to the conclusion that reference itself was not competent. It is settled law that if a Tribunal has no jurisdiction to examine the dispute, then no order of the writ Court can confer such jurisdiction.

16. The judgments relied upon by the petitioner are clearly distinguishable on facts.

17. In view of the aforesaid, this Court finds no error in the judgment of the Tribunal. Writ petition is dismissed.

18. Interim order, if any, stands discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.13 & 21.05.13

BEFORE
THE HON'BLE RAN VIJAY SINGH, J.

Civil Misc. Writ Petition No. 14285 of 2013
and
Civil Misc. Correction application no. 158910 of 2013

Hariom **...Petitioner**
Versus
The State of U.P. & Ors. **...Respondents**

Counsel for the Petitioner:
Sri K.K. Singh, Sri S.Q.Khan
Counsel for the Respondents:
C.S.C., Sri Mahesh Narain Singh
Sri Vijay Bhan Singh, Sri Shailendra Singh

(A)U.P.Z.A. & L.R.Act, Section 333- **Revision-against order granting lease for fisheries rights-held-not maintainable-only remedy to file application before the Distt. Magistrate-while granting or refusing lease for fisheries Rights-S.D.O. discharge administrative duty-not as court, can not be termed as decision-revision-held not maintainable.**

Held: Para-9
Under section 333 of the Act the power has been conferred upon the U.P. Board of Revenue, Commisisoner, Additional Commisioner to call for the record of any suit or proceeding decided by any court subordinate to him. Here in this case as I have held that while exercising power to approve or disapprove the proposal to grant lease the Sub Divisional Officer

does not act like a court, Therefore, the revision cannot be directly filed against the approval or disapproval to grant lease or even execution of the lease.

Case Law discussed:
(ILR(Alld) 2006-0-371); (2012(10) SCC 353; AIR 1950 SC 188; AIR 1956 SC 153; AIR 1963 SC 874; AIR 1965 SC 1595; 1969 SC 724; AIR 1999 SC 1786; AIR 2000 SC 485; AIR 2002 SC 2158; (2003) 3 SCC 563; (2011) 10; SCC 316; JT 2012 (9) SC 166; (2004) 9 SCC 619; (2011) 11 SCC 198; Special Appeal No. 164 of 2012

(B)Practice and Procedure- Order without jurisdiction-held nullity no benefit can be claimed.

Held Para-11
In view of the foregoing discussions, I am of the considered opinion that the order impugned dated 11.12.2011 passed by the Additional Commissioner (Administration), Moradabad, respondent no.2 in Revision No. 05/12-13 (Shashi Pal Singh and others. Vs. Hari Om and others) is without jurisdiction. It is also well settled that an order without jurisdiction is a nullity and no legal consequences can flow such orders reference. Reference may be made to the decisions of the Apex Court in Managing Director, Army Welfare Housing Organization vs. Sumangal Services Pvt. Ltd. (2004)9 SCC 619, Sarup Singh and Anr. vs. Union of India and Anr. (2011) 11 SCC 198 and a Division Bench decision of this Court in the case of Committee of Management Shri Jawahar Inter College and Anr. vs. State of U.P. and Ors. in Special Appeal No. 164 of 2012 decided on 25.1.2012 in which it has been held that the order without jurisdiction is a nullity.

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

1. Heard Sri K.K.Singh, learned counsel for the petitioner, learned standing counsel for the State respondents, Sri Shailendra Singh, learned counsel appearing for respondent nos. 5 to 7 and Sri Vijai Bhan Singh, holding brief of Sri M.N.Singh, learned counsel appearing for the Gaon Sabha.

2. Through this writ petition the petitioner has prayed for issuing a writ order or direction in the nature of certiorari quashing the order dated 11.12.2012 passed by the Additional Commissioner (Administration), Moradabad Division, Moradabad, respondent no.2 in Revision No. 05/12-13 (Shishu Pal Singh and others vs. Hari Om and others) by which the revision filed by the respondent nos. 5 to 7 have been allowed and the petitioner's fishery lease dated 26.9.2012 has been cancelled with the direction to initiate proceedings for grant of fresh lease.

3. Sri K.K.Singh, learned counsel for the petitioner while assailing the order impugned submitted that the order is without jurisdiction as against the order granting the fishery lease or lease a revision would not be maintainable. In his submission as the lease was granted under the provisions of the Government Order dated 17.10.1995 the appropriate remedy for the respondent was to seek its cancellation by way of filing an application before the Collector concerned but instead of doing so he availed the remedy of revision. He has drawn attention of the Court to a Full Bench decision of this Court in the case of **Ram Kumar vs. State of Uttar Pradesh** (ILR (Alld) 2006-0-371), wherein its has been observed that against an order granting lease or lease appropriate remedy is to file an application for cancellation of lease before the Collector.

4. Sri Shailendra Singh, learned counsel appearing for respondent nos. 5 to 7 submitted that since initial allotment

was bad, therefore the power has been exercised under section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and no infirmity can be attached with this order.

5. For appreciating the controversy in hand as to whether the revision shall be maintainable against an order granting lease or lease it would convenient to peruse the language used in section 333 of the U.P. Zaindari Abilition and Land Reforms Act, 1950 (in short the Act), which is reproduced herein below:

"**333. Power to call for cases**.-(1) The Board or the Commissioner or the Additional Commissioner may call for the record of any suit or proceeding [other than proceeding under sub-section (4-A) of Section 198) decided by any court subordinate to him in which appeal lies or where in appeal lies but has not been preferred, for the purpose of satisfying himself as to the legality or propriety of any order passed in such suit or proceeding and if such subordinate court appears to have;

(a) exercised a jurisdiction not vested in it by law; or

(b) failed to exercise a jurisdiction so vested; or

(c) acted in the exercise of jurisdiction illegally or with material irregularity;

the Board or the Commissioner or the Additional Commissioner, as the case may be, may pass such order in the case as he thinks fit.

(2) If an application under this section has been moved by any person either to the Board or to the Commissioner or to the Additional Commissioner, no further application by the same person shall be entertained by any other of them."

6. On the bare reading of section 333 of the Act it will transpire that the power under this section can be exercised by the Board (Board of Revenue, U.P.) or the Commissioner or the Additional Commissioner by calling the record of any suit or proceeding decided by any court subordinate to him against which no appeal lies or appeal lies but has not been availed with a view to satisfy himself as to the legality or propriety of any order passed in suit or proceeding and if such subordinate court has exercised a jurisdiction not vested in it by law or failed to exercise the jurisdiction so vested or acted in the exercise of jurisdiction illegally or with material irregularity.

7. The question would be as to whether the Sub Divisional Officer while approving or disapproving the proposal to grant lease acts as a court or as an administrative authority. What is court has not been defined in the U.P. Zamindari Abolition and Land Reforms Act, 1950. However, under the constitutional scheme and doctrine of separation of powers, there are three main limbs, legislature, executive and judiciary. The judiciary is distinct from the executive and legislature. The judicial function involves decision of rights and liabilities of the parties. Enquiry and investigation into the facts, as a matter of fact, are the material part of the judicial function. The court renders decision on an application, suit, revision, appeal, writ etc. in accordance with the provisions contained under which the application, suit, revision, appeal, writ etc. are filed. There is a complete mechanism and

procedure of the functioning of the court and rendering a decision in a case which requires version of the applicant, version of the other side, evidence on the pleadings of the rival parties, which may be oral or documentary, legal submissions etc. The Apex Court in the case of **State of Gujarat vs. Gujarat Revenue Tribunal Bar Association** (2012 (10) SCC 353) has held that an authority discharging statutory function may be described as a quasi-judicial authority when it possesses certain attributes or trappings of a court, but not all. In case certain powers under C.P.C. or Cr.P.C. have been conferred upon an authority, but it has not been entrusted with the judicial powers of the State, it cannot be held to be a court. Reference may be given in **Bharat Bank Ltd., Delhi v. The Employees of Bharat Bank & Anr**., AIR 1950 SC 188;**Virindar Kumar Satyawadi v. The State of Punjab**, AIR 1956 SC 153;E**ngineering Mazdoor Sabha & Anr. v. Hind Cycles Ltd**., AIR 1963 SC 874; **Associated Cement Companies Ltd. v. P.N. Sharma & Anr**., AIR 1965 SC 1595;**Ramrao & Anr. v. Narayan & Anr**., AIR 1969 SC 724;**State of Himachal Pradesh & Ors. v. Raja Mahendra Pal & Anr.,** AIR 1999 SC 1786; **Keshab Narayan Banerjee v. State of Bihar & Ors**., AIR 2000 SC 485; **Indian National Congress (I) v. Institute of Social Welfare & Ors**., AIR 2002 SC 2158; **K. Shamrao & Ors. v. Assistant Charity Commissioner**, (2003) 3 SCC 563;**Trans Mediterranean Airways v. Universal Exports**, (2011) 10 SCC 316 at page 338;**Namit Sharma v. Union of India**, JT 2012 (9) SC 166).

` 8. Here in this case under the Government Order dated 17.10.1995 procedure has been prescribed for grant of fishery lease and there the power has been conferred upon the Sub Divisional Officer either to approve or disapprove the proposal to grant lease. It is purely an administrative work entrusted upon the Sub Divisional Officer and it does not require the parties to plead their cases or produce any evidence or it requires any hearing before approving or disapproving the proposal. Therefore, I am of the considered opinion that while discharging the function either to approve or disapprove the proposal to grant lease the Sub Divisional Officer does not act as a court.

9. Under section 333 of the Act the power has been conferred upon the U.P. Board of Revenue, Commisisoner, Additional Commisioner to call for the record of any suit or proceeding decided by any court subordinate to him. Here in this case as I have held that while exercising power to approve or disapprove the proposal to grant lease the Sub Divisional Officer does not act like a court, Therefore, the revision cannot be directly filed against the approval or disapproval to grant lease or even execution of the lease.

10. In **Ram Kumar (supra)** a Full Bench of this Court has held that an order of the Sub Divisional Officer approving or refusing the proposal to grant lease/ execution of lease under the relevant Government Order although open to judicial review under Article 226 but it is neither appealable nor revisable under the provisions of the Act. The remedy available to the petitioner would be to file an application for cancellation of lease before the Collector as in the case of grant of lease for agricultural purpose with respect to the land under Sections 195 and

197 of the Act which power is conferred under sub-section (4) of Section 198 of the Act.

11. In view of the foregoing discussions, I am of the considered opinion that the order impugned dated 11.12.2011 passed by the Additional Commissioner (Administration), Moradabad, respondent no.2 in Revision No. 05/12-13 (Shashi Pal Singh and others. Vs. Hari Om and others) is without jurisdiction. It is also well settled that an order without jurisdiction is a nullity and no legal consequences can flow such orders reference. Reference may be made to the decisons of the Apex Court in **Managing Director, Army Welfare Housing Organization vs. Sumangal Services Pvt. Ltd**. (2004)9 SCC 619, **Sarup Singh and Anr. vs. Union of India and Anr.** (2011) 11 SCC 198 and a Division Bench decision of this Court in the case of **Committee of Management Shri Jawahar Inter College and Anr. vs. State of U.P. and Ors**. in Special Appeal No. 164 of 2012 decided on 25.1.2012 in which it has been held that the order without jurisdiction is a nullity.

12. In view of the foregoing discussions the impugned order dated 11.12.2012 passed by the Additional Commissioner (Administration) Moradabad Division, Moradabad cannot be sustained and it is, hereby, quashed. The writ petition succeeds and is allowed. However, allowing the writ petition and setting aside the order passed by the Additional Commissioner will not preclude the respondents to avail the remedy to file an application for cancellation of lease in accordance with law. In case such an application is filed that be considered and decided in accordance with law on its own merit expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2013

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 15504 of 2011

Mohammad Ikram and Anr. ...Petitioners
Versus
Deputy Labour Commissioner & Anr.. ...Respondents

Counsel for the Petitioner:
Sri A.K.S. Bais

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

Workman Compensation Act.- Section 23 readwith Rule 41 of the Rule-Power of Review whether can Commissioner workmen compensation review its earlier order-held-'No' unless allegation of fraud or misrepresentation-order-quashed.

Held: Para-11
A plea of misappreciation of evidence was raised. No plea of fraud was alleged by the owners. The Court is consequently, of the view that in the absence of a plea of fraud being raised, it was not possible for the Commissioner to reappreciate the entire arguments or reconsider the matter de novo or review its own judgment.

Case Law discussed:
2009(120)FLR; AIR 2000 SC 1165

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

1. Two sons of the petitioner died during the course of employment on 20th

October, 2008. It is alleged that the death occurred on account of leakage of a gas in the factory. A first information report was also lodged and the incident was also reported in the newspapers. The petitioner filed a claim application before the Commissioner Workmen's Compensation for a sum of Rs.8,85,360/-. The Commissioner after considering the matter gave an award dated 7th December, 2010 allowing the claim and awarding a sum of Rs.4,42,740/-. The employer, being aggrieved, by the said award filed a recall application, which was allowed by an order dated 14th February, 2011 and, by the same order, the claim of the petitioner was also rejected. The claimants, being aggrieved, by the said order has filed the present writ petition.

2. Heard Sri A.K.S. Bais, the learned counsel for the petitioners and Sri Vivek Singh, the learned counsel for the respondent.

3. The learned counsel for the petitioner submitted that there is no provision under the Workmen's Compensation Act for review of an order passed by the Commissioner Workmen's Compensation and, consequently, the impugned order is patently without jurisdiction and is liable to be quashed.

4. On the other hand, it was contended that the authority has the inherent power to recall its order and in any case, where fraud is played, the authority can always review its order.

5. In order to appreciate the rival contention of the parties, it is necessary to have a look into certain provisions of the Workmen's Compensation Act. Section 23 of the Act read with Rule 41 of the Workmen's Compensation Rules makes certain provisions of Code of Civil Procedure applicable to proceedings before the Commissioner. For facility, Section 23 of the Act and Rule 41 of the Rules are extracted hereunder:-

"23. Powers and procedure of Commissioners.- The Commissioner shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), for the purpose of taking evidence on oath (which such Commissioner is hereby empowered to impose) and of enforcing the attendance of witnesses and compelling the production of documents and material objects, [and the Commissioner shall be deemed to be a Civil Court for all the purposes of [section 195 and of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)]].

41. Certain provisions of Code of Civil Procedure, 1908, to apply.- Save as otherwise expressly provided in the Act or these Rules the following provisions of the First Schedule to the Code of Civil Procedure, 1908, namely, those contained in Order V, Rules 9 to 13 and 15 to 30; Order IX, Order XIII, Rules 3 to 10; Order XVI, Rules 2 to 21, Order XVII; and Order XXIII, Rules 1 and 2, shall apply to proceedings before Commissioners, in so far as they may be applicable.

Provided that--

(a) for the purpose of facilitating the application of the said provisions the Commissioner may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before him;

(b) the Commissioner may, for sufficient reasons, proceed otherwise than in accordance with the said provisions if he is satisfied that the interests of the parties will not thereby be prejudiced."

6. A perusal of the aforesaid provision indicates that only certain provisions of the Code of Civil Procedure are applicable to proceedings before the Commissioner Workmen's Compensation. Section 114 or Order XLVII of the Code of Civil Procedure are not applicable, which relates to review. These provisions have not been included and, consequently, the Court is of the opinion that the power of review has been specifically excluded under Section 23 of the Act read with Rule 41 of the Rules.

7. Rule 32(2) of the Rules provides that the Commissioner after pronouncing the decision has no power to make any addition or alteration in the judgment other than correction of a clerical or arithmetical mistake arising from any accidental slip or omission. For facility, the said provisions is extracted hereunder:-

***"32(2).** The Commissioner, at the time of signing and dating his judgment, shall pronounce, his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of a clerical or arithmetical mistake arising from any accidental slip or omission."*

8. From the aforesaid provisions, the Court is of the opinion that the Commissioner has the power to correct clerical or arithmetical mistake arising from accidental slip or omission in his judgment but has no power to review his judgment. Since there is no statutory provision conferring any power of review on the Commissioner under the Workmen's Compensation Act either specifically or by necessary implication, the Commissioner has no power to review his own decision.

9. **In Raman Agnihotri Vs. Commissioner Workmen's Compensation, Kanpur and others, 2009** (120) FLR 967 the Court held that the Commissioner Workmen's Compensation has no power to review his judgment.

10. The learned counsel for the respondent has relied upon a decision in **United India Insurance Com. Ltd. Vs. Rajendra Singh, AIR 2000 SC 1165** wherein the Supreme Court held that the Motor Accident Claims Tribunal had the power to review its own order where fraud was played upon it.

11. There is no quarrel with the aforesaid proposition. No Court or Tribunal can be regarded as powerless to recall its own order, if it is convinced that the order was obtained by fraud or misrepresentation. In the instant case, there is no plea of fraud being played. The Court finds that the Commissioner while passing the first order allowing the claim had considered all the evidence and the submission of the claimants as well as the owner and thereafter gave an award. The recall application was filed by the owners on the ground that certain facts and evidence had not been considered. A plea of misappreciation of evidence was raised. No plea of fraud was alleged by the owners. The Court is consequently, of the view that in the absence of a plea of fraud being raised, it was not possible for the Commissioner to reappreciate the

entire arguments or reconsider the matter de novo or review its own judgment.

12. In the light of the aforesaid, the order of the Commissioner dated 14th November, 2011 allowing the recall application and rejecting the claim of the petitioner is patently illegal and without jurisdiction, which cannot be sustained and is quashed.

13. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2013

BEFORE
THE HON'BLE S.P. MEHROTRA, J.
THE HON'BLE VIPIN SINHA, J.

Civil Misc. Writ Petition No. 19509 of 2005

Ram Roop Parasar ...Petitioner
Versus
C.A.T. Allahabad & Ors. ...Respondents

Counsel for the Petitioner:
Sri Satya Prakash

Counsel for the Respondents:
S.S.C., Sri Rakesh Sinha

<u>Central Civil Service Rules-1972-</u> Rule 68(1)-Interest on delay in payment of post retirel benefit-petitioner retired on 31.01.1997-charge sheet submitted on 06.01.1997 and 03.04.1997 enquiry officer found all allegation baseless-matter referred to higher authorities-who decided to dropped disciplinary proceeding on 30.10.2008-benefit given in Jan 2001 claim of interest denied-as petitioner not exonerated but proceeding dropped-held-misconceived-when enquiry officer recommended for exoneration which refused drop of proceeding-petitioner entitled for interest-matter remitted back for fresh consideration.

<u>Held: Para-29</u>
In view of the above discussion, we are of the opinion that the Writ Petition deserves to be allowed, and the order dated 1.11.2004 passed by the Tribunal is liable to be quashed, and the matter is liable to be remitted to the Tribunal for fresh consideration of the case in the light of the observations made above.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The present Writ Petition has been filed by the petitioner under Article 226 of the Constitution of India, interalia, praying for quashing the order dated 1.11.2004 (Annexure-9 to the Writ Petition) passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad (in short "the Tribunal") as also the order dated 11.5.2011 (Annexure-5 to the Writ Petition) passed by the Deputy Commissioner, Central Excise Division-I, Kanpur communicated to the petitioner by the communication dated 5.7.2001 (Annexure-6 to the Writ Petition) by the Joint Commissioner (P&V), Central Excise, Kanpur. Further prayer has been made for directing the respondents to pay interest over the retiral benefits of pension, death-cum-retiral gratuity and leave encashment and also to pay a sum of Rs. 18,863/- against commutation value.

2. It appears that at the relevant time, the petitioner was posted as Superintendent, Customs and Central Excise in Division-I, Central Excise, Range-3, Kanpur. The petitioner retired from service on 31.1.1997. It further appears that on account of an Audit Objection dated 28.9.1994 by the Senior Deputy Accountant General, U.P. Allahabad regarding loss of revenue ,

chargesheets dated 6.1.1997 and 3.4.1997 were issued to the petitioner and three others. As the petitioner was retiring from service on 31.1.1997, an order for continuation of the proceedings under Rule 9(2)(a) of the C.C.S. (Pension) Rules, 1972 (in short "the Pension Rules, 1972") was also issued and the same was served on the petitioner by the order dated 22.1.1997.

3. It further appears that the Enquiry Report dated 15.5.1998 was submitted by the Inquiry Officer (Assistant Commissioner, Central Excise Division-I, Kanpur-I). The Enquiry Report dated 15.5.1998 was communicated to the petitioner by the communication dated 26.5.1998 sent by the Commissioner, Central Excise, Kanpur-I. Copies of the said communication dated 26.5.1998 alongwith the Enquiry Report dated 15.5.1998 have been collectively annexed as Annexure-1 to the Writ Petition.

4. The Inquiry Officer in the said Enquiry Report concluded as under:

"On the basis of foregoing I feel that allegation of revenue loss as made in the Memorandum is baseless and there appears no revenue loss. Hence the question of failure of charged officer in detecting said revenue loss does not arise. Charges levelled in this regard in the memorandum is not sustainable."

5. It further transpires that pursuant to the said Enquiry Report, the Senior Audit Officer, I.D.T./D.P. in the Office of the Accountant General (Audit) II, U.P., Allahabad sent a communication dated 30.10.2000 (Annexure-3 to the Writ Petition) to the Joint Commissioner (Audit), Central Excise Commissionerate, Lucknow, interalia, stating that it had been decided to settle the Audit Objection in respect of the aforesaid matter relating to the petitioner. It further appears that thereafter on 7.12.2000, Vigilance Clearance was given in respect of the petitioner. Subsequent to the said Vigilance Clearance, retiral benefits were paid to the petitioner in the months of January, 2001, February, 2001 and March, 2001. Thus, entire retiral benefits stood paid to the petitioner. The petitioner made a claim for interest on account of late payment of retiral benefits and also in regard to the short payment of Rs. 18,863/- against commutation value. By the communication dated 5.7.2001 (Annexure-6 to the Writ Petition), the petitioner was communicated that by the communication dated 11.5.2001 (Annexure-5 to the Writ Petition), the claim of the petitioner in respect of the interest on account of delay in payment of retiral benefits and short payment of Rs. 18,863/- against commutation value had not been accepted. Copy of the communication dated 11.5.2001 was also enclosed with the said communication dated 5.7.2001. The petitioner thereupon filed an Original Application being Original Application No. 121 of 2003 before the Tribunal. Copy of the Original Application, verified as true copy, by Shri Satya Prakash, learned counsel for the petitioner, has been provided by him to the Court during the course of arguments. Following reliefs were claimed by the petitioner in his Original Application before the Tribunal:

"i) The respondents may be directed to quash the order dated 11-5-2011 passed by the Deputy Commissioner,Central Excise, Division-I, Kanpur and the order communicated on 5-7-2001 by the Joint Commissioner P&V, Central Excise,

Kanpur, contained in Annexures 5 & 6 respectively, when the proceedings initiated against the applicant vide memorandum of charge dated 3-4-1997 were pending and ultimately the memorandum of charge dated 3-4-1997 was dropped by the Commissioner, Central Excise, Kanpur vide his order dated 11-2-2002.

ii) The respondents may be directed to pay the interest over the retiral benefits of pension, death-cum-retirement gratuity and leave encashment.

iii) The respondents may be directed to pay Rs. 18,863/- against commutation value.

(iv) The suitable relief which this Hon'ble Tribunal deem fit and proper."

6. It will, thus, be noticed that in the said Original Application, the petitioner, interalia, claimed interest over the retiral benefits of pension, death-cum-retirement gratuity and leave encashment and further claimed an amount of Rs. 18,863/- against commutation value.

7. By the order dated 1.11.2004, the Tribunal dismissed the said Original Application filed by the petitioner. Relevant portion of the order of the Tribunal is reproduced below:

"The only question, which arises for decision, is with regard to the payment of interest, on delayed payment of retiral benefits to the applicant. It may be stated that Rule 68 of C.C.S. (Pension) Rules and Government of India's decision clearly provides that the interest will be paid only in case of full exoneration in the Disciplinary Proceedings. It is not applicable in the case where the Disciplinary Proceedings is dropped and it is not because of the applicant that he was fully exonerated, he is claiming it on the ground that the Disciplinary Proceedings were dropped and he was entitled for payment of interest on the delayed payment. I have no doubt about it that there is a distinction between the full exoneration in Disciplinary Proceeding and dropping of the Disciplinary Proceeding. In view of these facts, the O.A. is liable to be dismissed.

8. In the result, the O.A. is devoid of merits and is accordingly dismissed. I find no justification to interfere with the impugned orders.

9. No orders as to costs."

10. The petitioner has, thereupon, filed the present Writ Petition seeking the reliefs, as mentioned above.

11. We have heard Shri Satya Prakash, learned counsel for the petitioner and Shri Rakesh Sinha, learned counsel for the respondents, and perused the record.

12. In order to appreciate the submissions made by the learned counsel for the parties, it is pertinent to note that by the order dated 11.2.2002 (Annexure-7 to the Writ Petition), the Commissioner, Central Excise, Kanpur dropped the proceedings against the petitioner and other three persons started pursuant to the chargesheets dated 6.1.1997 and 3.4.1997. Relevant portion of the said order dated 11.2.2002 passed by the Commissioner, Central Excise, Kanpur is as under:

"6. The facts as afore-stated were brought to the notice of the Central Vigilance Commission and the Second Stage Advice in the matter was requested

by this office. The Central Vigilance Commission, vide their letter C.No.A/CEX/60 dated 11.12.2001, which was communicated to this office under cover of letter F.No. V.538/1/96/28 dated 02.01.2002 issued by the Directorate General of Vigilance, New Delhi, advised the exoneration of S/Shri R.R. Parshar, Superintendent (Retd.), R.C. Sharma, Superintendent, Tarun Banerjee, Inspector and S.P.S. Nirmal, Inspector in the referred case.

13. In view of the Discussion and Findings stated above, I order as under:

ORDER

The proceedings initiated against the charged officers vide Memoranda C.No.II(10)Vig./1/97/11-12 dated 06.01.97, C.No. II(10)Vig./8/97/272-273 dated 03.04.97, C.No. II(10) Vig./9/97/274-275 dated 03.04.97 and C.No. II(10)Vig./10/97/ 270-271 dated 03.04.97 are hereby dropped."

14. Shri Satya Prakash, learned counsel for the petitioner submits that the Tribunal erred in law in making distinction between exoneration in disciplinary proceedings and dropping of the disciplinary proceedings having regard to the facts and circumstances of the present case. It is submitted that a perusal of the order dated 11.2.2002 passed by the Commissioner, Central Excise, Kanpur shows that the petitioner was in fact exonerated of the charges and in consequence, the proceedings against the petitioner were dropped. It is further submitted that the Tribunal confined itself to the consideration of the claim of the petitioner in respect of the late payment of gratuity and it did not consider the claim of the petitioner for interest on account of delayed payment of other retiral benefits.

15. Shri Rakesh Sinha, learned counsel for the respondents submits that the Tribunal has correctly dismissed the Original Application filed by the petitioner. It is submitted that the proceedings against the petitioner were dropped only on 11.2.2002 while the retiral benefits had already been paid to the petitioner in the months of January, February and March, 2001 and as such, there was no delay in the payment of retiral benefits to the petitioner.

16. It is further submitted that the Tribunal rightly made the distinction between the exoneration in disciplinary proceedings and dropping of the disciplinary proceedings.

17. We have considered the submissions made by the learned counsel for the parties.

18. Rule 68 of the CCS (Pension) Rules, 1972 including relevant Decisions / Instructions of the Government of India is reproduced below:

"68. Interest on delayed payment of gratuity

[1. If the payment of gratuity has been authorized later than the date when its payment becomes due, and it is clearly established that the delay in payment was attributable to administrative lapses, interest shall be paid at such rate as may be prescribed and in accordance with the instructions issued from time to time.

Provided that the delay in payment was not caused on account of failure on the part of the Government servant to

comply with the procedure laid down by the Government for processing his pension papers.]

2. Every case of delayed payment of gratuity shall be considered by the Secretary of the Administrative Ministry or the Department in respect of its employees and the employees of its attached and subordinate offices and where the Secretary of the Ministry or the Department is satisfied that the delay in the payment of gratuity was caused on account of administrative lapse, the Secretary of the Ministry or the Department shall sanction payment of interest.

3. The Administrative Ministry or the Department shall issue Presidential Sanction for the payment of interest after the Secretary has sanctioned the payment of interest under sub-rule (2).

4. In all cases where the payment of interest has been sanctioned by the Secretary of the Administrative Ministry or the Department, such Ministry or the Department shall fix the responsibility and take disciplinary action against the Government servant or servants who are found responsible for the delay in the payment of gratuity.

5. Deleted.

Government of India's Decisions

(1) **Admissibility of interest on gratuity allowed after conclusion of judicial/ departmental proceedings**. - 1. Under the rules, gratuity becomes due immediately on retirement. In case of a Government servant dying in service a detailed time-table for finalizing pension and death gratuity has been laid down, vide Rule 77 onwards.

2. Where disciplinary or judicial proceedings against a Government servant are pending on the date of his retirement, no gratuity is paid until the conclusion of the proceedings and the issue of the final orders thereon. The gratuity, if allowed to be drawn by the Competent Authority on the conclusion of the proceedings will be deemed to have fallen due on the date of issue of orders by the Competent Authority.

3. In order to mitigate the hardship to the Government servants who, on the conclusion of the proceedings, are fully exonerated, it has been decided that the interest on delayed payment of retirement gratuity may also be allowed in their cases, in accordance with the aforesaid instructions. In other words, in such cases, the gratuity will be deemed to have fallen due on the date following the date of retirement for the purpose of payment of interest on delayed payment of gratuity. The benefit of these instructions will, however, not be available to such of the Government servants who die during the pendency of judicial/ disciplinary proceedings against them and against whom proceedings are consequently dropped.

4. These orders (Paragraph 3) shall take effect from the 10th January, 1983.

(2) Interest for delayed payment of Retirement/ Death Gratuity to be at the rate applicable to GPF deposits.-..............."

19. From a perusal of the above-quoted Rule 68, it is evident that the same deals with the question of payment of interest on account of delayed payment of gratuity.

20. Sub-rule (1) of Rule 68 provides that if the payment of gratuity has been authorized later than the date when its payment becomes due, and it is clearly established that the delay in payment was attributable to administrative lapses, interest shall be paid at such rate as may be prescribed and in accordance with the instructions issued from time to time.

21. In view of the proviso to sub-rule (1) of Rule 68, it is necessary that "the delay in payment was not caused on account of failure on the part of the Government servant to comply with the procedure laid down by the Government for processing his pension papers."

22. In other words, if the delay in payment was caused on account of failure on the part of the Government servant to comply with the procedure laid down by the Government for processing his pension papers, then such delay would not be attributable to administrative lapses.

23. Sub-para 2 of paragraph (1) of the Decisions/ Instructions of the Government of India in respect of Rule 68 provides that "where disciplinary or judicial proceedings against a Government servant are pending on the date of his retirement, no gratuity is paid until the conclusion of the proceedings and the issue of the final orders thereon. The gratuity, if allowed to be drawn by the Competent Authority on the conclusion of the proceedings will be deemed to have fallen due on the date of issue of orders by the Competent Authority."

24. Sub-para 3 of paragraph (1) of the Decisions/ Instructions of the Government of India in respect of Rule 68, as quoted-above, interalia, provides that "in order to mitigate the hardship to the Government servants who, on the conclusion of the proceedings, are fully exonerated, it has been decided that the interest on delayed payment of retirement gratuity may also be allowed in their cases." It is, interalia, further provided that "in such cases, the gratuity will be deemed to have fallen due on the date following the date of retirement for the purpose of payment of interest on delayed payment of gratuity."

25. In view of the above Rule 68 of the 1972 Rules, and the Decisions/ Instructions of the Government of India in respect of the said Rule, it is evident that in case the delay in payment of gratuity was attributable to administrative lapses, interest is required to be paid to the employee concerned. It is further evident that in case disciplinary proceedings are going-on against the employee concerned and the same conclude in fully exonerating the employee concerned, then interest on delayed payment of retirement gratuity would be allowed in his case, and for the payment of such interest, the gratuity would be "deemed to have fallen due on the date following the date of retirement".

26. The Tribunal in its order dated 1.11.2004 has referred to Rule 68 of the Pension Rules, 1972 and has held that as in case of the petitioner, the disciplinary proceedings were dropped and the case of the petitioner was not a case of the petitioner being fully exonerated, no interest was payable to the petitioner under Rule 68. The Tribunal was evidently relying upon sub-para 3 of para (1) of the Decisions/ Instructions of the Government of India in respect of Rule 68, as mentioned above. The Tribunal has

emphasized that there is distinction between the full exoneration in disciplinary proceedings and dropping of the disciplinary proceedings. In our view, the Tribunal has not correctly appreciated the import of the order dated 11.2.2002 passed by the Commissioner, Central Excise, Kanpur. From a reading of the entire order dated 11.2.2002, particularly, paragrpah 6 thereof, it is evident that while dropping the proceedings against the petitioner and other persons, the Commissioner, Central Excise, Kanpur relied upon the Advice of the Central Vigilance Commission, whereby the Central Vigilance Commission advised the exoneration of the petitioner and other three persons. Thus, the Commissioner, Central Excise, Kanpur by the said order dated 11.2.2002 dropped the proceedings against the petitioner and other three persons accepting the advice given by the Central Vigilance Commission regarding exoneration of the petitioner and other three persons. Hence, the distinction sought to be made by the Tribunal between the dropping of disciplinary proceedings and the full exoneration in the disciplinary proceedings, does not exist in the present case. In the circumstances, we are of the opinion that the Tribunal ought to have considered on merits the question of payment of interest to the petitioner on account of delayed payment of gratuity in the light of the aforesaid Rule 68 of the 1972 Rules and the Decisions/ Instructions of the Government of India in respect of the said Rule, particularly sub-paras 2 and 3 of para (1) of the Decisions/ Instructions, as quoted-above.

27. It is further noteworthy that in the Original Application, the petitioner claimed interest on the delayed payment of retiral benefits of pension, death-cum-retirement gratuity and leave encashment and also claimed an amount of Rs. 18,863/- against commutation value.

28. Rule 68 of the 1972 Rules, as noted above, deals with the question of payment of interest on account of delayed payment of gratuity. The Tribunal has not considered the claim of the petitioner for interest in respect of other retiral benefits, as claimed by the petitioner in the relief clause of the Original Application. Further, the Tribunal has also not considered the claim of the petitioner for payment of Rs. 18,863/- against commutation value.

29. In view of the above discussion, we are of the opinion that the Writ Petition deserves to be allowed, and the order dated 1.11.2004 passed by the Tribunal is liable to be quashed, and the matter is liable to be remitted to the Tribunal for fresh consideration of the case in the light of the observations made above.

30. The Writ Petition is, accordingly, allowed.

31. The order dated 1.11.2004 passed by the Tribunal is quashed. The matter is remitted to the Tribunal for fresh consideration of the Original Application in the light of the observations made above.

32. As the petitioner is an old person, it will be appropriate that the matter be decided by the Tribunal expeditiously.

33. However, on the facts and in the circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.06.2013.

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. Application No.(U/s 482 Cr.P.C.) 20005 of 2013

Mahesh Kumar Agarwal ...Petitioner
Versus
State of U.P. and Anr. ...Respondents

Counsel for the Petitioner:
Sri Nitin Kumar Agarwal

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 482-Quashing of Criminal Proceeding-offence under section 272, 273 I.P.C.-on ground in view of food safety and standard Act 2006-proceeding under IPC not amendable-In view of law laid down by the Court in case of Bankey Bihari Agrwal-entire proceeding pending before Session Judge quashed.

Held: Para-7
Learned counsel for the applicant has also placed reliance on a judgment of this Court in the case of Bankey Bihari Agarwal & another vs. State of U.P. & others reported in 2013 (5) ADJ 201 in which the proceedings on this ground were quashed.

Case Law discussed:
W.P. No. 8255(M/B) of 2010; 2013(5) ADJ 201

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Nitin Kumar Agrawal, learned counsel for the applicant and learned A.G.A.

2. By means of present 482 Cr.P.C. application, the applicant has prayed for quashing the entire proceedings of Case Crime No. 253 of 2010 under Section 272 & 273 I.P.C., police station Naraura, District Bulandshahar pending before the Additional District and Session Judge, Bulandshahar as Session Trial No. 635 of 2011 (State vs. Mahesh) under Section 272 & 273 I.P.C. as well as the impugned order dated 16.3.2013 and 23.3.2013 passed in the aforesaid session trial.

3. The facts of the case are that the shop of the applicant was inspected by opposite party no. 2 on 31.10.2010 and had taken the sample of sweet (Besan Ka Laddu) and the same to the Public Analyst for its opinion. In the report of the Public Analyst, Khesari was found in the Sweet which is injurious to the health, hence the same was adulterated. Thereafter on the complaint of the opposite party no.2, an F.I.R. has been lodged against the applicant on 29.12.2010. The investigation of the matter was done and after conclusion of the investigation, report under Section 173 Cr.P.C. was filed against the applicants under Sections 272 and 273 I.P.C. The applicant has moved a discharge application annexed as Paper No. 17-A to the present application on 1.5.2012 which was rejected by the trial court on 16.3.2013. Subsequently, the applicant has moved another application annexed as Paper No. 27-B to the present application before the trial seeking adjournment on the ground that he want to file an application before this Hon'ble Court challenging the order dated 16.3.2013 which was also rejected by the trial court by order dated 23.3.2013. Both the orders are impugned herein.

4. The applicant has questioned these proceedings on the ground that in

view of the Food Safety and Standard Act, 2006, no proceedings can be initiated under proceedings 272 and 273 of the I.P.C. The power of police has been excluded by the Act to initiate any investigation in the matter. His plea was rejected by the trial court. Under these circumstances, he has approached this Court.

5. The applicant has placed reliance on a Division Bench Judgment of this Court in **Writ Petition No. 8255 (MB) of 2010, M/s Pepsico India Holdings (Pvt) Limited and another.**

6. I have perused the material on record as well as the aforesaid Judgment. Following directions have been passed by the Division Bench:-

"In view of the aforesaid discussions, the writ petitions are allowed. The impugned G.O. dated 11.5.2010 issued by the State Government contained in Annexure-1 to the writ petition is hereby quashed. Consequently, the FIR dated 11.8.2010 registered as case crime no. 392 of 2010 under sections 272/273 IPC, PS Cantt. District Varanasi, FIR dated 11.8.2010 in Case Crime No. 144 of 2010 registered at PS Rohaniya, District Varanasi and the FIR registered as case crime no. 244 of 2010, PS Khuldabad, District Allahabad are also hereby quashed. The concerned Magistrates shall immediately pass necessary orders for forthwith release of all the petitioners, who are in jail."

7. Learned counsel for the applicant has also placed reliance on a judgment of this Court in the case of Bankey Bihari Agarwal & another vs. State of U.P. & others reported in 2013 (5) ADJ 201 in which the proceedings on this ground were quashed.

8. In view of the directions given by this Court, the proceedings before the Sessions Court are liable to be quashed as the applicants case is squarely covered by the aforesaid Judgment.

9. Accordingly, the application is allowed. The impugned orders dated 16.3.2013 and 23.3.2013 as well as all consequential proceedings are hereby quashed.

10. However, it will be open for the authorities concerned to proceed against the applicant under the Food Safety and Standard Act, 2006 in accordance with law.

11. Learned counsel for the applicant is permitted to make necessary correction in the present application.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2013

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 24457 of 2013

Dr. Parasu Ram Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri Shashi Nandan
Sri Udayan Nandan

Constitution of India-Art. 226- **suspension of Principal of intermediate college-whether during existence of first suspension order-can be second suspension even on fresh allegation?-held/a suspended employee can not be suspended-D.I.O.S to consider this**

aspect after giving opportunity of hearing to petitioner.

Held: Para-19

The aforesaid issue as to whether the previous suspension order survives or not would have to be gauged upon the status of the resolution passed subsequently suspending the petitioner again. If the previous suspension was surviving then the subsequent suspension would be a redundant exercise. An employee cannot be put under suspension if he is already suspended. However, if the previous suspension was non existent, then the District Inspector of Schools would have to take notice of the second suspension as well in view of the ratio of the division bench. The District Inspector of Schools was equally bound to consider the previous suspension matter in the light of the judgment dated 1.8.2012 and his powers as explained in the full bench judgment of Chandra Bhushan Mishra Vs. District Inspector of Schools reported in 1995(1) ESC 552.

Case Law discussed:

1986 U.P. L.B.E.C. 144; 1995(1) ESC 552

(Delivered by Hon'ble A.P. Sahi, J)

1. Heard Sri Ashok Khare, learned Senior Counsel for the petitioner and Sri Shashi Nandan, learned Senior Counsel for the respondent no. 4 - Committee of Management, and the learned Standing Counsel for the respondent Nos. 1, 2 and 3.

2. is writ petition questions the validity of the order passed by the District Inspector of Schools, Allahabad dated 31.3.2013 approving the proposal of suspension of the petitioner on the strength of the allegations as indicated in the impugned order coupled with the facts stated in the resolution dated 18.12.2011 passed by the Committee of Management for suspending the petitioner. The District Inspector of Schools has also recorded that the resolution has been passed with the approval of 12 out of 14 members of the Committee of Management and since the allegations made against the petitioner are prima facie serious, therefore, the suspension order is being approved.

3. The background of the case is that the petitioner was selected by the U.P. Secondary Education Services Selection Board and was appointed as Principal with his placement in the respondent no.4 - Institution on 20th July, 2011. The petitioner thereafter resumed charge and started functioning. After about three months, the Committee of Management proceeded to level certain charges against the petitioner including charges of financial irregularities, and accordingly, resolved to suspend him on 18th of December, 2011. The said resolution was disapproved by the District Inspector of Schools on 23rd June, 2012 against which the respondent - Committee of Management filed writ petition no. 34443 of 2012. The same was allowed and the matter was remitted back vide judgment dated 1.8.2012 calling upon the District Inspector of Schools to pass a fresh order keeping in view the fact that the petitioner has raised an objection with regard to the validity of the meeting in which the resolution was passed, and further to examine the affidavits that were filed by three persons referred to in the said judgment. The petitioner was allowed to function and receive his salary as Principal and it was further provided that his continuance would be dependent on the decision to be so taken by the District Inspector of Schools.

4. The District Inspector of Schools does not appear to have immediately proceeded to decide the matter and in between the Committee of Management appears to have passed a fresh resolution on 3rd of February, 2013 proposing to suspend the petitioner. This resolution was communicated in the shape of an order of the Manager of Institution dated 4.2.2013 copy whereof is Annexure 12 to the writ petition. A charge-sheet copy whereof is Annexure 13 was also served on the petitioner, which indicates additional charges having been levelled against the petitioner, apart from those which were subject matter of the earlier suspension order.

5. The District Inspector of Schools while passing the impugned order on 31st of March, 2013 has proceeded to notice this objection having been taken by the petitioner in paragraphs 10, 11 and 12 of his objections.

6. The District Inspector of Schools, however, while proceeding to record his findings has relied on the allegations of certain charges against the petitioner of having exempted the payment of fee of certain students. This act of unauthorised remittance has also been made the basis of the passing of the impugned order.

7. The District Inspector of Schools then proceeds to extract the resolution dated 18th of December, 2011 and has mentioned thereafter that 12 out of 14 members of the Committee of Management have supported the said resolution. In such circumstances, he has concluded that the petitioner is prima facie guilty of serious charges and as such the suspension deserves to be approved. It is to be noted that the approval is founded only on the basis of the earlier resolution dated 18.12.2011 recording a finding that 12 out of 14 members have been approved and the same and secondly having noticed the charges with regard to the exemption of fees of certain students.

8. Sri Khare, learned Senior Counsel for the petitioner contends that firstly, the fact or the charge of exemption of payment of fees, and its condonation in relation to some students, was neither the subject matter of the earlier charge-sheet nor is it subject matter of the subsequent charge-sheet served on the petitioner in March, 2013. He therefore submits that certain material which was not even known to the petitioner or was not even part of the allegations of the Committee of Management has been made the basis of passing the impugned order. He further submits that such material which was foreign to the knowledge of the petitioner and alien to the resolution of the Committee of Management could not have been made the basis for passing the impugned order which stands vitiated on account of consideration of extraneous material.

9. Sri Khare next contends that there is no basis for ascertaining as to how and on what documents, is the finding of 12 members having supported the resolution, based. He submits that no material has been disclosed or even considered by the District Inspector of Schools inspite of the fact that the judgment dated 1.8.2012 clearly indicates the filing of affidavits and the statement of certain persons which could have been made the basis for such a finding. He contends that even this material which was noticed by the Court and the other material which was contained in the objection of the petitioner has been completely omitted to be

considered as such the said conclusion is also based on no material.

10. Thirdly, Sri Khare contends that the passing of the resolution for suspending the petitioner again on 3rd of March, 2013 was also an erroneous exercise and even if it was based allegedly on new charges, the said factum having been raised, ought to have been taken care of by the District Inspector of Schools for the reason that after the passing of the resolution of second suspension, the previous suspension order and its resolution vanished. He relies on paragraph 4 of the Division Bench decision in the case of **Committee of Management, Jan Sahyogi Intermediate College, Modhi, Post Kunwara, Pargana Bharthana, District Etawah Vs. District Inspector of Schools, Etawah and another reported in 1986 U.P. L.B.E.C. 144.**

11. Replying to the said submissions, Sri Shashi Nandan contends that the charges which have been levelled in relation to the second suspension order, are fresh charges, and are not the same charges as involved in the previous suspension matter contained in the earlier resolution. He further submits that the second suspension resolution was not subject matter of consideration before the District Inspector of Schools. Even otherwise, the direction of the High Court dated 1.8.2012 was to be complied with and it is pursuant to the said directions that the District Inspector of Schools had to consider the case in accordance with the said directions and the second suspension resolution will have no impact on the same. He therefore submits that the charges are serious enough indicating financial irregularities as well and therefore, the satisfaction recorded by the District Inspector of Schools is based on the material on record and cannot be said to be perverse so as to warrant any interference under Article 226 of the Constitution of India. He further contends that the second suspension brings about certain additional charges subsequent to the resolution dated 1.8.2012 and in those circumstances, it cannot be said that the second suspension proceedings are either mala-fide or have been framed with a view to give colour to the action taken by the Committee of Management. The District Inspector of Schools therefore according to him rightly confined himself to the previous resolution, and has recorded a finding with regard to the validity of the meeting as well. He submits that the conclusion being not been based on the material with regard to the second suspension matter, does not vitiate the order at all.

12. Learned Standing Counsel has also adopted the same arguments as Sri Shashi Nandan, and he submits that the facts which have been brought on record can be assessed and the matter can be disposed of finally at this stage itself.

13. Learned counsel for the respondents including the counsel for the respondent no. 4, therefore do not propose to file any counter affidavit at this stage. Accordingly, the matter is being disposed of finally with the consent of the parties under the rules of the court.

14. Having heard learned counsel for the parties, the provisions of the U.P. Intermediate Education Act, 1921 contained in Section 16-G (5) to 16-G (7) spell out the procedure according to which the approval or otherwise of a

suspension order can be proceeded with by the District Inspector of Schools. In the instant case, there was a judicial intervention and the judgment dated 1.8.2012 had clarified the position in accordance with which the District Inspector of Schools had to proceed and decide the matter.

15. The District Inspector of Schools appears to have taken notice of the allegations in relation to the exemption of fees having been granted to some students and has made the same a basis for passing the impugned order. In the opinion of the Court, these allegations, if do not form part of the charge-sheet, the same should not have been treated to be a relevant material for the purpose of approving or disapproving the suspension order. This material was not even made known to the petitioner at any stage.

16. Secondly, the resolution dated 18th December, 2011 has been taken into consideration for the purpose of approving the suspension order. The said resolution indicates allegations of the petitioner having realized a sum of Rs. 1,50,000/- as fees and funds relating to Parent Teachers Association. The District Inspector of Schools has simply extracted the resolution without even prima facie indicating as to how the said charge levelled against the petitioner appears to be a charge requiring an enquiry to be held, and which may result in a major penalty against the petitioner. Simply having extracted the resolution will not amount to indicating any reason for approving the said resolution on the basis of such a charge.

17. Thirdly, the District Inspector of Schools has indicated that 12 out of 14 members had approved the resolution said to have been passed against the petitioner. The District Inspector of Schools has nowhere discussed any evidence that was indicated either in the judgment or in the objections raised by the petitioner or the Committee of Management in relation thereto. It is a one line conclusion with no material to support the said conclusion. Thus on all these scores, the order of approving the suspension resolution cannot be sustained.

18. Apart from this, the judgment of the division bench in the case of Committee of Management, Jan Sahyogi Intermediate College (supra) also cannot be ignored. Paragraph 4 of the said decision, clearly indicates, that the earlier suspension order would vanish if a subsequent suspension order has been passed. Sri Shashi Nandan has urged that the subsequent suspension order is founded on fresh charges and therefore the same cannot be the basis to apply the ratio of the said division bench judgment. He further submits that, in the case which was there before the division bench, there was no previous judicial intervention as presently involved. In the instant case according to him, it was a decision of this court which had directed the District inspector of Schools to take a decision. He therefore submits that the ratio of the division bench judgment being distinguishable on facts the same would not apply to the present controversy.

19. The aforesaid issue as to whether the previous suspension order survives or not would have to be gauged upon the status of the resolution passed subsequently suspending the petitioner again. If the previous suspension was surviving then the subsequent suspension

would be a redundant exercise. An employee cannot be put under suspension if he is already suspended. However, if the previous suspension was non existent, then the District Inspector of Schools would have to take notice of the second suspension as well in view of the ratio of the division bench. The District Inspector of Schools was equally bound to consider the previous suspension matter in the light of the judgment dated 1.8.2012 and his powers as explained in the full bench judgment of **Chandra Bhushan Mishra Vs. District Inspector of Schools reported in 1995(1) ESC 552.**

20. In this context, it would have been more appropriate for the District Inspector of Schools to have considered the impact of the second resolution passed by the Committee of Management for having suspended the petitioner even if it was on the basis of fresh charges. The petitioner should have been given the opportunity to contest the said position as well as he had already raised this objection. The District Inspector of Schools was therefore well aware of these proceedings having been undertaken and it cannot be accepted that the District Inspector of Schools was not aware of the proceedings of the second suspension resolution.

21. In the aforesaid circumstances, for all the aforesaid reasons, the order impugned dated 31.3.2013 cannot be sustained. It is hereby set aside. The matter is remitted back to the District Inspector of Schools to pass a fresh order in the light of the observations made hereinabove after giving an opportunity of hearing to all the parties concerned preferably within a period of two months from today. The status of the functioning of the petitioner shall continue to be the same as directed under the decision of this Court dated 1st of August, 2012 till fresh orders are passed.

22. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 24748 of 2013

Jagjeet Kaur ...Petitioner
Versus
Charan Singh and Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Tripathi, Sri Varinder Singh

Counsel for the Respondents:
Sri K. Ajit.

Constitution of India, Art. 226- Jurisdiction-suit for cancellation of will deed filed before civil court-according to plaint allegation-the petitioner are continuing in peaceful possession and their name recorded for last 18 yrs-unless declaration about title not claimed before revenue court-civil court has no jurisdiction-petition allowed-plaintiff either to file suit under 229-B before trail court pray for return of palint for presentation before Revenue court.

Held: Para-7
If the plaintiffs had been recorded tenure holders or the recording of the name of the defendant petitioner had been promptly objected to by the plaintiffs only then they could maintain the suit before the civil court. The relief claimed is purely of declaration.

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

1. Heard learned counsel for both the parties.

2. The question involved in this writ petition is as to whether O.S. No.403 of 2009, Charan Singh and others Vs. Smt. Jagjeet Kaur and others is maintainable before the civil court or revenue court. Petitioner is defendant No.1 in the suit. Trial Court/ Additional Civil Judge (J.D.), Court No.3, Rampur through order dated 01.10.2012 held that the question of jurisdiction was a mixed question of fact and law, hence issue No.6 pertaining to the jurisdiction would be decided after the evidence. Against the said order, petitioner filed Civil Revision No.71 of 2012. A.D.J., Court No.4, Rampur dismissed the revision by a detailed order on 11.02.2013, hence this writ petition.

The order passed by the Civil Judge is extremely sketchy.

4. Initially Sri Teja Singh was Bhoomidhar in possession of the agricultural land in dispute. According to the plaint allegations, Sri Teja Singh executed a Will of his entire properties on 05.02.1974 in favour of his nephews the plaintiffs, who are sons of Banta Singh, real brother of Teja Singh, who died issueless and that even otherwise they were legal representatives of Teja Singh and that even prior to death of Teja Singh, plaintiffs were owners of the properties in dispute. In para-4 of the plaint, it was stated that petitioner defendant had got a forged Will deed dated 19.01.1990 executed in her favour purporting to be on behalf of Teja Singh but he had died much before 19.01.1990 and some other person impersonated as Teja Singh, and that Will was got executed with active support of defendants No.2 & 3. In para-5 of the plaint, it was stated that plaintiffs came to know about the Will dated 19.01.1990 on 01.07.2009 (after more than 19 years) when they obtained copy of khatauni, and that they had filed application before the revenue court also on 15.07.2009 for cancellation of the name of petitioner defendant No.1. The prayer sought through the plaint of the suit is to the effect that permanent prohibitory injunction be issued against defendant restraining her from interfering in the possession of the plaintiffs over the land in dispute. Prayer for declaration has also been made to the effect that Will dated 19.01.1990 is forged, fabricated and got executed after the death of Teja Singh by someone who impersonated as Teja Singh.

5. In the plaint, no date of death of Teja Singh has been mentioned. Lower revisional court mentioned that in the entry dated 15.04.1985 in the khatauni, it was mentioned that Teja Singh had died and lekhpal must submit report about the legal representatives.

6. There was absolutely no allegation in the plaint that why after the death of Teja Singh, the names of plaintiffs were not entered in the revenue record on the basis of Will dated 05.02.1974 alleged to have been executed by Teja Singh. According to the plaint, allegations itself since 23.03.1991 till 30.06.2009, i.e. for more than 18 years, the name of petitioner was undisputedly continuing in the revenue records and only on 15.07.2009, application had been filed for correction of the revenue entry.

7. The matter is squarely covered by the Supreme Court authority reported in **Sri Ram and another Vs. A.D.J., AIR 2001 SC 1250**. If the name of petitioner was continuing for 19 years, then without seeking declaration from the revenue court, suit for cancellation of the Will could not be filed. If the plaintiffs had

been recorded tenure holders or the recording of the name of the defendant petitioner had been promptly objected to by the plaintiffs only then they could maintain the suit before the civil court. The relief claimed is purely of declaration. The Supreme Court in the aforesaid authority observed as follows in para-7:

"7. On analysis of the decisions cited above, we are of the opinion that where a recorded tenure holder having a prima facie title and in possession files suit in the civil court for cancellation of sale deed having obtained on the ground of fraud or impersonation cannot be directed to file a suit for declaration in the revenue court -- reason being that in such a case, prima facie, the title of the recorded tenure holder is not under cloud. He does not require declaration of his title to the land. The position would be different where a person not being a recorded tenure holder seeks cancellation of sale deed by filing a suit in the civil court on the ground of fraud or impersonation. There necessarily the plaintiff is required to seek a declaration of his title and, therefore, he may be directed to approach the revenue court, as the sale deed being void has to be ignored for giving him relief for declaration and possession."

8. Accordingly, both the impugned orders are set aside. It is held that the suit is not maintainable before the civil court. Issue No.6 is decided against the plaintiffs. The plaintiffs may either file fresh suit before the revenue court under Section 229-B of U.P.Z.A. & L.R. Act and such others sections of the said Act, which may be available to the plaintiffs or they may within two months from today apply before the trial court/ Additional Civil Judge (J.D.), Court No.3, Rampur to return the plaint for filing before the revenue court. If they do so, then the plaint shall be returned to them for filing the same before the revenue court.

9. Writ Petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.05.2013

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

Civil Misc. Writ Petition No. 25035 of 2013

Ashok Kumar ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Siddharth Khare

Counsel for the Respondents:
C.S.C., Sri A.K. Sinha
Sri V.P. Mathur

Constitution of India Art. 226- cancellation of candidature-petitioner participated in interview on 28.08.2012-no objection certificate could not be produced withing 21 days-but produced only on 13.09.2012 issued on 03.09.2012-commission being conscious about delay in getting no objection-taken decision on 18.04.2013-not to cancel the candidature on this Count-admittedly canceling candidature on 12.03.2013-was prior to decision held-no justification for cancellation of candidature.

Held: Para-9
From the facts, what this Court finds is that either the Commission ought to have strictly adhered to the terms and conditions of the advertisement and not interviewed the petitioner if no objection certificate was not filed or once the indulgence had been granted by the Commission and the

petitioner was permitted to file the no objection certificate within 21 days of the interview and from the facts we find that the no objection certificate was prepared and countersigned by the competent authority on 3.9.2012 and submitted before the Commission on 13.9.2012, which is on record and was also admittedly produced before the passing of the impugned order dated 12.3.2013, there was no justification for cancelling the candidature of the petitioner.

Case Law discussed:
W.P. No. 14841 of 2013

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

1. The petitioner appeared in the Combined State/Upper Subordinate Services Examination-2010 in which he was declared provisionally selected. At the time of interview, he was however required to submit his no objection certificate from his employer as he was employed with the State Government. On 28.8.2012 when the petitioner appeared before the interview board, he was interviewed and was required to give an undertaking that he would furnish the no objection certificate within 21 days. According to the respondents, the said certificate was not furnished within the said period of 21 days and as such, by order dated 12.3.2013 passed by the respondent no. 4 his candidature was cancelled on the ground that the petitioner did not furnish his no objection certificate within 21 days of the interview which was held on 28.8.2012. Challenging the said order dated 12.3.2013 passed by the respondent no. 4, this writ petition has been filed. Further prayer has been made for a direction to the respondents to grant appointment as Manager (Marketing & Economic Survey) in pursuance of the result as published by the U.P. Public Service Commission on 10.10.2012.

2. We have heard Sri Ashok Khare, learned Senior Counsel along with Sri Siddharth Khare, learned counsel for the petitioner as well as learned Standing Counsel appearing for the State respondent no. 1 and Sri A.K. Sinha, learned counsel appearing for the contesting respondents no. 2, 3 and 4 (U.P. Public Service Commission). Pleadings between the contesting parties have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of finally at the admission stage itself.

3. The case of the petitioner is that on 28.8.2012 the no objection certificate was not available with the petitioner even though he had applied for grant of such certificate on 18.8.2012, before the institution where the petitioner was working. It is admitted to the respondents that such certificate was issued after the same being countersigned by the District Inspector of Schools on 3.9.2012. It is also the specific case of the petitioner that he visited the office of the U.P. Public Service Commission on 13.9.2012 and was issued a gate-pass to enter the premises of the Commission on the said date in which the purpose of visit was mentioned as 'for submission of no objection certificate'. The issuance of the gate-pass, (filed as Annexure-7) mentioning the said purpose of the visit of the petitioner in the premises of the Commission is admitted to the respondents. The issuance of the certificate and countersignature of the District Inspector of Schools has also been got verified by the Commission through a letter sent to the District Inspector of Schools, Allahabad by the Commission on 7.5.2013 to which the District Inspector of Schools, Allahabad has responded on 8.5.2013 intimating that no objection certificate of the petitioner was sent by the Principal of the College to the District

Inspector of Schools on 3.9.2012 for countersignature, which was returned back on the same day after being countersigned by the District Inspector of Schools. Such communication has been filed by the petitioner as Annexure-1 along with the rejoinder affidavit. The same would go to show that the matter relating to the filing of the no objection certificate and its correctness was under consideration of the Commission even after filing of this petition.

4. Sri A.K. Sinha, learned counsel appearing for the contesting respondents has placed reliance on a letter of the petitioner dated 5.12.2012 in which it is stated that he was filing the no objection certificate. Sri A.K. Sinha has however stated that the recommendation for cancellation of the candidature of the petitioner was made by the Commission on 5.12.2012 and thereafter the candidature of the petitioner was cancelled by the Commission on 21.2.2013 and the petitioner was informed of the said cancellation by letter dated 13.3.2013. Specific averments in this regard have been made in paragraph 3 (D) of the counter affidavit filed by Sri Brijendra Kumar Dwivedi who is said to be posted as Under Secretary in the office of the U.P. Public Service Commission and in paragraph 1 he has been described as Section Officer of the Commission.

5. Sri A.K. Sinha, learned counsel for the contesting respondents has today passed on a communication of the State Government dated 13.3.2013 wherein in paragraph 3 it is mentioned that the candidature of 18 candidates including that of the petitioner was cancelled by the Commission vide letter dated 17.1.2013. Such communication, which has been passed on today during the course of argument, is taken on record.

6. From the facts of this case, it is not understood that when the petitioner was admittedly in possession of the no objection certificate, which was countersigned by the District Inspector of Schools on 3.9.2012 and the petitioner was to submit such certificate with the Commission within 21 days of the interview held on 28.8.2012 and the petitioner actually visited the premises of the Commission and got a gate-pass issued for the purpose of submitting the no objection certificate, why the petitioner would not submit the certificate, which was already in his possession and he very well knew that if the said certificate was not submitted, his candidature would be cancelled.

7. In paragraphs 18 and 19 of the writ petition, it is specifically stated by the petitioner that the no objection certificate was submitted by him personally on 13.9.2012 in the office of the U.P. Public Service Commission to which there is no specific denial in paragraph 8 of the counter affidavit except that it is stated that the no objection certificate was received in the office of the Commission on 5.12.2012. It is not disputed that if the candidature of the petitioner is considered to be valid, he would be selected on the post of Manager (Marketing & Economic Survey) after the result of interview. The appointment to the petitioner has not been given merely because of the alleged non-submission of the no objection certificate within 21 days of the interview.

8. Sri A.K. Sinha, learned counsel for the contesting respondents has

vehemently argued that the advertisement issued by the Commission inviting applications clearly provided that the candidates serving under the Central or State Government will have to produce a 'no objection certificate' from their employer at the time of interview and as such, he submits that since the no objection certificate was not produced within the extended period, the petitioner's candidature has rightly been rejected.

9. From the facts, what this Court finds is that either the Commission ought to have strictly adhered to the terms and conditions of the advertisement and not interviewed the petitioner if no objection certificate was not filed or once the indulgence had been granted by the Commission and the petitioner was permitted to file the no objection certificate within 21 days of the interview and from the facts we find that the no objection certificate was prepared and countersigned by the competent authority on 3.9.2012 and submitted before the Commission on 13.9.2012, which is on record and was also admittedly produced before the passing of the impugned order dated 12.3.2013, there was no justification for cancelling the candidature of the petitioner.

10. It is also noteworthy that the Commission itself has taken a decision on 18.4.2013 (filed as Annexure 16 to the writ petition and not denied in the counter affidavit) to the effect that the Commission has decided that no candidature shall be cancelled because of non-production of the no objection certificate and while sending the recommendation to the State Government for appointment of the candidate, the Commission shall make a request that those candidates, who have not produced the no objection certificate, may be issued appointment letter only after such certificate is produced. From this, it is absolutely clear that the Commission itself is conscious of the position that the no objection certificates are not delivered by the concerned authorities within time and therefore not produced at the time of interview and therefore such concession of the same being permitted to be produced till the issuance of the appointment letter is necessary.

11. Sri A.K. Sinha has placed reliance on a judgment of this Court passed in Writ Petition No. 14841 of 2013 (Amit Kapoor vs. U.P.P.S.C.Through Secretary) decided on 15.3.2013. We find that the same is distinguishable on facts as in that case the caste certificate was not produced by the petitioner therein within the extended period of 21 days. In the present case, as we have already observed above, the no objection certificate of the petitioner was prepared and countersigned and also submitted on 13.9.2012, well within the extended period of 21 days of the interview.

12. However, considering the fact that the petitioner has approached this Court in its extraordinary discretionary and equity jurisdiction and what we find is that the petitioner had submitted the no objection certificate duly prepared and countersigned by the competent authority within 21 days of the interview, and even if it is presumed that the same was produced later but before the order of cancellation had been passed, the same ought to have been taken into consideration, especially keeping in view the subsequent decision of the Commission dated 18.8.2013. As such, in the aforesaid facts and circumstances, we are of the

opinion that this writ petition deserves to be allowed.

13. Accordingly, this writ petition stands allowed. The order dated 12.3.2013 passed by the respondent no. 4 (Examination Controller, Public Service Commission UP, Allahabad) is quashed. The respondents are directed to grant appointment to the petitioner on the post on which he has been selected by the Commission in pursuance of the interview held on 28.8.2012, the result of which was published by the Commission on 10.10.2012.

14. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 25583 of 2013

Amar Nath Chaubey ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Niraj Tiwari, Sri Anirudh Upadhyay

Counsel for the Respondents:
C.S.C.

<u>**Constitution of India, Art. 226-**</u> **Payment of salary-ad hoc principal grade-rejected by D.I.O.S.-on ground before appointment no requisition send-provision of Section 18 not attracted-held-once requisition send-selected candidate not recommended-death before joining-resulted continuance of petitioner-as ad-hoc Principal entitled for salary as principal.**

<u>**Held: Para-8**</u>

Thus, in view of the aforesaid circumstances, the impugned order dated 02.02.2013, proceeds on an erroneous assumption of fact to apply the law wrongly and cannot be sustained. If the petitioner was working as an ad-hoc Principal and his signatures were attested then he would be entitled for payment of salary in the Principal's grade in view of the law as declared by this Court in the case of Narbedeshwar Misra Vs. District Inspector of Schools [1982 UPLBEC 171].

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

1. Heard learned counsel for the petitioner.

2. The petitioner is claiming payment of salary as Adhoc Principal in the Principal's Grade from 01.07.2010 to 30.06.2011.

3. The vacancy of Principal in the institution had come into existence and had been duly notified to the U.P. Secondary Education Service Selection Board. The Board selected one Dr. Chandresh Tiwari and placed him in the institution, but before Sri Chandresh Tiwari could join in the institution, he died. The petitioner was functioning as adhoc principal of the institution. There is no dispute about this fact and the attestation of his signatures on 05.08.2010.

4. Aggrieved by the non payment of salary in Principal's Grade, the petitioner came up before this Court by filing Writ Petition No. 64201 of 2012, which was disposed of on 11th December 2012 with a direction to the District Inspector of Schools, Varanasi to pass appropriate orders in accordance with law. The D.I.O.S. in turn has now passed the impugned order dated 02.02.2013 and has

rejected the claim of the petitioner on the ground that the Management failed to requisition the post after the death of Sri Chandresh Tiwari and in the absence of any such requisition, the provisions of Section 18 of the 1982 Act are not attracted for the purpose of payment of salary to the petitioner.

5. The finding recorded is that since there was no intimation of vacancy of the post of Principal to the Board, the adhoc Principal cannot get salary in the said grade as no selection process commenced for the purpose of posting a permanent principal in the institution. The reason appears to be that unless there is an intimation for the process of selection to commence with due intimation to the Board, the provisions of Section 18 for payment of salary are not attracted.

6. The reasoning given for attracting Section 18 may be correct, but in the facts of this case the reasoning appears to have been incorrectly applied, inasmuch as in the instant case the post had been duly notified and the selection process by the Board for filling up the post was under taken against which Dr. Chandresh Tiwari had been selected and placed for appointment in the institution. It is unfortunate that Dr. Chandresh Tiwari died before he could join, as a result whereof, the petitioner continued to work as Adhoc Principal of the institution till his retirement on 30.06.2011.

7. Thus, this is not a case of no intimation at all. Subsequent information after the death of Sri Chandresh Tiwari will not be relevant for the present purpose as the petitioner had been appointed when the earlier vacancy had arisen and the process of selection had also been undertaken by the Board.

8. Thus, in view of the aforesaid circumstances, the impugned order dated 02.02.2013, proceeds on an erroneous assumption of fact to apply the law wrongly and cannot be sustained. If the petitioner was working as an ad-hoc Principal and his signatures were attested then he would be entitled for payment of salary in the Principal's grade in view of the law as declared by this Court in the case of **Narbedeshwar Misra Vs. District Inspector of Schools [1982 UPLBEC 171].**

9. The writ petition is allowed, the order dated 02.02.2013 is set aside. The respondent District Inspector of Schools is directed to calculate the salary of the petitioner in the Principal's Grade and release the same within eight weeks from the date of production of certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2013

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 25871 of 2013

Alauddin ...**Petitioner**
Versus
The State of U.P. and Ors. ...**Respondents**

Counsel for the Petitioner:
Sri R.K. Ojha, Sri K.K. Rao.

Counsel for the Respondents:
C.S.C., Sri C.P. Mishra
Sri B.D. Pandey

U.P. Madarsa Board Act, 2004- Section 23 and 24-termination of teacher-questioned in absence of Rule, regulations governing appointment and other service conditions-petitioner can not be thrown at mercy of management-parties to complete pleadings-management restrained from creating third party right during pendancy of writ petition.

Held: Para-14

The State Government for the past 9 years, inspite of the Act having been framed has not carried out its duty and obligations as cast under Section 23 and 24 read with Section 32 of the 2004 Act.The State can frame regulations to prevent the oppression of the employees of an aided Madarasa without offending Article 30 of the Constitution as held in Para 21 of 2007(1)SCC386 and in Paras 90 to 114 of 2010(8)SCC page 49. In the instant case the State itself has framed the Act of 2004. There is no reason as to why rules have not been framed so far. The Act cannot be allowed to suffer desuetude and frustrate its object. The apathy of the State for no valid reason is embarrassing to the law framed and failure of a constitutional as well as a statutory obligation. The Court therefore has to step in and the petition would be maintainable.

Case Law discussed:
2007(1) SCC 386; 2010(8) SCC

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

1. Heard Sri R.K. Ojha, learned counsel for the petitioner. He submitted that this is a case that reflects the repression by a State - aided Minority Institution of its own employees of the Minority Community.

2. The petitioner has come up before this Court questioning the correctness of his termination order on the ground that it is not only in violation of the principles of natural justice but is also in violation of the Constitutional provisions and the law which has already been framed by the State Legislature in this regard.

3. Learned counsel for the petitioner contends that it is correct that the institution is a Madarasa and is a minority institution protected under Article 30 of the Constitution of India. The conditions of service of the employees of the said Madarasa is to be regulated under the law that has been framed for that purpose and if the Rule making authority has failed to perform his duty then this Court can step in and exercise its jurisdiction under Article 226 of the Constitution of India for the purpose of compliance of any such mandate that might be required to be pressed into service for framing the regular service conditions of such employees.

4. Sri Ojha submits that there is no dispute with regard to the fact that Madarasa where the petitioner is working as a Teacher is an Institution which falls within the definition of a Madarasa under the Uttar Pradesh Board of Madarasa Education Act, 2004. The said Act has been framed by the State Legislature under Entry 25 of List 3 of the Seventh Schedule of the Constitution of India. The Act was accordingly framed and notified pursuant to the provisions of Clause 3 of Article 348 of the Constitution of India and has been promulgated for being enforced. The Act has come into force with effect from 3rd of September, 2004, as per Section 1 thereof.

5. Section 23 and 24 authorize the framing of the procedure for appointment of teachers and other employees and provide for the conditions of service of such employees of Madarasa. Thus, the Act empowers the authority prescribed thereunder to lay down conditions of service of the teachers and other employees of the institution. Prior to the

said act, there were non-statutory rules known as Madarsa Niyamawali, 1987 under which jurisdiction is still exercised by the Inspector Arbi, Pharsi Madarasas.

6. On a perusal of these two Sections it appears that the service conditions shall be governed by regulations or any agreement between the Management and the Head of such institution with regard to teachers or other employees as the case may be. It further provides that such terms and conditions if inconsistent with the provisions of the Act shall be void. Thus, there is a peremptory nature of mandate contained in the aforesaid Sections to prescribe conditions of service.

7. Sri Ojha therefore submits that the State is obliged to prescribe such rules and regulations, once the Act has been enforced in the year 2004. The obligation of the State to frame rules therefore is mandatory and the State cannot sit tight and thereby pretend to protect the fate of such employees as is presently involved inasmuch as in the event of any action being taken, the employees of such institutions are left in the merciless hands of Managements to find out any way and means for the redressal of their grievance.

8. It is also submitted that before the the commencement of the Act in the State of Uttar Pradesh had framed non statutory rules known as Uttar Pradesh Arbi and Farsi Madarasa Niyamawali, 1987, but the same are also practically ineffective insofar as the employees of Madarsas are concerned as the rules have not been given a statutory status.

9. Sri Ojha has invited the attention of this Court to Sections 31 and 32 of the 2004 Act to contend that the State has the power to remove difficulties and also has the power to frame rules. This also includes the power for framing regulations for the purpose of implementation. He therefore, contends that in view of the absence of any rules or regulation to regulate the service conditions this petition can be pressed into service. He contends that principles of natural justice which form part of Article 14 as declared by the Supreme Court time and again can also be pressed into service, as the employer cannot act in a hire and fire manner by bypassing the service conditions of the employees of a Madarasa. Such requirement has to be observed and if the Management fails to comply with these basic principles, then the law deserves to be enforced by this Court under Article 226 of the constitution of India.

10. Sri Ojha contends that the State Government cannot abdicate or absolve itself of its duty to frame such rules as it has already framed the Act in order to prescribe conditions of service of such employees of Madarasa. Sri Ojha therefore prays, that this Court may issue a writ for the said purpose and may issue necessary directions in this regard.

11. Countering the said submissions Sri B.D.Pandey, who has put in appearance on behalf of the respondent no. 4, Committee of Management contends that this writ petition is not maintainable as this Court cannot exercise its jurisdiction under Article 226 of the Constitution of India against any order of termination passed by the Management which even otherwise has been done after complying with the principles of natural justice. He submits that in absence of any rule or regulation, no such public duty is cast that was to be performed.

The writ petition is not maintainable for which he relies on the judgment in the case of Taj Mohammad Vs. State of U.P. passed in Writ Petition No. 69539 of 2011.

12. Learned Standing Counsel submits that this writ petition would also involve the question of the minority status of a Madarasa and therefore in view of the provisions under Article 30 of the Constitution of India it will be required to be seen that whether this Court can enforce any regulations which have not been framed as yet in the shape of general principles, unless such action is taken by the State Government.

13. Having heard learned counsel for the parties, the petitioner has definitely raised his voice with regard to the protection which he claims under Article 14 of the Constitution of India. This would further involve the individual right of the petitioner as against the protection of Article 30 of the Constitution of India granted to the respondent institution. Even otherwise, the issue relating to Madarasa being fully a State aided institution would raise the question as to whether regulatory provisions can be made applicable which do not any way impinge the right to administer a minority institution.

14. The State Government for the past 9 years, inspite of the Act having been framed has not carried out its duty and obligations as cast under Section 23 and 24 read with Section 32 of the 2004 Act.The State can frame regulations to prevent the oppression of the employees of an aided Madarasa without offending Article 30 of the Constitution as held in Para 21 of 2007(1)SCC386 and in Paras 90 to 114 of 2010(8)SCC page 49. In the instant case the State itself has framed the Act of 2004. There is no reason as to why rules have not been framed so far. The Act cannot be allowed to suffer desuetude and frustrate its object. The apathy of the State for no valid reason is embarrassing to the law framed and failure of a constitutional as well as a statutory obligation. The Court therefore has to step in and the petition would be maintainable.

15. A vast multitude of Madarasa employees cannot be abandoned like a rudderless ship by the deliberate inaction of the State. Rule framing is an executive act though in the form of a subordinate legislation or delegated authority. The legal compulsion, where the attitude is unreasonably indifferent, can be enforced as it directly involves the protection of fundamental rights and discharge of legal and constitutional obligations.

16. In the aforesaid circumstances, an Ad-interim-Mandamus is issued to respondent no. 1 to inform the Court as to why the rules and regulations have not been framed so far inspite of a statutory duty have been cast upon the State of U.P. for framing such rules in order to govern service conditions of such employees of Madarasa or to get the rules framed and place it before the Court.

17. The respondent no. 1 who is represented by the learned Standing Counsel has accepted notice and will file a counter affidavit enclosing the entire material by 30th May, 2013. Respondent no. 5 shall also file a counter affidavit by the next date fixed.

18. Untill further orders of this Court, the respondent institution shall not create any third party rights in respect of

the post that was occupied by the petitioner.

19. List on 30.05.2013.

20. Copy of this order be provided to the learned Standing Counsel Sri Upendra Singh or Sri J.S. Tomar or to Sri A.K. Yadav, within three days.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2013

BEFORE
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 25990 of 2013

Yogendra Pratap Singh .. .Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Shri Ashwani Kujmar Mishra
Sri Bramhanand Tripathi

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

U.P. Intermediate Education Act, 1921-Chapter III Regulation 105, 106-Seniority-petitioner as well as private respondent were appointed on compassionate ground on supernumerary post-petitioner got appointed on 17.07.1998 while Respondent no. 6 on 18.11.2002-both were absorbed on 16.02.2006-for promotion on class III post respondent no. 6 claimed to be senior as one month prior to the petitioner had joined-in absence of specific provision fortuous joining can not be taken into account-petitioner being senior in age-entitled to be promoted stay granted-accordingly

Held: Para-35
In view of what has been indicated above and the fact that the petitioner is senior in age and there is no material to indicate that he had himself defaulted by not joining the institution, the petitioner is also entitled for an interim relief.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri Ashwani Kumar Mishra, learned counsel for the petitioner and Sri Mahendra Singh for the respondent no. 6. Learned Standing Counsel has accepted notice for the respondent Nos. 1, 2 and 3.

2. Issue notice to the respondent nos. 4 and 5, returnable at an early date.

3. All the respondents shall file a counter affidavit by the next date fixed. The matter shall be taken up again on 30th of May, 2013.

4. The dispute in the present writ petition relates to the inter-se seniority between the petitioner and the respondent no. 6 who were appointed on compassionate basis in different institutions against a supernumerary post. It is undisputed that the petitioner was appointed on 27th July, 1998 and the respondent no. 6 was appointed on 18th November, 2002.

5. It is also undisputed that the date of birth of the petitioner is 19th January, 1970 and that of the respondent no. 6 is 7th July, 1981.

6. Thus the petitioner was appointed earlier to the respondent no. 6 on compassionate basis and he is also senior in age. Both of them continued to work against supernumerary posts awaiting their absorption against a permanent substantive vacancy in any institution as per Regulations 105 and 106 of the Regulations framed under the U.P. Intermediate Education Act, 1921 under Chapter III thereof.

7. It is also undisputed that both of them were absorbed in Shri Gandhi Smarak Inter College, Hata, Kushinagar by an identical order issued on 16th February, 2006. Consequently, both of them had to join in the same institution against substantive posts. The petitioner joined in the institution on 1st of April, 2006 whereas the respondent no. 6 admittedly joined a month earlier on 1st of March, 2006. Both of them continued to function against Class IV posts on permanent basis and the dispute that has now arisen is in connection with promotion to a Class III post for which both are claimants.

8. Promotion to a Class III post is made on the basis of seniority subject to the possession of a satisfactory service record. The Principal wrote a letter to the Manager on 29.8.2012 reflecting the interse claim of seniority between the petitioner and respondent no. 6 recommending that the respondent no. 6 would be senior as he has joined earlier than the petitioner. The petitioner represented the matter before the management on 24.9.2012 and before the District Inspector of Schools on 30.10.2012. Thus the dispute of seniority came to the forefront for the first time between the petitioner and the respondent no. 6 on the issue of promotion against a Class III post as is now sought to be raised before this Court.

9. The District Inspector of Schools has approved the resolution of the Committee of Management dated 11.11.2012 promoting the respondent no. 6. The petitioner filed writ petition no. 1013 of 2013 in which a direction was issued to the District Inspector of Schools to decide the said dispute. Consequently, the District Inspector of Schools by the impugned order dated 11th February, 2013 has proceeded to hold that since the respondent no. 6 Shamshad Ahmad had joined one month earlier, on 1st of March, 2006, therefore, the respondent no. 6 would be senior as against the petitioner for the purpose of such consideration of promotion, and has accordingly accepted the proposal of promotion in favour of respondent no. 6.

10. Aggrieved, the petitioner is before this Court.

11. Sri Ashwani Kumar Mishra contends that the criteria adopted by the District Inspector of Schools from the date of joining is nowhere to be found under the rules relating to the service conditions of Class IV and Class III employees contained in the regulations framed under Chapter III of the U.P. Intermediate Education Act, 1921. He therefore submits that since the petitioner is senior in age, the date of joining would not be relevant. He further submits that the petitioner had taken a clear case that he was prevented from joining in the institution earlier on account of the fact that he had not been relieved from his earlier institution. He therefore submits that the act of the petitioner in not joining earlier was involuntary, and in such a situation, the same cannot go to the disadvantage of the petitioner. Had the management of the earlier institution relieved the petitioner he would have immediately joined in the institution to which he was appointed. Thus his joining was not on account of any default on the part of the petitioner, and the same being an inglorious uncertainty, the same cannot be taken to be the criteria for determining seniority.

12. Sri Mishra further points out that the District Inspector of Schools has relied on the Uttar Pradesh Government Servants Seniority (Third Amendment) Rules, 2007 to conclude that the date of joining would be relevant which is a wrong application of law ignoring the proviso to Rule 5 of the U.P. Government Servant Seniority Rules, 1991.

13. Sri Mishra submits that the said rules having been framed under Article 309 of the Constitution of India, and the Government Order having been issued under Article 162 of the Constitution, would not apply in the case of a Class IV employee of an Intermediate College whose service conditions are governed by the regulations framed under the U.P. Intermediate Education Act, 1921 and is not a government service. He therefore submits that applying a Government Service Rule for the said purpose was an erroneous approach adopted by the District Inspector of Schools. Even otherwise the District Inspector of Schools and the Management have overlooked Rule 5 (proviso) of the U.P. Government Servant Seniority Rules, 1991.

14. Sri Mishra then has proceeded to invite the attention of the Court to the law as existing on this subject and the decisions of this Court and of the apex court. To begin with Sri Mishra has invited the attention of the court to the proviso to Regulation 106 of the regulations framed under Chapter III of the 1921 Act which provides that where a candidate appointed on compassionate basis is occupying a supernumerary post, he shall continue to do so till a vacancy becomes available on permanent basis in any institution of the District, and upon availability of such a vacancy he shall be absorbed against the same. In such a case the service rendered by the incumbent of the supernumerary post shall be counted for the fixation of pay and retirement benefits. He submits that thus it is only the benefit of fixation of pay and retiral benefits that is available and not any other benefit like seniority in service by virtue of such occupation. He therefore contends that the rules specifically do not provide for getting the benefit of seniority while being appointed against a supernumerary post.

15. Advancing his submissions, he contends that a supernumerary post is an ex-cadre post and unless an employee falls within a cadre he cannot claim any such benefit of seniority. He therefore submits that the rule also gives an indicator that the seniority with regard to the period of occupation of a supernumerary post would not be available.

16. A learned Single Judge in the case of **Saradar Mohammad Ansar Khan Vs. State of U.P. & others reported in 1993 AWC Pg. 589** borrowed the principles relating to the seniority rules of teachers in Intermediate Colleges for the purpose of construing and adjudicating seniority inter-se dispute of Class III employees. It was a dispute of promotion to the post of Head Clerk to be filled up from the feeder cadre of Assistant Clerk. The two contenders therein were Assistant Clerks who had been selected on consideration of their merit and were placed accordingly in the select list. The management adopted the criteria of merit and placement in the select list as the basis of seniority. The learned Single Judge relied on certain principles of law and held that in the absence of any specific statutory rule for

the said purpose it would be reasonable to adopt the same criteria of seniority in age, as is provided for teachers.

17. The said judgment of the learned Single Judge was subjected to an appeal before this Court reported in **1993 Allahabad Civil Journal Pg. 952**. The division bench reversed the judgment of the learned Single Judge and held in paragraph 7 as follows:-

"7. When there are no rules or regulations for determining the seniority of the employees, **it is open to the employer to adopt any fair and reasonable criteria for this purpose. What is fair and reasonable is for the employer to determine.** Supreme Court in Reserve Bank of India Vs. N.C. Paliwal and others AIR 1976 SC 2345, in this connection has laid down as under:

"Then we come to the question of the rule of seniority adopted by the combined seniority scheme. Now there can be no doubt that it is open to the State to lay down any rule which it thinks appropriate for determining seniority in service and it is not competent to the courts to strike down such rule on the ground that in its opinion another rule would have been better or more appropriate. The only enquiry which the court can make is whether the rule laid down by the State is arbitrary and irrational so that it results in inequality or opportunity amongst employee belonging to the same class."

On the same principle the Committee of Management, being the employer of clerical staff of the Institution has, in the absence of any rule or regulation, full power to adopt any criteria or rule for fixing the seniority of the clerical staff of the institution. If the criteria/rule adopted by the managing committee is not found to be fair and reasonable, it will be open to the court to set aside its decision. In the instant case learned Single Judge has not held that the criteria adopted by the managing committee was unfair, unreasonable or unjust. As held by the Supreme Court in Reserve Bank of India Vs. N.C. Paliwal (supra). It is not competent to the court to strike down such rule on the ground that in its opinion another rule would have been better or more appropriate the managing committee declared the appellant as senior on the basis of merit assigned to him in the merit list prepared at the time of selection. This is a criteria adopted in various Government Departments for determining the seniority of the employees appointed on the same date. It is a well known rule for fixing seniority in the service jurisprudence. Supreme Court in Dr. N.D. Misra Vs. Union of India (JT 1994 (4) SC 206) has held that seniority of persons promoted on the same date has to be determined whether on the basis of length of service in the feeder post or on the basis of merit assigned to them by the selection committee. Relevant extract from the said decision of the Supreme Court is reproduced below:

"Persons promoted and appointed as Deputy Director Generals on the same date can be given seniority either on the basis of length of service in the post of Director or on the basis of merit assigned by the D.P.C. depending upon statutory rules or Government instructions on the subject."

18. Sri Mishra then invited the attention of the Court to the apex court decision in the case of Director of

Education (Secondary) and another Vs. Pushpendra Kumar and others reported in (1998) 5 SCC 192 to support the fact that the only limited benefits are available for occupants of supernumerary post. He then has cited the decision in the case of D.P. Das Vs. Union of India and others reported in (2011) 8 SCC 115 Paragraphs 18 to 21 to urge that in the absence of any rule of seniority available, the District Inspector of Schools could not have borrowed it from the Government Service Rules, and it was for the employer to have proceeded to adopt any reasonable rule, and in the absence of any such rule having been enforced or adopted the court can fill up the gap. For this he contends that it has been held that a fair and just principle of seniority has to be applied as held in the aforesaid decision. Paragraphs 18 to 21 of the aforesaid decision are extracted herein under for ready reference:-

"18.The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account . The Supreme Court in M.B. Joshi & others. V. Satish Kumar Pandey & Ors., AIR 1993 SC 267 has laid down that it is the well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances.

19. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just and fair. This is the mandate of Articles 14 and 16.

20. In Government Branch Press and another v. D.B. Belliappa a three-Judge Bench of this Court construing Articles 14 and 16 interpreted the equality clause of the Constitution as follows: (SCC pp. 485-86, para 24)

"24...The executive, no less than the judiciary, is under a general duty to act fairly. Indeed, fairness founded on reason is the essence of the guarantee epitomized in Articles 14 & 16(1)." (see AIR para 24 at page 434)

21. Another three-Judge Bench of this Court in Bimlesh Tanwar v. State of Haryana & other,(2003) 5 SCC 604, while dealing with the question of absence of a rule governing seniority held that an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. (see para 47 at page 619) "

19. He has then cited another decision of the apex court in the case of Shiba Shankar Mohapatra & others Vs. State of Orissa & others reported in (2010) 12 SCC Pg. 471 to advance his submission that in the event such a question relating to seniority where a person has been treated to be senior for a long time is raised then a long standing seniority should not be disturbed. He submits that the petitioner and the respondent no. 6 having been appointed in the institution after absorption were continuing since 2006 and the petitioner was undisputedly always shown senior in the documents of the institution over and above the respondent no. 6. He has further relied on the Full Bench decision in the case

of **Dr. Asha Saxena Vs. Smt. S. K. Chaudhary and others 1991 (2) U.P. Local Bodies and Education Cases 1202** to further substantiate that a long standing seniority cannot be altered.

20. Sri Mahendra Singh, learned counsel for the respondent no. 6 on the other hand contends that even assuming though not admitting that the arguments advanced on behalf of the petitioner and the decisions relied upon by the learned counsel are correct, then too also the criteria as evolved by the District Inspector of Schools cannot be said to be either perverse or unlawful or even unreasonable, inasmuch as, the petitioner had failed to join the institution and had arrived at a much later point of time for which there is no valid explanation. He further submits that the voluntary act of the petitioner in coming to join the institution later than the respondent no. 6, definitely makes him junior, and therefore the conclusion drawn by the District Inspector of Schools cannot be faulted with. He therefore submits that the criteria so adopted does not in any way violate Article 14 or is ultra vires or contrary to any such rule which may be available for such services in the education department. He contends that reference to the Government Servants Amended Seniority Rules, 2007 would therefore not be foreign or alien to the controversy.

21. Having heard learned counsel for the contesting parties and having perused the aforesaid entire position of law as placed before the court, it is evident that the regulations do not make any provision for determination of inter-se seniority of Class IV employees. Appointment to class IV posts are by direct recruitment only. Thus in the absence of any such rules, the decisions that have been relied upon do not indicate any fixed criteria that can be adopted for the purpose of determining such seniority. The division bench judgment in the case of Sardar Mohammad Ansar Khan (supra) in paragraph 7 thereof clearly indicates that it is for the employer to adopt a reasonable rule and in the event the rule adopted is not reasonable it can be subjected to challenge before a court of law. It was further held that the court could not have borrowed the rule of teachers for applying the same in the case of non teaching staff of the institution.

22. This court finds that subsequent to the decision, the apex court decision in the case of D.P. Das (supra), has held that in the absence of a rule governing seniority an executive order can be issued to fill up the gap, and in the absence of any rule or executive instructions the court may have to evolve a fair and just principle of seniority. The division bench in the judgment of Sardar Mohammad Ansar Khan (supra) did not lay down or evolve any principle of seniority except for leaving it open to such a rule being adopted by the employer and its judicial review by the court. Since the dispute was of placement on the basis of merit being a selection post, the court upheld the criteria evolved by the Committee therein

23. The said decision was rendered more than two decades ago but till date the legislature or the rule making authority has failed to make any attempt to lay down a rule of seniority inspite of the fact that such disputes keep on coming every now and then in all the institutions that are aided and governed by the provisions of the 1921 Act. Thus there is a permanent gap unfilled as on date

awaiting guidance in order to lay down any rule of principle of seniority.

24. Before any such pronouncement is made what has to be seen is that the mode of recruitment of a Class IV employee in an aided institution is by way of direct recruitment. One of the methods is compassionate appointment. It is not a case of preparation of merit and merit is not the criteria for the purpose of such appointment. There is no consideration like merit for offering a compassionate appointment. Only minimum qualifications are required to be possessed with relaxation if any under rules. There is nothing to be compared on merits. There can be two simultaneous appointments, one on compassionate basis and one by routine procedure, there can be no comparative merit between these two appointments. Similarly, as in the present case, the absorption is of two compassionate appointees. The rule of merit as upheld in the case of Sardar Mohammad Ansar Khan (supra) therefore is not attracted here.

25. In such a situation, it is only seniority by way of age which can be reasonably pressed into service as a rational criteria. The criteria of seniority in age for the purpose of future promotion subject to rejection of unfit, which is also involved in the present case, therefore would be a rationally just method to determine seniority.

26. There are certain more complications that have to be taken into account. A supernumerary post being an ex-cadre post, a person originally senior as a supernumerary appointee, cannot claim seniority by virtue of such appointment against an ex-cadre post. The seniority has to be determined after the person enters into a regular cadre.

27. Yet there is another anomaly involved as in the present case where both the petitioner and the respondent no. 6 have been appointed on supernumerary basis. The petitioner has been appointed in 1998 and the respondent no. 6 has been appointed in 2002. The petitioner who was appointed much before the respondent no. 6 does not get any benefit of his seniority inspite of having worked in an aided institution. The other side of the coin is that a person after having been appointed on a supernumerary post in an institution of his choice may not like to alter his position and may allow him himself to continue against such a supernumerary post, inspite of availability of a permanent post in any other institution where he may not like to join. In such a situation, the person holding a supernumerary post should not be allowed to take undue advantage of his position and for this, it would be more appropriate that the rule of seniority is framed from the date of substantive appointment after absorption. The mode of recruitment and the manner of entry of a candidate in a particular cadre is therefore very much essential to be taken into account for the purpose of framing a rule of seniority. At the same time, it would also be relevant to again repeat that the proviso to Regulation 106 has consciously not included any benefit of seniority being given to a compassionate appointee. Thus a criteria will have to be evolved on the basis of substantive appointment in the cadre after the availability of a permanent vacancy duly sanctioned under the provisions of the act and the rules.

28. Prima facie, as per the ratio of the decisions noted above, where there is no prescribed rule to fix seniority, a

reasonable rule can be adopted by the employer. In the instant case the appointing authority of a Class IV employee is the Principal and the employer is the Committee of Management, and not the District Inspector of Schools. The Committee is the appointing authority of a Class III employee (Clerk) and not of a Class IV employee. The District Inspector of Schools, being neither the appointing authority nor the employer, cannot therefore adopt any rule on his own so long as regulations are not framed. No order exists issued by the Government under Section 9(4) of the 1921 Act. The Government will therefore have to provide for effective regulations which have not been framed. The District Inspector of Schools therefore cannot on its own employ any rule. On the other hand every aided institution is an independent unit by itself with its own Principal and a Committee of Management. This does not mean that every institution should be allowed to frame its own rule that will lead to a chaos throughout the State. The State will therefore have to frame an uniform regulation to govern such matters.

29. The difficulty has arisen on account of there being a purely legal gap in this particular field which is being experienced in almost several cases before this Court. Accordingly, this court may have to issue necessary instructions in the light of Paragraph 21 of the decision in the case of D.P. Das (supra) for determining the inter-se seniority or resolving any such dispute that may arise in future.

30. Consequently, the learned Chief Standing Counsel is directed to place a certified copy of this order before the respondent no. 1 who shall convene a meeting with the Director of Education and such other authorities that he may find necessary for the purpose of such determination, and framing of such a rule so that such disputes are resolved under a rule which is statutory, either by amending the rules or by issuing a Government Order under Section 9(4) of the U.P. Intermediate Education Act, 1921. This exercise must be done by the next date fixed.

31. It is made clear that no further time deserves to be given as the State has already slept over the matter for 20 years by not framing rules after the decision in Sardar Mohammad Ansar Khan's case.

32. An affidavit shall be filed by the respondent no. 1 bringing to the notice of the Court as to what exercise has been undertaken in this regard.

33. Coming to the present case, the Principal has applied the concept of absorption on the post by relating it to the date of joining. The petitioner and the respondent no. 6 were absorbed under a common order dated 16.2.2006. This is not an absorption in the same organization against the earlier post held by the incumbent. Here the absorption under the regulation can be made in any of the institutions throughout the district under Regulation 105. In the instant case also the petitioner and respondent no. 6 were in different institutions before absorption in the same institution. Their date of joining is different. This can be for various reasons that can be beyond the control of an employee. The order of absorption is the same and of one date. If the reasoning of joining as borrowed from the Government Servant

Seniority Rules is to be adopted, as in the present case, then the proviso to Rule 5 of the 1991 Rules makes it clear that a person would loose seniority if he fails to join except for any valid reason, on which the decision of the appointing authority shall be final. The Principal or the Management or even the District Inspector of Schools have not cared to make any such assessment inspite of the petitioner having taken this stand clearly that his joining late was not voluntary and was delayed as he was not relieved timely by the earlier institution. Thus on this score Sri Mishra is right in his submission.

34. The petitioner was shown senior in the documents since 2006.

35. In view of what has been indicated above and the fact that the petitioner is senior in age and there is no material to indicate that he had himself defaulted by not joining the institution, the petitioner is also entitled for an interim relief.

36. Until further orders of the court the operation of the order dated 11th of February, 2013 shall remain stayed.

37. A copy of the order shall be given to the learned Standing Counsel within five days free of charges for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2013

BEFORE
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition No. 26924 of 2008

M/s Bagson ...Petitioner

Versus

Labour Court, II and Anr. ...Respondents

Counsel for the Petitioner:
Sri Shakti Swarup Nigam

Counsel for the Respondents:
C.S.C., Sri Rajesh Tiwari

U.P. Industrial Dispute Act-1947-Section 6-N- Writ against award for reinstated with full back wages-pursuant to interim order of writ court in compliance of provisions under section 17-B Rs. 17000/- deposited by petitioner-workman at the time of award was 57 years old-for violation of the provisions of section 6-N-tribunal ought to have grant lum-sum compensation-after death of workman-award modified to release Rs. 17000/- apart from compensation of Rs. 50,000/- in favor of heirs of the workman.

Held: Para-8

Having heard learned counsel for the parties and having perused the material on record and in view of the law settled by the Hon'ble Apex Court, I am of the opinion that it would be just and fair that since the workman is no more, a compensation of Rs.16,000/- which has already been deposited before the Labour Court may be released to the heirs of respondent workman along with another sum of Rs.50,000/- which have been agreed by both the parties before this court, may be paid to legal heirs and representative of the workman as full and final compensation for violation of provisions of section 6-N of the Act. It is directed that the amount as indicated above, shall be released to the legal heirs and representative of the respondent workman within a period of two months from the date of passing of this order.

Case Law discussed:
(2007) 9 SCC 748; (2008) 5 SCC 75

(Delivered by Hon'ble Bharti Sapru, J.)

1. This petition has been filed by the petitioner being aggrieved by an award of the Labour Court dated 3.1.2008 by which the Labour Court has come to the conclusion that the services of the respondent workman were terminated in violation of provisions of section 6-N of the U.P. Industrial Disputes Act.

2. The Labour Court has reinstated the workman along with 60% of his back wages. From the record, it is reflected that the workman was 53 years of age at the time when he raised an industrial dispute. Consequently he would have inevitably retired in the year 2002. However this aspect of the matter has not been taken into in the award of the Labour Court.

3. Learned counsel for both sides who are present in court have informed the court that the workman is no more. He passed away in the year 2009.

4. This petition was filed in the year 2008 and the court has passed an interim order on 4.6.2008 by which the petitioner was asked to comply with the provisions of section 17-B of the Industrial Disputes Act.

5. Petitioner states that he had complied with the provisions of section 17-B of the Act and in pursuance thereof, Rs.16,000/- have been deposited before the Labour Court. The workman however did not turn up.

6. In recent decision of the court in **Madhya Pradesh Administration versus Tribhuban reported in (2007) 9 SCC 748** and **Sita Ram versus Motilal Nehru Farmers Training Institute reported in (2008) 5 SCC 75,** the Hon'ble Apex Court has opined that subject to the facts in each given case, a compensation in lieu of reinstatement could be given where there is violation of section 6-N of U.P. Industrial Disputes Act.

7. In the facts and circumstances of this case, the workman is no more and finding of the Labour Court is that section 6-N of the Act is violated, the Labour Court ought to have taken into account these facts and the legal heirs of the workman could have given compensation in lieu of reinstatement and that too for the period when he had not reached the age of superannuation and no relief could have been given beyond that.

8. Having heard learned counsel for the parties and having perused the material on record and in view of the law settled by the Hon'ble Apex Court, I am of the opinion that it would be just and fair that since the workman is no more, a compensation of Rs.16,000/- which has already been deposited before the Labour Court may be released to the heirs of respondent workman along with another sum of Rs.50,000/- which have been agreed by both the parties before this court, may be paid to legal heirs and representative of the workman as full and final compensation for violation of provisions of section 6-N of the Act. It is directed that the amount as indicated above, shall be released to the legal heirs and representative of the respondent workman within a period of two months from the date of passing of this order.

9. The writ petition is disposed of as above. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.05.2013

BEFORE

THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 27319 of 2013

Bhuneshwar Prasad Kureel ...Petitioner
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare, Sri Subhanshu Srivastava

Counsel for the Respondents:
C.S.C., Sri Shivam Yadav

Constitution of India, Art. 226- Service law-dismissal of service-petitioner was appointed as mechanic in NOIDA Authority under S.C./S.T. Category-cancellation of appointment on ground petitioner being resident of Chhatisgarh-could not be treated as S.C./S.T. in U.P.-the date on when-presidential notification made under Art. 341 enlisted as S.C.-entitled to benefit of reservation in his original State-impugned dismissal order-erroneous- in law and fact both-can not sustained-entitled to continue in Service.
Held: Para-15
Therefore, according to the said decision a person claiming benefit will have to show that he or his ancestors hailed on the date of the notification from a caste in the schedule from a place identified in the schedule. In other words the relevant date is not the date of migration but the date of inclusion of the caste or tribe in the schedule.

Case Law discussed:
1994 Vol. 5 SCC Page 244; (1990) 3 SCC 130; (2000) Vol. 2 SCC Page 20; (2009) Vol. 15 Page 458; W.P. No. 25844 of 2007; W.P. No. 26044 of 2000; Vol. 11 SCC Page 66; W.P. No. 3627 of 2011

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

1. Heard Sri Ashok Khare, learned Senior Counsel assisted by Sri Sudhanshu Srivastava for the petitioner and Sri Shivam Yadav for the Respondent Nos. 3 and 4 and learned Standing Counsel for the Respondent Nos. 1 and 2.

2. This petition was entertained and the matter was heard on three previous days and ultimately the following questions were framed on 17th May, 2013 to enable the learned counsel to advance their submissions on the legal issues that have been raised vis a vis the challenge to the legality of the impugned order dated 26th April, 2013 resulting in the termination of the services of the petitioner.The order passed on 17th May, 2013 is quoted hereinunder:

"Heard Sri Ashok Khare, learned Senior Counsel for the petitioners alongwith other counsel who are appearing in the connected cases and Sri Shivam Yadav for the respondent authority and the Sri A.K. Yadav, learned Standing Counsel for the State.

The issue involved in all these writ petitions is in relation to the claim of benefit as a Scheduled Caste by the petitioners for appointment in the respondent authority.

Prima facie there does not appear to be any dispute with regard to the status of their caste and the only ground on which their services have been terminated is that they are not a domicile or a resident of State of U.P. and therefore they were not entitled to be appointed so as to receive the benefit of reservation as a scheduled caste.

The impugned order proceeds on the law laid down by the apex court in the case of Action Committee On Issue Of Caste Certificate To Scheduled Castes of

Maharashtra and another Vs. Union of India and another reported in (1994) 5 SCC 244.

The matter was heard yesterday and today as well and judgments have been cited at the bar including the decision in the case of Union of India Vs. Dudh Nath Prasad reported in 2000 (2) SCC 20; the decision in the case of S. Pushpa and ors. vs. Sivachanmugavelu and Ors. reported in (2005)3 SCC 1; State of Uttaranchal Vs. Sandeep Kumar Singh and others, 2010 (12) SCC 794; M. Chandra vs. M. Thangamuthu, (2010) 9 SCC 712.

The contention raised by Sri Khare is that the issue of domicile would not be relevant for the purpose of such a consideration, inasmuch as, there is no dispute with regard to the fact that the petitioners are a notified scheduled caste under the presidential order in the State of U.P. He submits that merely because they have migrated to a different State they do not get any benefit of such reservation in the migrated State and it is only in their parent State that they would be entitled to such benefit. He therefore contends that the provisions of Article 341 cannot be interpreted so as to render it nugatory by adding the requirement of domicile. He submits that there is neither any statutory provision nor is there any executive instruction or office memorandum explaining the aforesaid position as sought to be justified while passing the impugned termination order. He therefore contends that the respondent authority could not have terminated the services on this ground.

Sri Shivam Yadav and Sri A.K. Yadav have vehemently urged that the Supreme Court in the decision of Subhash Chandra Vs. Delhi Subordinate Services Selection Board reported in (2009) 15 SCC 458, which is being relied upon by the learned counsel for the petitioners, and which in paragraph 96 declares the earlier law in the case of Dudh Nath Prasad (supra) to be per-incuriam, has already been referred to a larger bench in the decision of State of Uttaranchal Vs. Sandeep Kumar Singh (supra).

They contend that if a scheduled caste of his parent State has migrated to another State, and is not a resident of the State of U.P., as in the present case then he does not suffer from any disadvantage so as to entitle him to claim any benefit within the State of U.P. for public employment. They contend that the issue of domicile therefore is intertwined with the issue of claim of reservation and the same cannot be read in a divorced manner.

Sri Shivam Yadav however prays that the matter be adjourned for today to enable him to further address the court on this issue and assist the court on such requirement.

Put up on Tuesday next as fresh along with the connected matters."

3. The dispute centers around the appointment of the petitioner as a mechanic against a Class-IV post in the Respondent NOIDA authority. The petitioner was extended the benefit of appointment on the claim of reservation under the Scheduled Caste Category. The petitioner's appointment has been annulled by the impugned order on the ground that the petitioner is not entitled to the benefit of reservation as a scheduled caste inasmuch as he is a resident of another place out side the State of U.P. Consequently, applying the ratio of the judgment of the Apex Court in the case of **Action Committee Vs. Union of India 1994 Volume 5 SCC Page 244,** on the issue of caste certificate the impugned order has been passed recording that the

benefit of reservation extended to the petitioner was erroneous and, therefore, his appointment was invalid. Consequently, the services have been terminated invoking the powers under Clause 22(2) of the NOIDA Service Rules, 1981.

4. Sri Ashok Khare contends that the impugned order proceeds on a totally erroneous application of law and without even adverting to the facts on the basis whereof the petitioner was claiming reservation as a resident of the State of U.P. under the scheduled caste category. Sri Khare has taken the Court through various documents including the certificates issued to the petitioners from his migratory State, namely, Chhattisgarh, which was part of erstwhile Madhya Pradesh, and he also contends that the ancestors of the petitioner including his father were born in the State of U.P. in the District of Unnao at the time of the issuance of the Presidential Order. In such circumstances the petitioner will be entitled to the benefit of reservation in terms of Article 341 of the Constitution of India.

5. He contends that the caste of the petitioner has not been disputed in the impugned order. The caste of the petitioner is enlisted in the schedule for the State of U.P. and the petitioner belongs to the same caste. He further contends that the issuance of the caste certificate is only a certification of the caste which has been placed in the schedule under the Presidential notification and, therefore, in the absence of any evidence to the contrary the denial of the benefit of reservation is against the Constitutional provision. He, therefore, contends that the impugned order ignoring these vital aspects has proceeded to non suit the petitioner for reasons that cannot be countenanced in law.

6. In short Sri Khare submits that not only factually but also legally the petitioner is a resident within the meaning of Article 341 of the State of U.P. and there is ample evidence to support it on the basis whereof he was offered employment which could not have been cancelled on a summary basis as has been done through the impugned order.

7. He further submits that against the show cause notice the petitioner had filed a complete reply bringing on record all such documents and the same has also not received attention on the part of the authority, therefore, the impugned order is also vitiated for non consideration of relevant material.

8. Advancing his submissions Sri Khare contends that the decision in the case of Action Committee (supra) relies on the Constitution Bench judgment in the case of **Marri Chandra Shekhar Rao Vs. Dean, Seth G.S. Medical College, (1990) 3 SCC 130** and other judgments that have been referred to therein and the said judgments nowhere, in any manner, dilute the status of the claim of the petitioner, as such, the said law has been wrongly applied and the impugned order deserves to be set aside.

9. Countering the said submissions Sri Shivam Yadav has invited the attention of the Court to the case of **Union of India Vs. Doodh Nath Prasad (2000) Volume 2 SCC page 20** and he has further contended that the judgment in the case of **Shubhash Chandra Vs. Delhi Subordinate Services selection board (2009) Volume 15 page 458** the meaning of the words "Ordinary resident and domicile" has been dealt with, and according to which the petitioner has

failed to establish his domicile, and consequently the conclusion drawn in the impugned order does not suffer from infirmity. He further submits that if the petitioner does not belong to the State of U.P. then he cannot be extended the benefit of reservation as he had already migrated a generation back to the erstwhile State of M.P. and is now a resident of Chattisgarh. Sri Yadav has relied on the judgment of a learned Single Judge of this Court in the case of **Param Jeet and others Vs. Chief Executive Officer NOIDA Writ Petition No. 25844 of 2007** decided on 1st June, 2012 to substantiate his submission.

10. Sri Shivam Yadav has then urged that the appointment orders of similarly situated employees are available for perusal, and the petitioner as well as the other incumbents whose services have been terminated, have been unable to lead any cogent evidence to factually establish their domicile. They have failed to discharge their burden as such the impugned order does not require any interference by this Court. He, therefore, submits that the claim of the petitioner deserves rejection.

11. He then invited attention of the Court to a Division Bench Judgment in the case of **Mohammad Hasan Zafari Vs.Director of Higher Education in Writ Petition No. 26044 of 2000** decided on 2nd April, 2004 to contend that if the petitioner has failed to produce a valid caste certificate from the State of U.P. then the benefit of reservation under Section 9 of the U.P. Public Services Reservation for Schedule Caste and Schedule Tribe and other backward 1994 cannot be extended to the petitioner.

12. With the support of the aforesaid judgments and the other judgments that have been cited at the bar including the judgment in the case of **Bhagwan Das Vs. Kamal 2005 Volume 11 SCC Page 66** it has been urged that the domicile of the petitioner having not been established there is no occasion to extend the benefit of reservation to the petitioner within the State of U.P.

13. After the matter was heard at length, all the learned counsel for the parties agreed that the matter be disposed of finally at this stage itself, and that no further affidavits are required to be filed keeping in view the legal issues that have been raised in the present writ petition. Accordingly, this writ petition is being disposed of finally itself with the consent of the parties.

14. The issue of extending the benefit of reservation within the State of origin is no longer res integra and beginning with the case of Marri Chandra Shekhar Rao (supra), this issue has been universally accepted by all the High Courts, and the judgments being affirmed by the Apex Court, to the effect that a Schedule Caste who is notified within his state of origin as on the date of the Presidential Order the said Scheduled Caste is entitled to the benefit of reservation in his State of origin only.

15. The peculiar circumstances that arise, as has arisen in this case, is on account of migrations. The question of issuing certificates or recognition of the caste in another State was dealt with in the case of Action Committee (supra) and the aforesaid issue is no longer res integra where it has been reiterated that it is the state of origin where a schedule caste duly

notified will get the benefit of reservation. The peculiarity of the present case is that the petitioner claims that his father was a domicile and resident of the State of Uttar Pradesh as on the date of notification of the Presidential Order and, therefore, the petitioner is also entitled to the benefit of reservation even if he had migrated with his father to the State of Madhya Pradesh and now he is living in the State of Chattisgarh. The aforesaid issue of claim of reservation in relation to the State came up for consideration in two cases of the Bombay High Court, namely, Chetna wife of Rajendra Vs. Committee for Scrutiny of Caste 2005 Volume 4 Maharastra Law general page 711 and in a latest decision of the Bombay High Court in the case of **Preeti Gopalrao Kamble VS. The Principal in writ petition No. 3627 of 2011** decided on 10th October, 2012. The Bombay High Court was scrutinizing this aspect of the matter and had catalogued the entire law with regard to migration and reorganization of States, and had then drawn its conclusion to hold that the object of including a caste or a tribe in the schedule to the orders was to do away with their disadvantaged position in the areas where they resided viz a viz other population. The crucial test, therefore, was whether the person concerned suffers the decree of disadvantage as claimed by him by virtue of his being a schedule caste of the State of his origin or not. It has further been held that it is the date which is equally relevant in order to identify the persons as belonging to a caste included in the schedule on the date of such notification with reference to the locality. Therefore, according to the said decision a person claiming benefit will have to show that he or his ancestors hailed on the date of the notification from a caste in the schedule from a place identified in the schedule. In other words the relevant date is not the date of migration but the date of inclusion of the caste or tribe in the schedule.

16. It is to be remembered that the benefit of reservation in a State to a particular caste is founded on the social philosophy of the caste having been oppressed for generations in his place of origin. The inclusion of the caste in the schedule is a testimony thereof. The birth of a person in that caste, therefore, entitles him to the benefit of reservation. How migration can dissolve the status of domicile and on the basis of what legal foundation has not been indicated in the impugned order.

17. Having considered the said decision and the ratio thereof, the aforesaid principle ought to have been observed by the authority before having proceeded to have cancelled the appointment of the petitioner which apparently has not been done nor any exercise has been undertaken to assess the evidence which is being relied upon by the petitioner. It is only on the basis of an incomplete legal proposition and an assumption, that the petitioner does not belong to the State of Uttar Pradesh, that the impugned order was passed. The factual aspects have also not been thrashed out.

18. In my opinion, this exercise resulting in the impugned order was clearly an erroneous assumption both in fact and in law and consequently the impugned order cannot be sustained. The order dated 26.4.2013 is hereby quashed. The petitioner shall be entitled to continue in service and receive salary.

19. It shall be open to the authority to pass any fresh order in case it is so warranted in law, after examining the

entire gamut of facts and applying the law as laid down by the Apex Court and as observed hereinabove after giving an opportunity of hearing to the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2013

BEFORE
THE HON'BLE SUNITA AGARWAL, J.

Civil Misc. Writ Petition No. 35696 of 2008

Constable No. 491 C.P. Gabbar Singh ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Sri P.K. Kashyap, Sri Anoop Mishra

Counsel for the Respondents:
C.S.C.

U.P. Police Officers of Subordinate Ranks(Punishment & Appeal) Rules 1991- Rule 8(2)(b)-petitioner working as Police Constable-placed under suspension on involvement in criminal case-even on fair acquittal by appellate Court-neither disciplinary authority not appellate authority taken into consideration thereof-based their consideration on three grounds-beyond scope of statutory provisions-power exercised under Rule 8(2)(b)-contrary to requirement-held-dismissal order set-a-side with all consequential benefits.

Held: Para-14 & 15

14-After considering all the oral and documentary evidences petitioner was acquitted which will be termed as honourable acquittal. Surprisingly the appellate authority in its order dated 27.3.2008 did not consider the acquittal order dated 20.7.2007 rather rejected the plea taken by the petitioner on the ground that there was report of Circle Officer, Pilibhit dated 22.1.2007 against the petitioner and charge sheet has been filed. The said approach of the appellate authority is illegal.

15. Moreover in view of the above discussion it is clear that power exercised by the Superintendent of Police, Pilibhit under Rule 8(2) (b) of the Rules is contrary to the requirement as laid down in the said Rules. The order of dismissal does not fulfil the requirement of the aforesaid Rule and, therefore, cannot be sustained. The appellate order also cannot survive. Both the orders dated 26.6.2007 and 27.3.2008 are hereby quashed.

Case Law discussed:
2006(8) ADJ 570; 2006(4) ESC 2303 (All.) ;2005 (2) ESC (All.)1229; 2006(1) ESC 374; (1991) 1 SCC 362

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

1. Heard Sri Anoop Mishra, learned counsel for the petitioner and learned standing counsel.

2. Challenge in the present writ petition is the dismissal order dated 26.6.2007 and the appellate order dated 27.3.2008 dismissing the services of the petitioner under the U.P. Police Officers of Subordinate Ranks(Punishment and Appeal) Rules, 1991(hereinafter referred to as the "Rules, 1991").

3. The facts of the case in brief are that petitioner while working as constable in Pilibhit was dismissed by order dated 26.6.2007 passed by the Superintendent of Police, Pilibhit invoking power under Rule 8(2)(b) of the Rules. It was indicated in the order of dismissal that case crime no. 668 of 2006 under sections 364, 302, 201 I.P.C. has been registered by the petitioner's son against him and three other persons. Petitioner was arrested and sent to district jail , Pilibhit. The charge sheet no. 201/2006 dated 19.10.2006 was

filed in the court. On the basis of these criminal charges initially petitioner was suspended vide order dated 3.9.2006 and later on after submission of charge sheet and arrest he was dismissed by order dated 26.6.2007. The charge against the petitioner was that he murdered his own daughter with the help of three other persons.

4. Petitioner filed appeal dated 19.9.2007 against the dismissal order dated 26.6.2007 before the Deputy Inspector General of Police, which was dismissed on 27.3.2008. In the meantime, the trial court i.e. Upper Sessions Judge, Court No.1, Pilibhit by judgement and order dated 20.7.2007 acquitted the petitioner on the ground that prosecution had miserably failed to prove the charges levelled against all the accused including the petitioner. It has further been brought on record that by communication dated 13.11.2007sent by the Special Secretary to the District Magistrate, Pilibhit,it was informed that State Government had decided not to file Government Appeal against the acquittal of the petitioner by order dated 20.7.2007.The order passed by the Sessions Court dated 20.7.2007 in S.T. No. 564 of 2006 was brought before the appellate authority. However, appellate authority did not consider the same and dismissed the appeal.

5. Learned counsel for the petitioner challenging the order contended that invocation of power under Rule 8(2)(b) of the Rules by the disciplinary authority is unjustified in as much as no reasons have been recorded for dispensing/holding inquiry under Rule 8(2) (b) of the Rules.

6. Learned counsel for the petitioner placed reliance on judgement of this court in **2006(8) ADJ 570(Narendra Prasad Rai Vs. State of U.P. and others); 2006(4) ESC, 2303 (All.) (Bhupat Singh Yadav Vs. State of U.P. and others); Ravindra Raghav Vs. State of U.P. and others reported in 2005 (2) ESC (All.), 1229 and Division Bench judgement reported in 2006 (1) ESC 374 (All.) (State of U.P. and others Vs. Chandrika Prasad).**

7. Learned counsel for the petitioner further submits that Division Bench of this court while considering the scope of powers under Rule 8(2) (b) of the Rules observed that Rule 8 is Pari materia with Article 311(1) and (2) of the Constitution of India. The normal rule is that no punitive action entailing consequence of dismissal, removal or reduction in rank would be taken without holding a disciplinary enquiry in order to deprive a person of the aforesaid Constitutional protection and in order to bring the same within the ambit of exception provided in the Constitution. Heavy burden lies upon the State to show that the order has been passed strictly within the four corners of the Statute and all the relevant ingredients have been taken into account.

8. Learned Standing Counsel on the other hand defending the order passed by the disciplinary authority submits that petitioner was found involved in criminal proceedings and was arrested, it was, therefore, not reasonably practicable to hold inquiry. In view thereof the order dated 26.6.2007 invoking provision of Rule 8(2) (b) of the Rules was rightly passed. The reasons have been recorded in the order by the disciplinary authorities, in view thereof order cannot be said to be bad.

9. A perusal of the dismissal order dated 26.6.2007 shows that disciplinary

authority has nowhere mentioned that holding of disciplinary inquiry is not reasonably practicable. On the other hand it appears that order has been passed treating the petitioner guilty of offence alleged to have been committed by him. The disciplinary authority has stated in the order that on the basis of report of Circle Officer, Pilibhit dated 19.10.2006, the heinous act of the petitioner would impair the image of entire police force. The question mark is raised on the integrity of entire police force, in case, the petitioner is not penalised and there is every likelihood of occurrence of indiscipline amongst other members of police force. It has further been recorded that petitioner has been found guilty of heinous and inhumane conduct and person of such criminal mentality is not a fit person to be retained in police force. Police force is a disciplined force and keeping the petitioner in the department will also be against the public interest and discipline of the force. While recording all these findings Superintendent of Police, Pilibhit in one paragraph of dismissal order had stated that It is empowered to remove the petitioner in exercise of powers conferred under Rule 8(2) (b) of the Rules, if it is found not practicable to hold disciplinary inquiry against the delinquent and in the concluding part of the order Superintendent of Police,Pilibhit observed that in exercise of power under Rule 8(2) (b) of the Rules having found petitioner guilty of charges and unsuitable for police force, he is liable to be dismissed.

10. Before proceeding further in the matter it would be appropriate to reproduce the Rule 8(2) (b) of the Rules which provides for dismissal and removal

"8(2) (b) Where the authority empowered to dismiss or removal a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry."

11. The words "some reasons to be recorded in writing that it is not reasonably practicable to hold enquiry" means that there must be some material for satisfaction of the Disciplinary Authority not to hold enquiry. The subjective satisfaction of the authorities is to be based on certain objective facts so as to justify dispensation of the inquiry.

12. The reasons as indicated in the order for not keeping the petitioner in service any more, are (1) First ground was that he was held guilty of the criminal offence in which only charge sheet was submitted at that stage that too on the report of the Circle Officer, Pilibhit, (2) Second ground was that in view of the act which was described as heinous and inhumane act of the petitioner, it would not be appropriate to allow him to retain in service as it would inculcate indiscipline amongst other police officer and (3) third ground was that it would affect discipline of police force and would be against the public interest.

13. The reasons assigned by the disciplinary authority for not holding disciplinary proceedings against the petitioner in the order dated 26.6.2007 cannot be sustained for the reasons that none of them would satisfy subjective satisfaction which was required to be recorded for dispensing with the inquiry. Petitioner was already suspended from service on 3.9.2006 and disciplinary

authority treated him guilty of criminal charges levelled against him of which trial was undergone. This approach of the disciplinary authority is against the principles as laid down by the Apex Court in case of Jaswant Singh Vs. State of Punjab and others (1991) 1 SCC 362 and therefore, order passed by the disciplinary authority cannot be sustained.

14. Before concluding the matter it may be relevant to state that criminal case filed against the petitioner was decided by the Sessions Judge by judgment and order dated 20.7.2007,the petitioner and other accused were honourably acquitted. As the petitioner was acquitted after consideration of prosecution evidences and prosecution had miserably failed to prove the charges levelled against him. Even complaint, which was alleged to have been made by his son, had clearly stated that he had never lodged any complaint. The sessions court in its judgment and order dated 20.7.2007 recorded the finding that language of the complaint clearly shows that it could not have been written by son of the petitioner, who was 17 years old at the relevant point of time, it appears that it was written on the dictation of some policeman. All other prosecution witnesses were declared hostile as they refused to accept the prosecution case that recovery of dead body and other materials were recovered in their presence and hence no reliance on the prosecution story of recovery can be placed. There was no independent witness. The case set up by the police that petitioner had admitted the offence was found not proved. The trial court recorded finding that no disclosure statement was recorded by the police and from their own records, it is apparent that there were various discrepancies in the case set up by the prosecution. After considering all the oral and documentary evidences petitioner was acquitted which will be termed as honourable acquittal. Surprisingly the appellate authority in its order dated 27.3.2008 did not consider the acquittal order dated 20.7.2007 rather rejected the plea taken by the petitioner on the ground that there was report of Circle Officer, Pilibhit dated 22.1.2007 against the petitioner and charge sheet has been filed. The said approach of the appellate authority is illegal.

15. Moreover in view of the above discussion it is clear that power exercised by the Superintendent of Police, Pilibhit under Rule 8(2) (b) of the Rules is contrary to the requirement as laid down in the said Rules. The order of dismissal does not fulfil the requirement of the aforesaid Rule and, therefore, cannot be sustained. The appellate order also cannot survive. Both the orders dated 26.6.2007 and 27.3.2008 are hereby quashed.

16. As suspension order dated 3.9.2006 merged in the order of dismissal order dated 26.6.2007, the dismissal order is set aside. The petitioner shall be reinstated in the service forthwith with all consequential benefits. It is, however, open to the respondent to hold disciplinary enquiry against the petitioner in accordance with law.

17. The writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2013

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 36788 of 2008

Tajammul Hussain ...Petitioner
Versus
State of U.P. and Ors. ...Respondents

Counsel for the Petitioner:
Mohd. Naushad Siddiqui

Counsel for the Respondents:
C.S.C.

Forest Act 1927-Section-68(2)-compounding of offence-Petitioner's tractor loaded with bolder carrying two cubic meters-confiscated on failure of showing Patta and other valid papers-both authorities failed to consider the question of compounding of offence-one Lacs Rs. already deposited with Court-be return back to petitioner after adjusting the amount of companding Rs. 50,000/-petition disposed of accordingly.

Held: Para-15
However, the authorities below committed patent error of law in not considering the question of compounding in accordance with Section 68(2) of the Act. No useful purpose will be served by remanding the matter. Prima facie under the facts and circumstances of the case Rs.50,000/- would be appropriate amount to be directed to be paid by the petitioner under Section 68(2) of the Act.

Case Law discussed:
1993 (2) Callt. Law Times 252; 2006 (3) AWC 2339

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

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

2. This writ petition is directed against order dated 08.05.2007 passed by Authorised Officer/ Regional Forest Officer, Kashi, Vanya Jeev Prbhag, Ramnagar, Varanasi. Through the said order, it was directed that petitioner's tractor and bolders (forest produce) loaded thereupon which had been seized and confiscated would be kept in custody in Chakiya premises and after expiry of period of appeal proceedings for disposal of the tractor and said forest produce would be taken. The said order was passed in Case No.35 of 2005, State of U.P. Vs. Tajammul Hussain and Sri Bihari under Section 26 (g), 41, 42, 52 and 52-A of Forest Act, 1927 as amended by U.P. in 1965 by U.P. Act No.23 of 1965 and in 2000 by U.P. Act No.1 of 2001. Against the said order, petitioner filed Appeal No.23 of 2007 under Section 52-B of the Act. The Prescribed Authority/ Special Secretary to Government of U.P. dismissed the appeal and approved the order dated 08.05.2007, hence this writ petition.

3. The allegation against the petitioner was that in the intervening night of 17/18th April 2005 at about 2.30 A.M., petitioner's tractor was checked and it was found that it was carrying two cubic meters bolder (patra). Bihari was driving the tractor. No permission to take out the bolder was shown by the driver. The tractor was stopped at Sultanpur Marg near Samal Canal and the tractor was coming from Chanuari Pahari Chhitampur Block K.N.-2. Bihari and another person sitting in the tractor, who were sent to the jail, stated that the tractor belonged to the petitioner. Tractor and bolder were seized/ taken in custody. Appellant filed application for release of the tractor and bolder, on which the impugned orders were passed.

4. The authorities below held that it was a case of illegal mining from reserved forest. Petitioner, the owner of the tractor was found to be involved in the case and it was held that his acquiescence was there.

5. In this writ petition on 01.09.2008 following order was passed on the order sheet:

"Standing Counsel is granted three weeks' further time to file a counter affidavit.

The tractor and trolley of the petitioner was seized along with the goods by the authorities. The petitioner filed an appeal, which was also rejected. Consequently, the present writ petition.

From a perusal of the record, I find that the tractor and the trolley was seized on 18th of April, 2005, and in these three years, the condition of the tractor and trolley must have deteriorated. Consequently, no useful purpose shall be served if the tractor remains in the custody of the authorities.

Consequently, I direct the authorities to release the tractor and the trolley within 24 hours from the date of receipt of certified copy of this order subject to the petitioner furnishing a sum of Rs. One lakh by way of security. The District Forest Officer (respondent no.3) will deposit this amount in an interest bearing Account and such deposit would be subject to further orders of the Court.

Certified copy of this order shall be made available to the learned counsel for the petitioner on payment of usual charges within 48 hours."

6. After the above order, the amount of Rs.1 lac was deposited and it was subsequently renewed. Tractor and Trolley were released. The case of the petitioner was that bolders belonged to another person and without his consent or knowledge, his driver was carrying them.

7. As per Section 2(2)(4) of the Act, rock, minerals including limestone and all products of mines or quarries are forest products.

8. Learned counsel for the petitioner has argued that firstly no offence was committed as it is not proved that the bolder was taken out from any reserved forest area. Secondly, petitioner was not aware and even if it is assumed that bolder was being brought from reserved forest area, it was the action of his driver and petitioner was neither aware nor in connivance with the driver. Thirdly, confiscation is optional as the word used in Section 52 A is "may' and not "shall'. Lastly, learned counsel for the petitioner has argued that the seizer was compoundable in view of Section 68(2) which is quoted below:

"*On the payment of such sum of money, or such value, or both, as the case may, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, no further proceedings shall be taken against such person or property."*

9. Learned counsel for the petitioner has cited the following authorities:

10. The first authority is of **P.K. Mondal Vs. State of West Bengal, 1993 (2) Callt. Law Times 252** interpreting Section 59-A of the Forest Act as added by West Bengal and holding that the word used is "may' hence it is the discretion of the authorised officer to pass or not to pass order of confiscation depending upon the facts of the case. Similar is the provision of Section 52-A as added by U.P.

11. The second authority is of **Baddu Vs. State of Madhya Pradesh** given in Writ Petition No.9266 of 2008, decided on 22.03.2011.

12. The third authority is reported in **Bhagwandeen Vs. State of U.P., 2006 (3) AWC 2339**. In the said case it was held that knowledge of the vehicle owner had been held on the basis of presumption, which was not correct.

13. In my opinion, under the facts and circumstances of the case, the authorities below should have considered as to whether it was a fit case for confiscation or not and whether compounding under Section 68 was warranted or not.

14. Learned counsel for the petitioner has most vehemently argued that question of compounding should have been considered in accordance with Section 68(2) of the Act. In my opinion, the other findings regarding knowledge of the petitioner and bolder having been taken from the reserved forest are findings of fact suffering from no such error which may warrant interference in exercise of writ jurisdiction.

15. However, the authorities below committed patent error of law in not considering the question of compounding in accordance with Section 68(2) of the Act. No useful purpose will be served by remanding the matter. Prima facie under the facts and circumstances of the case Rs.50,000/- would be appropriate amount to be directed to be paid by the petitioner under Section 68(2) of the Act.

16. Accordingly, impugned orders are set aside and substituted by a direction to pay Rs.50,000/-. The amount of Rs.1 lac has already been deposited under order of this court. Accordingly, impugned orders of confiscation of tractor and trolley are set aside. Matter is compounded on payment of Rs.50,000/- by the petitioner. The amount of Rs.1 lac has been kept in interest bearing account. Accordingly, it is directed that out of the total amount i.e. the principal amount of Rs.1 lac and the interest which has actually accrued, an amount of Rs.50,000/- shall be adjusted as amount payable by the petitioner under Section 68(2) of the Act as aforesaid and rest of the amount, i.e. Rs.50,000/- of the principal and the total interest accrued thereupon shall at once be returned to the petitioner in no case beyond two months from the date of filing of certified copy of this judgment before the authority where the amount was deposited.

17. Writ Petition is disposed of as above.