ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD8.12.1999

BEFORE
THE HON'BLE SUDHIR NARAIN,J.

Civil Misc. Writ Petition No. 17608 of 1987

Jagdish Prasad ...Petitioner
Versus
The Ist Additional District Judge. Mathura & others ...Respondents

Counsel for the Petitioner:
Shri Ramjee Saxena

Counsel for the Respondents:
S.C.
Shri Janardan Sahai

U.P. Urban Building (Regulation of letting,Rent and Eviction Act, 1972, S.21 (1) (a) & (b) read with u.p,. Urban Buildings (Regulation of letting, Rent & Eviction) Rules, 1972, R.18- Release application by land-lord dismissed-Second application after 3 years on same grounds- Whether barred by res-judicata – No.
Held –

On the facts of the present case it was found that the condition of the building further deteriorated and the need of the landlord further increased. Both the authorities have recorded concurrent finding that the disputed accommodation is in dilapidated condition and is required by the landlord for his personal need. There is no legal infirmity in the findings recorded by them. (Para7)

Case referred
1984 A.L.J. 48
1986 (2) A.R.C. 49

By the Court

1. This writ petition is directed against the order of Prescribed Authority dated 3.5.1985 allowing the application filed by the landlord respondent under Section 21(1)(a) and (b) of U.P. Act No. 13 of 1972 on the allegation that he bona fide requires it for his personal use. The application was contested by the petitioner. The Prescribed Authority has allowed it by his order dated 3.5.1985 and this order has been affirmed by the Appellate Authority on 28.8.1987.

2. I have heard Sri Ramji Saxena learned counsel for the petitioner and Sri Janardan Sahai learned counsel for the respondents.

3. Briefly stated the facts are that respondent no.3 purchased the shop in question from its erstwhile owner on 26.6.1972. He filed application under Section 21(1) (1) (a) and (e) of the Act against the petitioner on 31.5.1997 on the allegation that the shop in question is in dilapidated condition and equerries demolition and reconstruction. It was further stated that after demolition of the shop he will reconstruct it and utilise it for residential purpose as the accommodation with him for his family members is insufficient. The Prescribed Authority rejected the application on 28.3.1978 Respondent no. 3 preferred appeal and the appeal was dismissed on 27.7.1978. After about three years respondent no.3 again filed application for release under Section 21(1) (a) and (b) of the Act on the allegation that the condition of the building has further deteriorated and the members of family have increased and therefore the disputed accommodation be released for demolition and reconstruction and for his bona fide need for residential purpose. The Prescribed Authority on consideration of material evidence on the record allowed the application on 3.5.1985 and released the disputed accommodation. The petitioner preferred and appeal against this order. The Appellate Authority has dismissed it on 28.8.1987.

4. Learned counsel for the petitioner has submitted that earlier the application having been filed on the same grounds and having been rejected, the findings recorded in the earlier proceedings will operate as resjudicata. He has placed reliance upon the decision

Dr.Sita Ram Gandhi Vs. IVth Additional District Judge, Meerut and another, 1984 ALJ 48,wherein it was observed that Rule 18 of U.P. Urban Building (Regulation of Letting. Rent and Eviction) Rules, 1972 (in short the Rules) though restricts a landlord from moving a second application within a year of the dismissal of the first application but it does not rule out the applicability of the principle of resjudicata. The principle behind the resjudicata is different than one which led the legislature to frame Rule 18. The two things should not be mixed up and confused.

5. This case was explained and distinguished in Ram Lila Society Kanpur v. IInd Additional District Judge, Kanpur and others 1986 (2) ARC 49, wherein it was held that if there are additional reasons to file another application, after one year, the second application cannot be rejected merely on the ground that earlier application was dismissed.

In Sita Ram Gandhi's case (Supra) the Supreme Court itself made clear that the changed circumstances may be taken into account in deciding the second application for release made by the landlord.

6. In the matter of need as well as hardship the time is very important factor. The changes occur each day and each month. It is on this principle Rule 18 was framed which provides that where an application of the landlord against the tenant for eviction filed under Section 21 (1) (a) of the Act has been finally allowed or rejected on merits, if second application is filed within a period of six months the Prescribed Authority shall accept the findings in those proceedings as conclusive. This Rule engraved the principle of resjudicata for a fixed period because after some period the changes may itself occur.

7. On the facts of the present case it was found that the condition of the building further deteriorated and the need of the landlord further increased. Both the authorities have recorded concurrent finding that the disputed accommodation is in dilapidated condition and is required by the landlord for his personal need. There is no legal infirmity in the findings recorded by them.

I do not find any merit in the writ petition. It is accordingly dismissed.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: THE ALLAHABAD 14.12.1999

BEFORE
THE HON'BLE D.S.SINHA,J.
THE HON'BLE I.M.QUDDUSI,J.

Civil Misc. Writ Petition No. 36726 of 1991

Prem kumar ...Petitioner
Versus
State of U.P. through the District Magistrate, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Shri Sharad Varma

Counsel for the Respondents:
S.C.
Shri P.K.Mukherji

Self- Employment to Educated Unemployed Youth Scheme, 1985,Cl. 19(10) read with U.P. Public Money (Recovery of Dues) Act, 1972-Loan granted under the scheme on 31.3.1984-Recovery sought as arrears of land revenue scheme declared as 'State Sponsored Scheme' under U.P. Act 23 of 1972 w.e.f. 17.10.1985- Hence recovery, held, illegal.
Held –
The loan advanced to the petitioner having been sanctioned on 31st March 1984, and not after 17th October 1985, the recovery certificate under the U.P. Public Money (Recovery of Dues) Act 1972 for realisation of the loan as arrears of land revenue could not be issued in view of sub-clause (10) of clause 19 of the Scheme. (Para 7)

By the Court

1. Heard Shri Sharad Verma, learned counsel appearing for the petitioner, Shri Sanjay Goswami, learned Standing Counsel of the State of U.P., representing the respondents No.1 and 2 and Shri Pradeep Kumar Sinha, holding brief of Shri P.K. Mukerji, learned counsel of the contesting respondent No.3.

2. Through the impugned citation dated 26th November, 1991, a photocopy whereof is annexure-2 to the petition, issued at the behest of the contesting respondent No.3 a sum of Rs.35,400 plus recovery charges is sought to be recovered from the petitioner. Feeling aggrieved by the impugned citation, the petitioner has filed this petition under Article 226 of the Constitution of India.

3. The contention of the petitioner is that the recovery proceeding in pursuance whereof the impugned citation has been issued is wholly illegal being contrary to sub-clause (10) of Clause 19 of the Scheme for providing Self Employment to Educated Unemployed Youth (SEEUY) where under the amount sought to be recovered was given to him by way of loan. A copy of the Scheme is to be found on record as Annexure-S.A. 1 to the supplementary – affidavit filed by the petitioner.

4. It is not disputed that the money sought to be recovered from the petitioner as arrears of land revenue was advanced to him by way of loan by the respondent No.3 under the Scheme for providing Self Employment to Educated Unemployed Youth (SEEUY) and it cane be recovered as arrears of land revenue only if the Scheme is a "state Sponsored Scheme" contemplated under the U.P. Public Money (Recovery of Dues) Act, 1972, hereinafter called the Act.

Sub-clause (10) of clause 19 of the Scheme runs as under:-

"The Govt. of Uttar Pradesh has declared the scheme as State sponsored under U.P. Public Money (Recovery of Dues) Act, 1973 (U.P. Act 23 of 1972) amended by U.P. Public Money (Recovery of Dues) Amendment Act, 1975 (U.P. Act 17 of 1975) as from the 17th October 1985. The Recovery Certificate can be filed in respect of the loans sanctioned after 17th October 1985 and not in respect of loans sanctioned and disbursed before 17th October 1985."

5. A bare perusal of sub-clause (10) of Clause 19 of the Scheme, quoted above, reveals that loan sanctioned and advanced before 17th October 1985 can not be recovered as arrears of land revenue in as much as the Scheme was declared "State Sponsored Scheme" under the Act only with effect from 17th October,1985.

6. In paragraph 4 of the petition it is asserted that the loan was sanctioned on 31st March 1984. Paragraph 11 of the counter-affidavit filed on behalf of the respondent No.3 contains reply to the averments made in paragraph 4 of the petition. The factum of sanction of the loan to the petitioner under the Scheme (SEEEUY) on 31st March 1984, when the scheme was not declared to be a "state Sponsored Scheme" under the Act, is not denied.

7. The loan advanced to the petitioner having been sanctioned on 31st March 1984, and not after 17th October 1985, the recovery certificate under the U.P. Public Money (Recovery of Dues) Act 1972 for realisation of the loan as arrears of land revenue could not be issued in view of sub-clause (10) of Clause 19 of the Scheme.

8. Therefore, the impugned recovery proceedings in pursuance whereof impugned citation has been issued is bad being in contravention of sub-clause (10) of Clause 19 of the Scheme and can not be sustained.

9. In the result, the petition succeeds and is allowed. The citation dated 26th November,1991 (Annexure-2 to the petition) is quashed. There is no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2000

BEFORE
THE HON'BLE A.K.YOG, J.

Civil Misc. Writ Petition No. 17719 of1997.

Narendra Veer Singh Tomar ...Petitioner
Versus
Adhyaksha, Jila Panchayat, Jila Parishad Etah. & another ...Respondents

Counsel for the Petitioner:
Mr. B.P.Singh

Counsel for the Respondents:
S.C.
Mr. N. Chaudhry

Article 226 of the Constitution of India- the request of the petitioner to change inquiry officer at the earliest opportunity was turned-down. This was not just and proper – the principles of natural justice have been violated- the termination order based on a vitiated inquiry report cannot be sustained and accordingly set aside.
Held –
The request of the petitioner to change the Enquiry Officer at the earliest opportunity was turned down. This is not just and proper. Consequently, the termination order, which is based on a vitiated Enquiry Report cannot be sustained and, accordingly, set aside.(Para 12)
Cases referred-
AIR 1993 SC p.2155

By the Court

1. Both the Respondents are represented by their counsel Shri N.S. Chaudhary, Advocate and parties have exchanged Counter and Rejoinder Affidavits. Writ Petition is finally decided at Admission stage.

2. This petition has been filed against the order of termination dated 07th May 1997 (Annexure-1 to the Writ Petition) dismissing from service of concerned Zila Parishad of Etah.

3. A preliminary objection has been raised on behalf of the Respondents on the ground of alternative remedy under Rule 42,U.P.Zila Parishad Rules, 1070.

4. The learned counsel for the Respondents submitted that this petition should not be entertained on any ground whatsoever since the Petitioner had an alternative remedy under Rule 42 Uttar Pradesh Zila Parishad Services Rules, 1970.

5. This position has been disputed by the learned counsel for the petitioner and it is argued that this Court should not forestall the hearing of the petition on the ground of alternative remedy when the ground taken in the Writ Petition for challenging the impugned order is, apart from other grounds, violation of principles of natural justice.

6. Shri B.P. Singh learned counsel for the petitioner places reliance on AIR 1993 SC 2155 Ratan Lal Sharma versus Managing Committee (Paragraph 11)

7. Without recording facts in detail, it will suffice to mention that the only point raised by learned counsel for the petitioner at this stage was relating to the prejudice and personal interest of Sher Singh. The person, who was appointed as Enquiry Officer in the instant case and who submitted an adverse report against the Petitioner which is the basis of termination.

8. Relevant facts have been stated in Paragraph 10 of the Writ Petition but the same has not been categorically and specifically

denied in Paragraph 6 of the Counter Affidavit filed on behalf of Respondent Ns.1 and 2. Learned counsel for the petitioner further submitted that Respondent No.2 was the Head of the Committee. Which dealt with the actions in question in respect of which charge has been framed against the petitioner and therefore, according to him said Sher Singh could not act impartially.

9. Objection to this effect was taken at the earliest by the Petitioner as is evident from the Following:-

1. Explanation of the Petitioner dated o4th February 1997 – Writ Annexure – 7 (particular page 44 of the Writ Paper Book).

2. Petitioner's letter dated 13th February 1997- Writ Annexure 8 (Particular page 54 of the Writ Paper Book). Objection was thus taken at the earliest and the post opportunity- as required by the ratio in the case reported in (1997) ISCC 111 (Pr15)

10. It is a cardinal principal of Rule of Law – that justice need not only be done but also seems to have been done.

11. I find substance in the contention of the Petitioner.

12. Consequently the impugned order of termination is vitiated. It will not be out of place to mention that the request of the Petitioner to change the Enquiry Officer at the earliest opportunity was turned down. This is not just and proper. Consequently, the termination order, which is based on a vitiated Enquiry Report cannot be sustained and accordingly, set aside. In view of the statement made on behalf of the Petitioner that he will be retiring in a couple of years I direct the Respondents and any other competent concerned authority to appoint Enquiry Officer afresh with direction to complete enquiry Officer afresh with direction to complete enquiry within two months as prayed by learned counsel for the petitioner from the date of receipt of certified copy of this judgment subject to the condition that Petitioner shall cooperate in the enquiry. The Enquiry Officer so appointed shall be an officer other than Sher Singh – Respondent No. 2. This judgment shall, however, Not be taken in any way casting aspersion upon the impartiality or integrity of said Sher Singh.

13. During pendency of the Enquiry. Petitioner will be entitled to his future salary. Passing of this Judgment shall abide by the resultant order passed later. It will be open to the employer to take work or not from the Petitioner. Question regarding Payment of arrears of salary or any future salary after final decision in the matter shall abide by the final decision in pursuance of the present judgment.

14. Writ Petition stands allowed subject to the objection directions made above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD JANUARY 25, 2000

BEFORE
THE HON'BLE R.R.K. TRIVEDI, J.
THE HON'BLE M.C. JAIN, J.

Civil Misc. Writ Petition No. 24999 of 1997

R.K. Dubey, son of Late Sri Pandit B.N. P. Dube ...Petitioner

Versus

State of U.P. through Chief Secretary & others ...Respondents

Counsel for the Petitioner:
Mr. Ashok Khare

Counsel for the Respondents:
S.C.

Article 206 of the Constitution of India-the petitioner has to be treated at par with his junior. There is no justification in denying the pay scale to the petitioner which is being paid to his juniors. Held-para 8 that the

petitioner would be placed at per with his junior Sri Yashpal for promotion in the highest pay scale Rs. 5900/---6700/- with effect from 11.8.87 (from which date the said promotion has been granted to the petitioner's junior Sri Yashpal) and he would be entitled to the arrears of salary in the said pay scale with effect from 11.8.87.

By the Court

1. The petitioner retired from service on 31.12.87. He was initially appointed as Naib Tehsildar in 1953 and was promoted as officiating Dy. Collector and his appointment was notified in the gazette dated 23.3.62. He was confirmed on the said post of 4.1.75. As per G.O. dated 5.10.85, he was allotted seniority of the recruitment year 1970 instead of 1961. He had earlier filed of Civil Misc. Writ Petition No. 13140 of 1992 which was decided on 28.2.92 and would be given all the consequential benefits including the retrial benefit in accordance with law within a period of three months from the date of presentation of certified copy of the order before the authority concerned in the government. The correctness of the said judgment was challenged by the State Government by means of Special Leave petition before the Supreme Court Which was dismissed on 16.8.95. Ultimately, by the orders dated 6.11.96, he was granted notional promotion in the senior pay scale with effect from 2.7.1973 in the special grade pay scale with effect from 15.11.1984 but no. arrears were paid to him and it was mentioned in the orders that the promotions were notional nature. However, he was not granted promotion in the highest pay scale Rs. 5900/- 6700/-. His seniority has been fixed just above Sri Yashpal. The promotion to the highest pay scale Rs.5900/- - 6700/- was granted to his junior Sri Yashpal with effect from 11.8.1987, but the Government declined to promote him (petitioner) in the said pay scale by rejecting his representation by order dated 19.6.1997, annexure 17 to the writ petition, on the ground that the promotion in the highest pay scale Rs. 5900/- - 6700/- was granted notionally to the petitioner's junior Sri Yashpal by order dated 26.11.1991, viz., after the retirement of petitioner and as such there could be no question of granting promotion to the petitioner in the highest pay scale Rs. 5900/--6700/- even notionally.

2. The petitioner is aggrieved by such order passed by the Government on 19.6.1997 and has prayed for quashing the same. According to him, as he was in service on 11.8.1987 with effect from which date highest pay scale Rs. 5900/- - 6700/- has been granted to his junior Sri Yashpal, he is also entitled to the said pay scale with effect from 11.8.1987. It is also his contention that his junior Sri Yashpal has been paid the arrears in the highest pay scale Rs. 5900/--6700/- with effect from 11.8.1987. He claims that he is also entitled to the said arrears with effect from 11.8.1987 in the highest pay scale Rs. 5900/--6700/- till the date of his retirement as also for back arrears for his promotion in the senior pay scale with effect from 2.7.1973, special pay scale with effect from 10.1.1978 and higher pay scale with effect from 15.4.1984. He has prayed for being awarded interest also. He has also prayed for a writ in the nature of mandamus for grant of promotion to him in the Indian Administrative Services.

3. At the time of admission of this writ petition, it was ordered as below on 1.8.1997:

"We are not satisfied that the petitioner is entitled to promotion to Indian Administrative Services. However, his claim for higher pay scale in Provincial Civil Services from the date on which it was granted to Sri Yashpal, as well as his claim for arrears of salary in provincial Services is liable to be considered. To this extent this writ petition is entertained. Learned Standing Counsel prays for and is granted one month time to file counter affidavit. The case be listed thereafter."

4. So, having regard to the above orders passed at the time of admission of the writ

petition, the precise question for decision is whether the petitioner is entitled to claim the highest pay scale of Rs. 5900/- to 6700/- as granted to his junior Sri Yashpal with effect from 11.8.87 with arrears consequent upon his promotion in senior pay scale with effect from 10.1.1987 and higher pay scale with effect from 15.4.84.

5. Counter and rejoinder affidavits have been exchanged. The Stand of the respondents (State) is that the highest pay scale Rs. 5900/- -6700/- cannot be granted to the petitioner as he had already retired on 31.12.1987 viz., 26.12.91 on which date the said pay scale was granted to the petitioner's junior Sri Yashpal when he was still in services (Sri Yashpal retired on 31.3.92.) It also been refuted that any arrear were paid to Sri Yashpal in the pay scale Rs.5900/-6700/- with effect from 11.8.87 as his promotion also to the said grade was on notional basis. It has been submitted that Sri Yashpal was paid arrears in the pay scale Rs.5900/- 6700/- with effect from 1.1.1991 only when he was still in service. The petitioner could also not claim the arrears for his promotion in senior pay scale with effect from 2.7.73 special grade pay scale with effect from 10.1.78 and higher pay scale with effect from 15.11.84 as the same had been granted to him on basis by orders dated 6.1.96. subsequent to his retirement on 31.12.87.

6. We have heard the petitioner in person, who has submitted written arguments also, as well as Sri Ashok Mehta, learned Chief Standing Counsel on behalf of the respondents. Obviously, the thrust of the Petitioner is that he has to the treated at per with his junior Sri Yashpal. We are of the opinion that since the highest pay scale Rs. 5900/--6700/- has been granted to the petitioner's junior Sri Yashpal with effect from 11.8.87, on which date the petitioner was also in service (having retired on 31.12.87), there is no justification whatsoever in denying the said pay scale to the petitioner with effect from 11.887 till the date of his retirement on 31.12.87. The mere fact that the promotion to Sri Yashpal in the said pay scale of Rs. 5900/- -6700/- was granted under an order dated 26.11.91 (subsequent to the retirement of the petitioner) cannot be a ground for the denial of the said pay scale to the petitioner with effect from 11.8.87, on which date he was also admittedly in service. The situation would have been different, had the said pay scale being granted to the petitioners junior Sri Yashpal with effect form a date subsequent to 31.12.87 on which the petitioner had retired. Equals have to be treated alike. The seniority of the petitioner was admittedly settled above Sri Yashpal. Therefore, he is entitled to the same pay scale and benefits which have been granted to his junior Sri Yashpal.

7. In the resultant effect, the impugned order dated 19.697 passed by the State Government, Annexure 17 to the Writ Petition, denying the pay scale of Rs. 5900- -6700/- to the petitioner with effect from 11.8.87 cannot be sustained and has to be quashed. Its effect would be hat the petitioner would be treated at par with Sri Yashpal in the matter of sanction of pay scale Rs. 5900/- -6700/- with effect from 11.8.87 and he would be entitled to the arrears in the said pay scale with effect form 11.8.87 till the sate of his retirement on 31.12.87 if the same have been paid to his junior Sri Yashpal. Consequential pension and retrial benefits shall follow. As regards the payment of arrears to the petitioner in the senior pay scale with effect from 2.7.73, special grade pay scale with effect from 10.1.78 and higher pay scale with effect from 15.1.84 also again he has to be treated at per with his junior Sri Yashpal, meaning thereby that his salary should be re fixed in the said pay scales and the arrears should be paid to him, in case the same have been paid to Sri Yashpal. To say in different words, the petitioner shall not be entitled to any such arrears as also the arrears consequent to his promotion in the pay scale Rs. 5900/- -

6700/- with effect from 11.8.87, only if no such arrears have been paid to his junior Sri Yashpal on the premise that such promotions were notional. We do not find the petitioner to be entitled to any other relief excepting of being placed at par with Sri Yashpal in the matter of promotion and payment of arrears of salary as detailed here in above.

8. For the reasons mentioned above. We quash the order dated 19.06.97 passed by the State Government (Annexure 17 to the writ petition). We direct that the petitioner would placed at per with his junior Sri Yashpal for promotion in the highest pay scale Rs. 5900/--6700/- with effect from 11.8.87 (From which date the said promotion has been granted to the petitioner's junior Sri Yashpal) and he would be entitled to the arrears of salary in the said pay scale with effect from 11.8.87 till the date of his retirement on 31.12.87 in case the said arrears have actually been paid to his junior Sri Yashpal and his pension and retrial benefits would be refixed accordingly. He would also be entitled for the re fixation of his salary in the senior pay scale with effect from 10.01.78 and higher pay scale with effect from 15.11.84 and would get the arrears accordingly in case the salary of his junior Sri Yashpal has been re fixed in the said pay scales and arrears have been paid to him. The necessary exercise would be completed and orders would be issued in this behalf by the State Government within a period of three months from the date of the presentation a certified copy. of this order before the Secretary (appointment Department) Lucknow.

9. Under the circumstances of the case, there would be no order as to costs.

10. The petition stands decided in the above terms.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.1.2000

BEFORE
THE HON'BLE R.H. ZAIDI, J.

Writ Petition No. 3614 of 2000

M/s Bansal Chemical Corporation ...Petitioner
Versus
Presiding Officer, Employee's Provident Fund Appellate Tribunal, New Delhi and Others ...Respondents

Counsel for the Petitioner:
Shri S.D. Pathak
Shri Dinesh Pathak

Counsel for the Respondent:
Shri Satish Chaturvedi

Employee's Provident Funds and misc. provisions Act, 1952, S.7-A (1)- In proceedings under the Act an order dated 2.6.95 under S.7-A(1) (b) was passed—No appeal filed against it – Appeal against order determining amount partly allowed—case remanded for taking decision after affording opportunity to the parties to produce evidence—Appellate Authority held that coverage has already become final petitioner challenged the same in present writ.

Held –

In the present case, the question of coverage of establishment was duly decided by order dated 2.6.95 against the petitioner, no appeal against the said order was filed by the petitioner . The appeal as stated above, was filed only against the order dated 18 .2. 98 where by the amount due against the petitioner was determined by the competent Authority, as it is evident from the memo appeal, a copy of which is contained in Annexure –12 to the writ petition. In the memo appeal the petitioner might have taken ground regarding coverage also but the same cannot be deemed to an appeal against the order dated 2.6.95 , as the validity of the said order was not challenged

by the petitioner by filing an appeal under Section 7 (1) of the Act. (para 8)

By the Court

1. Heard learned counsel for the petitioner and Mr. Satish Chaturvedi appearing for the respondents.

2. By means of this petition filed under Article 226 of the Constitution of India, petitioner prays for issuance of writ, order or direction in the nature of Certiorari quashing the order dated 5.7.99 where by the appeal filed by the petitioner U/s 7(1) the Employee's Provident Funds And Miscellaneous Provisions Act, 1952 against the order dated 18.2.98 has been allowed an the case has been remanded to Respondent no.2 with the observations that the question of coverage has already become final.

3. It appears that in the proceedings under the aforesaid Act order dated 2.6.95 was passed in exercise of powers under Clause (b) of Sub-section (1) of Section 7-A, against the said order no appeal was filed by the petitioner. Respondent no.2, therefore, proceeded to determine the amount due from the petitioner in exercise of power under clause (b) of sub-section (1) of Section 7-A. Order was there after passed on 18.2.90. It is no necessary to state all facts relating filing writ petition in this court and the orders passed therein. It would suffice to state that appeal was filed against the order dated 18.2.98 only, by the petitioner. The appeal filed by the petitioner has been allowed by impugned judgement and order. Operative portion of the said order is quoted below:-

> " The appeal is partly allowed. The impugned order is set aside to the extent that determination may be done by a speaking order disclosing the basis of determination may be done by a speaking order disclosing the basis of determination. The appellants will be afforded one opportunity to produce all the records and statements extracted from those records to make out their own case quite clear. If because of some emergency the y cannot produce all the records on one day, one more opportunity of one month may be given, failing which the case may be proceeded ex-party and decided afresh.
>
> 2. The coverage has already become final. The case is remanded back for re-determination in the light of observations made above."

4. It is evident from the order that the appeal filed by petitioner has been partly allowed and case has been remanded to respondent no.2 to take decision in the light of the observation made in the said order after affording an opportunity to the parties to produce evidence and in accordance with law

5. The petitioner is aggrieved only by last direction given by the appellate court to the effect that the question of coverage has already become final.

6. Learned counsel for the petitioner vehemently urged that respondent no.1 was not right in making the said observation in as mush as in appeal question of coverage as well as determination of amount both were raised. Respondent no.1, thus, was not right in observing that the question of coverage has become final. On the other hand, learned counsel appearing for contesting respondents submitted that order dated 2.6.95 it self was appealable but no appeal against the said order was filed. The said order has thus become final. The petitioner, therefore, has got no right to challenge validity of said order by filing the present petition.

7. I have considered submissions made by learned counsel for the parties and also perused the record.

Sub-section (1) of Section 7-A of the Act reads as under:-

"7-A, Determination of moneys due from employers--(1) The Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, By order,--

(a) in a case where dispute arises regarding the applicability of this Act to an establishment, decide such dispute; and

(b) determine the amount due from any employer under any provision of this Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be,

And for any of the aforesaid purposes may conduct such inquiry as he may deem necessary.]"

8. A reading of the aforesaid section reveals that it provides that the authority concerned may, be order in case where a dispute arises regarding the applicability of the Act to an establishment decided such dispute and may also determine the amount due from any employer under any provision of the Act, the Scheme or the Family Pension Scheme or the Insurance Scheme, as the case may be. There may be cases in which the question of coverage is decided in negative. In such cases, the question of determination of amount due from any employer under any provision of the Act or Scheme referred to in clause- (b) will not arise. There may also be the cases in which both aforesaid questions may be decided by different orders on the same date or different cases. A party feeling aggrieved by an order of question of coverage of the establishment under the provisions of the Act has got a right to file an appeal under Section-7(I) of the Act. In the present case, the question of coverage of establishment was duly decided by order dated 2.6.95 against the petitioner, no appeal against the said order was filed by the petitioner. The appeal, as stated above, was filed only against the order dated 18.2.98 where by the amount due against the petitioner was determined by the Competent Authority, as it is evident from the memo appeal, a copy of which is contained in Annexure-12 to the writ petition. In the memo appeal the petitioner might have taken ground regarding coverage also but the same cannot be deemed to an appeal against the order dated 2.6.95, as the validity of the said order was not challenged by the petitioner by filing an appeal under Section 7(1) of Act.

9. Submissions made by learned counsel for the petitioner to the contrary, therefore, cannot be accepted. In my opinion, respondent no.1 was justified in observing that the order dated 2.6.95 relating to the coverage of establishment under the provisions of the Act has become final.

10. I do not find any illegality or infirmity in the impugned order. No case for interference under article 226 of the Constitution of India, is made out.

11. Writ petition fails and is dismissed in limine.

Petition Dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.1.2000

BEFORE
THE HON'BLE D.K. SETH, J.

Civil Revision No. 41 of 2000

Revision against the judgment and order dated 2.11.99 passed by Shri Ziley Singh, VIIIth Additional District Judge, Sharanpur of dismissing the application 17-C2/1 filed by the revisionist under Section 10 read with section 151 C.P.C. in Misc. Case No. 21 of 1995.

Smt. Meena Bhandari ...Revisionist
Defendant/ Applicant
Versus
Smt. Krishna Kumari ...Plaintiff/
Respondent/Opp. Parties

Counsel for the Revisionist:
Shri A.M. Zaidi

Counsel for the respondent:

Code of civil procedure, 1908, Ss. 10 read with S. 151-Scope and Applicability.
Held –
In the present case suit no. 333 of 1994 being a suit for injunction cannot involve the issue with regard to the question of grant of probate in respect of a will, even if the parties may be same and may claim under same title. Since the issues involved are altogether different and the issues are not being directly and substantially in issue in the previously instituted suit, Section 10 cannot be attracted.
The ground that documents cannot be used simultaneously in to suits, cannot be a ground for staying of the suit even if section 151 is attracted. (Para 12 & 13)
Cases Referred :
A.I.R.1933Crl887
A.I.R.1938 Mad 602
A.I.R.1954 Pat 314
A.I.R.1966 Cal 382
A.I.R.1962 SC 527
A.I.R.1988Cal 183 at P. 191
A.I.R.1953 Bom 117
A.I.R.1976 Del 60

By the Court

1. The order dated 2.11.1999 passed by the learned Additional District Judge VI court, Sharanpur in Misc. case no 21 of 1995 has since been challenged in this revision petition.

2. The impugned order was passed on an application under section 10 read with Section 151 of code of Civil Procedure of stay of Misc. case No. 21 of 1995 in view of pendency of O.S. No. 333 of 1994. The said application under Section 10 is Annexure 5 to the said application in support of the revision petition. The prayer made in the said application was to the extent that further proceedings of Misc. case No. 21 of 1995 should be stayed till the disposal of O.S. No. 333 of 1994 pending before the learned Civil Judge, Sharanpur.

3. The present proceeding is a proceeding for probate of a will filed before the learned District Judge since been transferred to learned Additional District Judge, in the said order dated 2.11.1999 the learned Additional district judge had pointed out the issues involved in O.S. No. 333 of 1994 are not identical with those of Misc. case No. 21 1995. The O.S. No. 333 of 1994 was for injunction between the parties, here the case no. 32 of 19955 is for grant of probate of a will. Thus, the issues involved in two proceedings are altogether different apart form the fact that issue involved in the probate proceedings cannot be adjudicated upon in Suit No. 333 of 1994 by the learned Civil Judge, who had no jurisdiction of adjudicate upon such question. On these grounds, he had given the finding that the question does not come within the purview of Section of 10 of C.P.C.

4. Learned counsel for the petitioner contended that since the parties are same and the subject matter of the suits is same, therefore, section 10 shall apply in full force. He further contends that even if Section 10 may not apply, Section 151 may be attracted in the interest of justice. He further contends that since the same set of documents and papers would be relied upon by the parties in their defence, in such circumstances under section 151 further proceedings of Misc. case No. 21 of 1995 should be stayed.

5. I have heard the learned counsel at length.

6. Section 10 applies in a situation where there is a previously instituted suit between the same parties or between the parties under whom they or any of them claim litigating under the same title in which the matter in

issue is directly and substantially involved in issue in such previously instituted suit in a court of competent jurisdiction.

7. Thus, there are four essential conditions for attracting the application of section 10 C.P.C. (1) That the matter in issue in the second suit is also directly and substantially in issue in the first suit; (2) that the parties in the second suit are the same or parties under whom they or any of them claim litigating under the same title; (3) that the court in which the first suit is instituted is competent to grant the relief claimed in the subsequent suit; (4) that the previously instituted suit is pending (a) in the same court in which the second suit is brought, or (b) in any court in India, or (c) in any court beyond the limit; of India established or continued by the Central Government, or (d) before the Supreme Court.

8. The above proposition can find support form the decisions in the case of Kilipada Banerji vs. Charubala Dasee (AIR 1933 Cal. 887); Somasundaram Chettiar vs . A. Venkata Subbayya (AIR 1938 mad. 602); Nune Singh vs. Munni Nath Singh (AIR 1954 Patna 314); Jugometal Trg. Republike vs. rungta and Sons (AIR 1966 Cal. 382).

9. In Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hira Lal (AIR 1962 SC 527) it was held that Section 10 is clear definite and mandatory. The court in which a subsequent suit is instituted is prohibited form proceeding with its trial in certain specified circumstances. Section 10 does become inapplicable on the ground that the previously instituted suit was vexations or otherwise.

10. In J.C. Roy Chowdhary vs. M/s Krishna Lapn Board Mills (AIR 1988 Cal. At page 191) it was held that when neither the parties nor the issues are the same and when the subject matter in controversy is not the same, section 10 has no application. In Manohar Lal (supra) the Apex Court had held that where requisite conditions for stay under Section 10 is not fully satisfied court cannot exercise its inherent power. Section 151 can be applied in a case where the court thinks that the suit is an abuse of the process of the Court or has been filed mala fide, or it's a vexatious suit. Such a view as taken in Jai Hind Iron Mart vs Tulsiram Bhagwandas (AIR 1953 Boon 117); M/s Anand Silk Store vs. M/s Shree Ram Silk Mfg. Co. and others (AIR 1976 Delhi 60)

11. In order to attract application of Section 10 all the four ingredients referred to above are required to be fulfilled. Now let us examine how far the above four ingredients are fulfilled in the present case.

12. In the present case suit No. 333 of 1994 being a suit for injunction cannot involve the issue with regard to the question of grant of probate in respect of a will, even if the parties may be same and may claim under the same title. Since the issues involved are altogether different and the issues are not being directly and substantially in issue in the previously instituted suit, Section 10 cannot be attracted.

13. The ground that documents cannot be used simultaneously in two suits, cannot be a ground for staying of the suit even if section 151 is attracted. There are ways and means and procedure laid down for production of certain documents form record of the Court to that of another, which may be resorted to by the parties, if they are so advised. This cannot form a ground for stay of proceedings, which is otherwise outside the purview of Section 10 C.P.C.

Even if such a question arise in the previously instituted suit for injunction, such issue cannot be adjudicated upon by the learned Civil Judge in a suit for injunction in the absence of jurisdiction conferred on him with regard to grant of probate of a will. Thus, it cannot be said that issues involved in the probate proceedings could be imagined to be

involved directly and substantially in issue in a previously instituted suit in a court of competent jurisdiction.

For all these reasons, I do not find any infirmity in the order passed by the learned Additional District Judge since impugned.

The petition, therefore, fails and is accordingly dismissed. No. costs.

A certified copy of this order shall be given to the learned counsel for the parties on payment of usual charges within a week.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.1.2000

BEFORE
THE HON'BLE A.K. YOG, J.

Civil Misc. Writ petition No. 9027 of 1996

Constable No. 860020697,
Rama Kant Shukla ...Petitioner
Versus
Union of India Through the Director General of Border Security Force, New Delhi and others ...Respondents

Counsel for the Petitioner:
Shri A.N. Tripathi

Counsel for the Respondents:
S.C.
Shri S.K. Rai
Shrui V.P. Singh
Shri S.N. Srivastava

Constitution of India, Article 226 read with Border Security Force Act, 1968, S.117- Petitioner-Counstable chargesheeted and dismissed from service – Order challenged by petitioner – Preliminary objection as to availability of alternative remedy under S.117 of B.S.F. Act – Parties agreeing to avail the same Petition dismissed with suitable direction.

Held –

Keeping in mind the entirety of the circumstances of the present case particularly the fact that petitioner has been dismissed form service, it will be in the fitness of things and the ends of justice demands that he be allowed to persue his alternative remedy. In view of the above, petitioner may avail his alternative remedy under Section 117, Border Security Force Act, 1968 in accordance with law an which Respondent shall not oppose on ground of delay/laches or limitation, as expressed before this court and noted above. (Para 13 & 15)

Cases referred :
1997 (I) U.P.L.B.E.C. 236 (D.B.)
.A.I.R. 1988 All 36
1988 All 47
A.I.R. 1985 S.C. 1289
JT 199+(5) SC1
1968 U.P.L.B.E.C. 252
A.I.R. 1966 SC 1313

By the Court

1. This petition has been filed by one Constable, Rama Kant Shukla, serving in Border Security Force. Admittedly, provisions of Boarder Security Force Act, 1968 are applicable to the facts of the present case. Petitioner was serving somewhere in the State of Jammu and Kashmir on 21.6.1995 where some incident alleged to have taken place. A charge-sheet was served upon the petitioner on 25th July, 1995 under 09 Battalion Boarder Security Force, where he was serving. He was put under summary trial by Summary Security Force Court as contemplated under the aforesaid Act. Evidence was led at Gujrat as is evident from the Annexures filed along with the writ petition.

2. The dismissal order dated 23.3.2996 (Annexure-12 to the Writ Petition) was passed and promulgated at Gujrat as contemplated under aforesaid Act.

3. A Supplementary Affidavit was filed by the Petitioner when this Court disclose the cause of action. In para 3 of the Supplementary Affidavit it is stated that petitioner had left place of his posting (at

Gujrat) and no document has been filed to show when he left Gujrat after obtaining permission form the concerned competent authorities. The Supplementary Affidavit further discloses that petitioner was at Allahabad (through according to him for his treatment) where he received order of dismissal, which was redirected form his village address at Pratapgrah in State of U.P.

4. The respondents filed at Counter Affidavit and a Rejoinder Affidavit has also been filed.

5. The learned counsel for the Respondent, at the outset raised two preliminary objection – namely, his Court has no jurisdiction as neither cause of action nor any part of it had arisen within territorial jurisdiction of this Court and secondly petitioner has an adequate and efficacious remedy available under Section 117 Border Security Force Act. 1968.

6. I have heard Sri A.N. Tripathi, learned counsel for the petitioner and Sri S.K. Rai, Advocate, learned counsel representing the Respondent.

7. On the Preliminary objection, learned Counsel for the Respondents Sri Rai has placed reliance on the following decisions:

1. 1997(1) U.P.L.B.E.C 236 (DB) (para 6 to 8) (Chabi Nath Rai Versus Union of India and others)

2. A.I.R. 1988 Allahabad 36
(Daya Shankar Bhardwaj Vs Chief of the Air Staff, New Delhi & Others)

3. 1988 Allahabad 47
(Rakesh Dhar Tripathi Versus Union of India and other)

4. A.I.R. 1985 SC 1289
(State of Rajsthan and other vs. M/s Swaika Properties and another).

5. JT 1994(5) SC 1 (para 7)
(Oil & Natural Gas Commission vs Utpal Kumar Basu and others)

8. Learned counsel for the petitioner intially attempted to distinguish those case and seek to place reliance on the decision reported in **1986 U.P.L.B.E.C.252, State of Madhya Pradesh and others Versus Bhaskar Dutt Misra and others** (Hon'ble N.D. Ojha, J.) placing reliance on the decision reported in **A.I.R. 1966 SC 1313 (State of Punjab Versus Amar Singh).**

9. Cases reported in State of Madhya Pradesh (Supra) and State of Punjab Supra) have been taken note of by the Division Bench of this Court in the case of Chabi Nath Rai (Supra).

10. In the case of Chabi Nath Rai (Supra) this Court considered Various decisions and laid emphasis on the distinction between cause of action and the right of action, It has also been held that jurisdiction was dependent upon the facts determined on the plea where cause of action arises and jurisdiction cannot be determined on the basis of place where the persons gets right of action i.e. where the order is actually served.

11. There is no reason not to accept the view expressed in the case of Chabi Nath Rai (Supra) on the question of jurisdiction.

12. Learned counsel for the petitioner fairly submitted that in case petitioner is allowed to avail alternative remedy, he will not press this petition and avail the alternative remedy.

13. Keeping in mind the entirety of the circumstance of the present case particularly the fact this petitioner has been dismissed form service; it will be in the fitness of things

and the ends of justice demands that he be allowed of persue his alternative remedy.

14. Learned counsel, on behalf of the Respondent has no objection to the above, if concerned authority promptly and without undue delay decides on merit on being approached.

15. In view of the above, petitioner may avail his alternative remedy under Section 117, Border Security Force Act. 1968 in accordance with law on which Respondent shall not oppose on ground of delay/laches or limitation, as expressed before this court and noted above.

16. In this given case parties have exchanged Counter and Rejoinder affidavits hence this court should not non suit Petitioner on this ground – particularly when alternative remedy has become time barred.

17. In this instant case (when this Court has no jurisdiction) it is not competent to issue direction to respondents. But in the instant case situation is different. Respondents and noted above, non suits the Respondent from taking objection of delay, if petitioner approaches for relief under Section 117, Border Security Force Act, 1968.

18. In view of the above no party has grievance if the rights of the petitioner are adjudicated on merit under Section 117, Border Security Force Act, 1968.

19. In the result, Writ petition fails and is dismissed in limine solely on the Ground of alternative remedy. Dismissal of writ petition or any observation made in this judgment shall not affect or prejudice either of the parties in any manner while matter is being considered and decided under Section 117 Border Security Force Act. Petitioner shall not be non-suited on ground of delay, time consumed in writ shall be excluded, if he approaches under Section 177 of the Act within three months form today.

20. No order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2000

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA,J.

Civil Misc. Writ Petition No. 9761 of 1997

Nar Singh son of Ram Ashrey...Petitioner
Versus
Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Tripathi

Counsel for the Respondents:
S.C

Section 48 of U.P. Consolidation of Land Holding Act No revision is maintainable against interlocutory order. The Settlement order of Consolidation has full jurisdiction to grant or refuse the stay. Held(Para 6)

The Settlement officer consolidation was acting as a court and had full jurisdiction to grant or refuse the stay, which is inherent power of the court and if an order was passed against the party, it was interlocutory order during the pendency of the appeal and no revision under section 48 of the U.P. consolidation of Land Holdings Act was maintainable.

Cases referred
1993 RDP 30

By the Court

1. By means of this writ petition, the petitioner has sought for quashing of the impugned orders dated 25.2.1997 and 19.6.1995 passed by the respondent nos. 1 and 2 respectively (Annexures 4 and 2 to the writ petition). The revision which was filed by the petitioner before the Deputy Director of

Consolidation was against the order passed by the Settlement Officer Consolidation exercising powers of the appellate authority. The appellant court in the appeal filed under Section 11 of the U.P. Consolidation of Land Holdings Act granted interim order. Which was challenged by the petitioner in Revision under Section 48 of the Act.

2. Learned counsel for the petitioner urged that there is no doubt that the order passed by the appellate authority is interlocutory order but the nevertheless the order passed by the appellate authority is not under the provisions of the U.P. Consolidation of Land Holdings Act for grant of stay order nor the provisions of the Code of Civil Procedure are applicable, therefore, the appellate authority had no jurisdiction to pass the stay order. In support of his arguments, Sri Tripathi placed before the Court a decision reported in 1993 RD 30 in which the Court has held that stay order can be granted and he argued that this decision is applicable only in those cases where there are special facts and circumstances but no special facts and circumstances exist in the present case. His further submission is that if the authority who has no jurisdiction to pass the stay order has passed the order it shall be deemed that the said order has been passed mechanically, and not by applying mind, therefore, the order liable to be quashed.

3. After hearing the learned counsel for the petitioner. I am of the view that the contention raised by the petitioner is not correct. From the perusal of the provisions of Section 48 it is clear that no order of interlocutory in nature can be challenged under Section 48 of the Act. Section 48 of the U.P. Consolidation of Land Holdings Act, which is quoted below:-

(1) Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness legality or propriety of any order (other than an interlocutory order) passed by such authority in the case of proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as the thinks fit.

(1) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3)

(2) Any authority subordinate to the Director of Consolidation may after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1)

Explanation – (1) For the purpose of this section, Settlement Officer Consolidation, Consolidation Officers, Assistant Consolidation Officer, Consolidator and Consolation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation –(2) For the purposes of this section the expression interlocutory order in the relation to a case or proceeding, means such order deciding any matter arising in such case or proceedings or collateral thereto as does not have the effect to finally disposing of such case or proceedings."

4. From the perusal of this Section it is crystal clear that the Director of Consolidation can no t entertain revision against the interlocutory order under Section 48 of the U.P. Consolidation of Land Holdings Act. Section 11(2) of the U.P. Consolidation of Land Holdings Act shows that Settlement Officer Consolidation hearing an appeal under sub-section (1) shall be deemed to be a Court of competent jurisdiction. Section 11 of the U.P. Consolidation of Land Holdings Act is also quoted below:-

Section-11

Appeals- (1) Any party to the proceedings under Section 9-A aggrieve by an order of the Assistant Consolidation Officer or the Consolidation Officer under that section, may within 21 days of the date of the order, file an appeal before the Settlement Officer,. Consolidation who shall after affording opportunity of being heard to the parties concerned give his decision thereon, which except as otherwise provided by or under this Act, shall be final and not be questioned in any court of law.

(2) The Settlement Officer, Consolidation haring an appeal under sub-section(1) shall be deemed to be a court of competent jurisdiction, anything to the contrary contained in any law for the time being in force notwithstanding"

5. Thus, if the aforesaid two provisions are read together it is apparent that the Settlement Officer Consolidation was acting as a court and had full jurisdiction to grant or refuse the stay, which is inherent power of the court and if an order was passed against the party, it was interlocutory order during the pendency of the appeal and no revision under section 48 of the U.P. Consolidation of Land Holdings Act was maintainable, therefore, the present writ petitions filed against the order rejecting the revision against the interlocutory order, has no force and is accordingly dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLD. JANUARY 10,2000

BEFORE
THE HON'BLE RAVI S. DHAVAN,J.
THE HON'BLE ALOK CHAKRABARTI,J.

Special Appeal No. 255 of 1996

Special Appeal against the order dated 31.1.1996 passed by Hon'ble Mr. Justice R.B. Mehrotra, J. in writ Petition No. 20174 of 1986

Chief of the Army Staff, Army Headquarters & others ...Appellants/Respondents
Versus
Laxman Giri , Ex. Havaldar No. 9212544, ...Respondent/Petitioner

Counsel for the Appellants:
Shri Shishir Kumar

Counsel for the Respondent:
Shri R.N. Rai.

Chapter 8 Rule 5 of the Rules of the Court Lustful male chauvinist passions violating the privacy of a woman, does not call for any interference by the High Court .(Held Para 7)

What a petitioner, Laxman Giri, as Havaldar, did to the wife of a solider , is worse than a conduct unbecoming of a gentleman. The less said the better. Lustful make chauvinist passions violating the privacy of a woman, does not call for any interference by the High Court

By the Court

1. This special appeal has been filed against the judgment dated 31 January 1996 on Writ petition No.20174 of 1986. Laxman Giri Ex. Havaldar No. 9212544 V. The Chief of the Army Staff. Army Headquarters. New Delhi and others. The petitioner, Laxman Giri a non-commissioned officer. Found himself facing charges before a summary court marital for being drunk after a Bara Khana and thereafter while proceeding from the mess to the lines. Having grabbed the wife of Sepoy Raghav Singh and placing one hand on her mouth and with the other fondled her breast. The incident saw immediate action the Officer Commanding. 15 Mahar Regiment. To which the petitioner, Laxman Giri Havaldar, was attached. The matter was investigated summary of evidence was recorded. The petitioner was charged, tried and was sentenced to (a) reduction in rank, (b) suffer rigorous imprisonment for nine months which sentence would be carried out by confinement in civil prison and (c) dismissal from service.

2. Apparently, the submissions as were made on behalf of the petitioner were that for want of procedure, in conformity with Section 120 of the Army Act, 1950. The entire proceedings were bad. At the very outset, this Court places on record that the leaned judge was in error in the judgment. On record of the writ petition lies a supplementary affidavit, affirmed on 5 March 1995. Which read with the record produced shows that there was full compliance of section 120 of the Army Act read with rule 130 and the reference, in fact, had been made as the Army Act rules and regulations so required. The matter had been processed on a reference being made to the judge Advocate General Department, before trial. The proceedings had been signed by Colonel, Deputy judge Advocate General Headquarters 10 Corps. The army had taken a decision that the matter calls for an immediate attention and thus without delay, the summary of evidence had been recorded. In the circumstances, this aspect of the record was not noticed by the learned judge and to that extent the judgment is in error.

3. Besides, one needs to keep in mind that there are four kinds of court martial (a) general courts-martial; (b) district courts-martial; (c)summary general courts-martial; and (d) summary courts-martial[1]. The present case is of summary court-martial which can be held by the Commanding Officer of any corps, department or detachment of the regular army.[2] In the circumstances of the present case, trial by summary court-martial was not out of place nor bad for lack of jurisdiction. The satisfaction whether there is or "there is no grave reason for immediate action" and whether "detriment to discipline" will be affected, an aspect mentioned in Section 120, will be of the Officer concerned. Maliciousness, mala fides and violation of the rule of natural justice is not a circumstance in issue in the present case.

4. Besides, as soon as the proceedings were initiated ultimately to culminate in a verdict by summary court martial, the petitioner on 18 November 1985 had a statement recorded that whatever he had done, was under the influence of liquor and he was prepared to accept any punishment and in future he would not dink or do any such act. What act the petitioner did as a consequence of being drunk, stands recorded in the proceeding. The proceedings were yet to culminate but had begun on a complaint of Raghave Singh, Sepoy, making allegations under Section 354 of the Indian Penal Code, 1860. The complaint was, to the effect, that the petitioner, Laxman Giri a non-commissioned officer, had assaulted or used criminal force with his wife intent to outrage here modesty. As a consequence of this complaint, the summary of evidence was recorded on 18 November 1985. The petitioner, Laxman Giri elected to cross-examine Smt. Sanjari Devi,. Wife of Sepoy, Raghav Singh, First, the statement of Smt. Sanjari Devi was recorded who stated that on Diwali day, i.e. on 12 November 1985, there was Bara Khana in the unit where all families had attended. After the Bara Khana was over, the wives with their husbands proceeded to the family lines. Enroute, an unknown individual grabbed her from the rear and with one hand closed her mouth and with the other hand pressed her breast. She was carrying her two year old baby. She cried for help to her husband who was walking ahead of her. In the cross-examination, The petitioner asked questions. It would be best to reproduce the questions and answers:-

Q. When I caught you which hand did I use to close your mouth?

A. With the right hand.

Q. When this happened where were your hands?

[1] Section 108 of the Army Act, 1950
[2] Section 116 of the Army Act, 1950

A. I was holding my 2 year old baby with both the hands.

Q. What did you do when I tried to molest you?

A. I held my child with one hand and pushed you away with the other."

5. If this was not enough, in February 1986 the petitioner attempted to compromise with the husband of Smt. Sanjari Devi, In this compromise, recorded in Hindi the incident is accepted. One glaring feature of this compromise is that the petitioner, Laxman Giri was a non-commissioned officer. He was seeking a compromise with a sub-ordinate, an ordinary soldier. Raghav Singh whose wife he had molested was only a sepoy.

6. The balance which remains on record is of two aspects (a) a drunken non-commissioned officer and (b) molestation of a soldier's wife. Within the military, regimentation calls for stricter standards in viewing or make eyes on the wives of colleagues. Even incivility is treated as statutory misconduct. There is a code of ethics in the military .An officer including a Junior Commissioned Officer or Warrant Officer should they behave so as to present a conduct unbecoming of a gentleman, may be convicted by court martial or cashiered. This is so provided in Section 45 of the Army Act, 1950

7. What the petitioner, Laxman Giri, as Havaldar, did to the wife of a soldier, is worse than a conduct unbecoming of a gentlemen. The less said the better. Lustful male chauvinist passions violating the privacy of a woman, does not call for any interference by the High Court.

8. The judgment on the writ petition is, any case, in error and, thus, set aside. The special appeal is allowed. The writ petition is dismissed with costs throughout.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.1.2000

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA,J.

Civil Misc. Writ Petition No. 2670 of 1978

Hari Singh ...Petitioner
Versus
The Deputy Director of Consolidation Etah camp at Mathura and others...Opp. parties

Counsel for the Petitioner:
Shri N.S. Choudhary
Shri R.N. Singh
Shri S.N. Singh

Counsel for the Respondent:
S.C.
Shri G.N. Verma

Constitution of India, Article 226 readwith U.P. consolidation of holdings Act, S.48-Scope.
Held –
It is true that entry in revenue records must be in accoriance with the provisions of Land record Manual. The oral evidence was adduced which was not considered by the consolidation officer and the settlement officer consolidation at all and the Deputy Director of consolidation simply mentioned the names of the witness and not discussed the oral evidence or its evidentiary value rather decided the case on the basis of entries which according to him was not in accordance with law.
I am of the view that it is fit case in which the deputy director of Consolidation should be directed to decide the matter afresh in accordance with law. There cannot be any doubt that the deputy director of Consolidation has no jurisdiction to discuss the evidence. (para 14 & 15)

Case Referred
1994 RD 290
1996 RD 216
1999 RD 44
1996 RD 51
1981 RD 291
WPNO:10103of 1975 decided on 22.2.1999
WPNO:1860 of 1976 decided on 18.12.1995

By the Court

1. This writ petition under Article 226 of the Consolidation of India has been filed by the petitioner for quashing the judgement and order dated 25.2.1978 passed by the respondent Joint Director of Consolidation(Annexure-to the writ petition)

2. Brief facts as stated in the writ petition for the purpose of the present case are that plot nos. 338,339,349 and 351 were recorded in the basic year Khatauni in the name of respondent no. 4, Goswami Raghunath Lalji Maharaj and the name of the petitioner was recorded in class –9. The petitioner filed an objection under Section 9(2) of the U.P. Consolidation of land holdings act and claimed that he be declared sirdar on the basis of the adverse possession. The case of the petitioner was contested by the opposite party on the ground that the petitioner is not in possession, therefore, the entry of class –9 may be rejected. It is stated that the petitioner in order to prove his possession, he filed various revenue receipts of the years 1962,1963,1965,1973,and 1975 etc. and produced the witnesses namely himself and Bhola Singh. The Consolidation Officer dismissed the objection of the petitioner and directed that the name of the petitioner should be expunged. Being aggrieved against the judgement and order of the Consolidation Officer the petitioner preferred an appeal before the Settlement officer consolidation who allowed the appeal of the petitioner and declared the petitioner to be Sirdar over the plots in dispute. Therefore, the respondent no. 4 filed a revision before the deputy director of consolidation and the deputy director of consolidation allowed the revision setting aside the finding recorded by the Settlement Officer consolidation .The petitioner has proffered the present writ petition against the aforesaid judgement of the deputy director of consolidation

3. Sri S.N. Singh, learned counsel for the petitioner urged his first point that the deputy director or consolidation had no right to set aside the findings recorded by the Settlement Officer consolidation in favour of the petitioner while exercising powers under section –48 of the U.P. Consolidation of land holdings Act. The second point urged by the learned counsel for the petitioner is that if the deputy director of consolidation was of the view that the findings of fact should be set aside, then he should have remanded the case to the evidence afresh and should not have re-appraised the evidence in exercise of the revisional jurisdiction. Third point urged by the learned counsel for the petitioner is that when the petitioner had taken plea of adverse possession and had produced oral as well as documentary evidence, then should not have ignored the same.

4. Sri S.N. Singh learned counsel for the petitioner, in support of his first point submitted that the deputy director of consolidation had limited jurisdiction under section 48 of the U.P. consolidation of land holdings Act. His submission is that the deputy director of consolidation has committed error in law in reversing the finding recorded by the Settlement Officer consolidation to the effect that the petitioner was in possession and has acquired Sirdari right for that purpose he had placed reliance on 1994 RD 290(Ram Dular versus deputy Director of Consolidation). In this case the power of the deputy director of consolidation under section 48 of the U.P. Consolidation of land holdings Act has been discussed ,where it is said that it is clear that the director had power to satisfy himself as to the legality of the proceeding or of correctness of the proceedings of correctness of the proceedings of correctness , legality or propriety of any order , other –than inter locutory order passed under, the said Act . but in considering the correctness ,legality or propriety of the order or regularity thereof ,it cannot be assumed to itself ,of those facts. It has to considered by

the authority as a fact finding authority by appreciating for itself of those facts. It has to consider whether the legally admissible evidence had not been considered by the authorities in recording a finding of fact or law or conclusion reached by it is based on no evidence, any patent illegality or impropriety had been committed or there was any procedural irregularity, which goes to the root of the matter, had been committed in recording the order of finding.

5. On the basis of the aforesaid judgement of the supreme court, the learned counsel for the petitioner has urged that when the appellate court considered the revenue entry and recorded the finding of fact that the petitioner was in possession, then if the deputy director of consolidation wanted to reserve the finding, he should have considered the oral evidence also.

6. Sri S.N. Singh learned counsel for the petitioner has further placed reliance on 1996 RD 216 (Krishna Pratap Singh vs. deputy Director of Consolidation Faizabad and others). In this case, it was held that the jurisdiction with the deputy director of consolidation stands vested under the provisions contained in Section-48 of the Act, cannot be deemed to be such as appellate power as is vested in appellate authority envisaged under the Act. The revisional power contemplated under Section 48 of the U.P. Consolidation of land holdings Act, therefore must fall short of the appellate power of interference with a finding of fact where the finding of fact depends on the credibility of the witness there being a conflict of oral evidence lead by the parties. The other case on which the reliance has been placed by the learned counsel for the petitioner is 1999 RD 44 (Jan Mohammad Versus the Deputy Director of Consolidation Allahabad and others) where the reliance has been placed on Ram Dular's case (supra) deciding the powers of the deputy director of consolidation. The other case on which the reliance has been placed is 1998 R.D.51 (Subedar Tiwari Versus the Deputy Director of Consolidation Varanasi and others) where it has been held that when two consolidation authorities decided the case concurrently, then it was appropriate that the deputy director of consolidation again appreciate the entire evidence.

7. On the point of consolidation of oral evidence, Sri S.N. Singh has placed reliance on 1981 RD 291 Triloki and others Versus Ram Iqbal and others earlier not in accordance with law does not means that other evidence regarding possession cannot be looked into. His submission is that if the settlement officer consolidation has held that the petitioner had acquired right on the basis of the entries of 1371 F to 1382F and the Deputy Director of Consolidation was of the view that the revenue entries were in accordance with the provisions of land manual as the dairy of lekhpal was not there nor there was mention on the basis of whose order the petitioner was recorded in class-9, it was the duty of the Deputy Director of Consolidation to have examined the oral evidence as oral evidence is also the evidence of possession . The Deputy Director of Consolidation has not mentioned the same, therefore the order is illegal .

8. Sri G.N. Verma learned counsel appearing for the respondent replied the argument of the learned counsel for the petitioner. He made contention that Section-48 of the U.P. Consolidation of land holdings Act was amended on several times. Initially, there was limited power with the Deputy Director of Consolidation but subsequently, he has been given ample power to satisfy himself as to the legality of the proceedings or as to the correctness of the proceedings as to correctness, legality or propriety of any order other than interlocutory order passed by the subordinate authorities under the Act and in case, the Deputy Director of Consolidation has summoned the record, he should appraise

the finding of fact on the basis of evidence available on record. His submission is that from the perusal of the order passed by the Deputy Director of Consolidation is will be clear that he had held that the revenue entries were not in accordance with law, therefore, the Deputy Director of Consolidation was right in ignoring those entries in favour of the petitioner, since he has mentioned the oral evidence also, especially the statement of Lekhpal who has stated that the petitioner was not in possession therefore, the finding of the Deputy Director of Consolidation does not suffer from any error much less error apparent on the face of record and the finding is supported on the basis of evidence and cannot be without jurisdiction. He further submitted that the deputy director of consolidation placed reliance on the oral evidence also and came to the conclusion came to the conclusion that the petitioner has failed to prove his possession. Sri Verma has placed reliance on a judgment delivered by me on 22.2.1999 in Civil Misc. Writ Petition No.10103 (Ram Ratan Versus Deputy Director Consolidation and another. This judgment has considered the original Section-48 of U.P. Consolidation of Land Holdings Act as well as amendments made subsequently and then came to the conclusion that the Deputy Director of Consolidation had jurisdiction to peruse the record and the finding of fact also.

9. Sri S.N. Singh, in reply to the arguments of Sri G.N. Verma has submitted that the Deputy Director Consolidation should not have acted also as a trial court to reappraise the evidence on record and for the purpose he has placed reliance on the judgment delivered in Writ petition No. 1860 of 1976 (Ram Deo Versus Deputy Director of Consolidation and others) decided on 18.12.1995 by Hon. A.P. Singh, J. as he then was.

10. After hearing the learned counsel for the parties, I am of the view that before discussing other points, it is necessary to quote the provisions of section 48 of the Consolidation of Land Holdings Act as it was originally enacted and was subsequently amended. The relevant provisions of Section-48 of U.P. Consolidation of Land Holdings Act is quoted below.

" 48 Revision and reference- (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken, Where he is of the opinion that a Deputy Director of Consolidation has-
(i) exercised jurisdiction not vested in him in law; or

(ii) failed to exercise the jurisdiction vested in him; or

(iii) acted in the exercise of his jurisdiction illegally or
with substantial irregularity;
and as a result of which substantial injustice appears to have been caused to a tenure holder, and he may, after affording reasonable opportunity of hearing to the parties concerned, pass such orders in the case or proceedings as he thinks fit"

11. There was an amendment in the said section by the Act of 38 of 1958 which reads as under:-

"48. Power of Director Consolidation to call for record and to revise order. –The Director of consolidation may call for the record or any case if the officer (other than the arbitrator) by whom the case was decided appears to have exercise a jurisdiction so vested, or to have acted in the exercise jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with substantial irregularity and may pass such orders in the case as it thinks fit."

12. Section 48 was again amended by U.P. Act no. VIII of 1963, which reads as follows:-

(1) Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order (other than an interlocutory order) passed by such authority in the case of proceedings, may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section(3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1).

Explanation:- For the purpose of this section Settlement Officer Consolidation, Consolidation Officers , Assistant Consolidation Officer, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation."

13. From a perusal of the judgement of Consolidation Officer it is apparent that only question which was to be decided was as to whether the petitioner acquired Sidari right on the basis of the adverse possession. The Consolidation Officer considered the entries of 1371 F to 1382Fand came to the conclusion that entry of 1371Fis not in accordance with the rule, therefore, he first year entry is no in accordance with the rules. For the 1372 F the Consolidation Officer found the petitioner's name is entered in column no. 5Varg –9 but there is no khasra of 1372F and Khatauni to prove that the name of the petitioner was ordered to be recorded in class 9 by the Supervisor Kanoongo, therefore on the basis of the illegal entry, he cannot be held to be Sirdar. It is significant to mention that the Consolidation Officer has not committed mistake in not considering the evidence but the appellate court was of the view that in Khasra of 1371F to 1378F the name of the petitioner is entered in remarks column and his name is entered in 1372Fin Khatauni in Varg-9 therefore the petitioner has acquired Sirdari right He also came to the conclusion that on Smt. Padmawti was entered as Original tenant, thereafter the name of respondent no. 4 Goswami Raghunath Lalji Maharaj was entered as original tenure holder but there is no record as to how the respondent no. 4 became the owner in place of Smt. Padmawati . But none of the two persons took any action to get the entry of class 9 expunged therefore the petitioner has acquired Sirdari right. It is also significant to mention here that Settlement Officer Consolidation any oral evidence nor he has mentioned the entries 1371F to 1382F are in accordance with the Land Record Manual or not. The Deputy Director of Consolidation in the opening part of the judgement has mentioned the names of the witnesses examined on behalf of respondent no. 4 namely Amar Singh Lekhpal and Rama Kant Arora He has also mentioned that the petitioner himself examined and one Bhola Nath and further held that the entry of 1371f, is not in accordance with the law as the procedure for issuance of P.A. –10 was not as opted and further the entry of 1372f. is without any order of the competent authority . He has considered the statement of Bhanwar Singh Lekhpal on the point of possession. He has observed that the Lekhpal has said that Hari Singh is not possession. He has further observed that the oral evidence can not stand against the documentary evidence. He has also made observation that it was for the petitioner to prove that his entry was made after adopting the procedure of issuance of P.A.-20. He has held that entry is in accordance with law.

14. It is clear from the judgement that he has not discussed the statement of the petitioner's witness namely. Bhola Singh and Hari Singh himself, rather he has simply

mentioned their names. The respondents have filed counter affidavit along with the statement of Hari Singh .The petitioner along with the supplementary affidavit has filed the certified copies of the statement of himself and one Bhola Singh and also statement of Amar Singh Lekhpal and Rama Kant Arora. From the perusal of the aforesaid statement, it is apparent that these witnesses deposed on oath regarding the possession over the land in question therefore, their statements cannot be said to be irrelevant or of no value. From a perusal of the judgement of the Deputy Director of Consolidation, as stated above, it is clear that he has not considered the oral evidence in details rather has only mentioned the names of the witnesses. It is true that entry in revenue records must be in accordance with the provisions of Land Record Manual. The oral evidence has also got evidentiary value. In the present case, the oral evidence was adduced which was not considered by the Consolidation Officer and the Settlement Officer Consolidation at all and the Deputy Director of Consolidation simply mentioned the names of the witnesses and not discussed the oral evidence or its evidentiary value rather decided the case on the basis of entries which according to him was not in accordance with law.

15. I am of the view that it is a fit case in which the Deputy director of Consolidation should be directed to decide the matter afresh in accordance with law. The question as to whether the Deputy director of Consolidation had jurisdiction to re-appraise the evidence has already been answered by me in the case, referred to above (Rama Ratan case), therefore, there cannot be any doubt that the Deputy Director of Consolidation has no jurisdiction to discuss the evidence. I, therefor allow the writ petition and set aside the judgement and order dated 25.02.78 passed by the respondent no. 1, Annexure –3 to the writ petition and remand the case to Deputy Director of Consolidation to decide the matter afresh in accordance with law. There will no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.1.2000

BEFORE
THE HON'BLE M.KATJU, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil misc. writ Petition No. 9951 of 1994

Harpal Singh ...Petitioner
Versus
State Public Services Tribunal, Bench No. 5, & others ...Respondents

Counsel for the Petitioner:
Shri Yar Mohammad

Counsel for the Respondent:
S.C.

Article 226 of the Constitution of India –the petitioner was not guilty of any financial irregularities or any other serious misconduct but he was guilty of negligence Punishment of termination is disproportionate to the offence – order quashed. - (Held- Para 13)
The punishment given to the petition is disproportionate to the offence. At best it was a case of negligence on the part of the petitioner and not a case where he indulged in any financial irregularity or committed serious misconduct. Dismissal order was disproportionate to the offence.

By the Court

1. This writ petition has been filed against the impugned order of dismissal dated 23.1.1987 Annexure 7 to the petition and the order dated 30.10.1087 dismissing the appeal vide annexure 8 to the writ petition and the impugned order dated 12.11.1993 passed by the U.P. Public Tribunal Annexure 9 to the petition dismissing the petitioner's claim petition.

2. Heard learned counsel for the parties.

3. The petitioner was appointed as constable in the year 1980after a selection against a permanent post in the G.R.P constable cadre. It is alleged in paragraph 2 of the petition that he served the department sincerely, honestly and diligently at Fatehpur railway station. However on 24.4.1986the petitioner was served with a charge sheet by the Dy. S.P. Railways, Varanasi alleging that on 10.1.1986 the petitioner was on duty on three platforms i.e. platforms no. 1,2and 3 at Fatehpur railway station from 6 p.m. to night. On that very day i.e. on 10.1.1986 at about 11.24p.m. Toofan Express came from Kanpur and stopped for five minutes at Fatehpur station one Smt. Lilawati who was suffering from labour pain alighted at Fatehpur railway station alongwith her luggage, but her husband could mot get down from the train at Fatehpur and the train started . It is alleged that Smt. Lilawati was tortured and murdered but the petitioner did not report about this incident although he arrived back from his duty at 0.15 a.m. on 11.1.1986 at G.R.P station Fatehpur .It is alleged that due to his negligence Smt. Lilawati was misbehaved with and murdered. True copy or the charge sheet is Annexure 1 to the petition. In paragraph 4 of the petition it is stated that there is no mention In the charge sheet about the time and place of the place of the incident and the detail about the alleged misbehavior with Smt. Lilawati.

4. On receiving the above charge sheet the petitioner moved applications dated29.04.1986 30.04.1986and14.05.1986 before the enquiry officer to supply him the copies of the preliminary enquiry report, statement of witnesses therein general diary entries and other papers connected with the murder case, Panchayatnama. F.I.R statement of complainant Nanak Prasad and those of witness before the C.I.D True copies of the applications are Annexure 2,3and 4 of the petition. However, it is alleged 6 of the petition that the enquiry officer only allowed the petitioner of make inspection of the preliminary enquiry file but the copies of the documents demanded by the petitioner was not supplied nor he was allowed to insect those documents. In paragraph 7 of the petition it is alleged that the petitioner also requested the enquiry officer for summoning the complainant Nanak Prasad husband of Smt. Lilawati but this request was also turned down.

5. In these circumstances the petitioner submitted a reply to the charge sheet on 14.10.1986. True copy of the reply is Annexure-5.

6. In paragraph 9 of the petition it is alleged that the enquiry officer without placing on record the petitioner's explanation to the charge sheet and without summoning Nanak Prasad submitted his report to the superintendent of Police on 31.121986 vide Annexure 6 to the petition. G.R.P then issued a show cause notice to the petitioner alongwith the report and the petitioner submitted reply vide Annexure 6(A). Therefore the superintendent of police, G.R.P. passed the impugned order dated23.1.1987 dismissing the petitioner vide Annuxure 7 to the petition. The petitioner's appeal before the D.I.G. was rejected on 30.10.1987 vide Annuxure 8 to the petition. The claim petition before the Tribunal was also dismissed vide judgement dated12.11.1993.True copy of the judgement is annexure 9 to the petition. True copy of the A.I.R is Annexure 10 to the petition.

7. In paragraph 14 of the petition it is alleged that the complainant Nanak Prasad was an important witness and had he been summoned by the enquiry officer he could have identified the real culprit and the petitioner would not have been made a scope goat.

8. In paragraph 15 it is alleged that the charge sheet does not mention about the time or place of misbehavior in the incident nor does it show that the petitioner was not present at the platform and even the correct version of the complainant as revealed in the F.I.R. is not mentioned therein. In paragraph 16it is alleged that it does not stand to reason that the lady was misbehaved and with and murdered at the platform itself as no one can dare to commit such a heinous crime at the platform. Before the enquiry officer the prosecution examined certain witness but none of them deposed that after the arrival of Toofan Express on platform no. 2 at 11.24p.m. Smt. Lilawati was either seen on the platform or was misbehaved or murdered . In fact her dead body was found near the outer signal.

9. In paragraph 19 of the petition it is alleged that the enquiry officer did not disbelieve the statement of constable clerk Mukteshwar Singh to the effect that the information regarding the incident was sent to the S.O at his residence on 11.1.1986 at 5 a.m. through sentry constable Satya Narain Upadhyay. It was submitted that while on the one hand the enquiry officer disbelieved the statement of constable Nagendra Ram saying that as he was on sentry duty could not have accompanied the Station Officer to the platform to see off Dr. Sharma and Magistrate, he did not apply the same test in the statement of Mukteshwar Singh. It is also alleged that the evidence of constable Chauthi Ram was wrongly brushed aside by the enquiry officer .In paragraph 20 it is stated that the Station Officer, G.R.P Fatehpur had in his statement in the preliminary enquiry stated that he had seen off Dr. Ramesh Chandra Sharma and Sri J.P. Singh Munsif Magistrate, Khaga and after departure of the train he went straight to his quarter but in his statement in the criminal case he gave a different version. The Station officer Sri D.P Singh was also suspended in connection with the same incident but he was reinstated in February 1987 with the condition that the enquiry may go on.

10. In paragraph 21 it is stated that in the sessions trial it came on record that the complainant Nanak Prasad had come back from Khaga to the G.R.P thana on 11.1.1986 on 3.a.m.to make a report about the disappearance of his wife and the luggage and that the S.O. was informed about the incident at 3.40 a.m. but the S.O. sent verbal orders to the constable Moharrir to stop the G.D. and not to do anything in the matter unless he arrived at the thana and himself came to thana at. 7a.m..It is also on record that the F.I.R was not registered and no action was taken for two days and hence there was public movement and the trains were stopped and stones were hurled at the G.R.P station. It is alleged that as a result of inaction of the station Officer that the petitioner was suspended just to pacify the angry mob of people. The station Officer Sri D.P Singh was also suspended but later on reinstated and no further enquiry was made him or constable Ram Raj Misra as recommended by the C.I.D.

11. In paragraph 22 of the petition it is alleged that there was no eye witness of the occurrence and the alleged last seen evidence did not find support from the statement of the witness and the F.I.R. was manipulated and ante-timed by the first investigating officer whose statement and version was found to be false by the C.I.D. In paragraph 23 it is alleged that the S.O. Sri D.P. Singh was present at platform no.2 when Toofan Express arrived at Fatehpur on 10.1.1986 at 11.24 p.m. It is alleged that it was also on record that the sentry constable Nagendra Ram had accompanied tha S.O to the alongwith the luggage of Dr. Saheb and the Munsif Magistrate. Neither the Station officer nor the sentry constable Nagendra Ram deposed that the deceased lady was seen alighting with labour pain at platform. The petitioner against him as the Station Officer, Sri D.P. Singh or constable Ram Raj Misra was spared.

12. A counter affidavit has been filed and we have perused the same .In paragraph 8 of the counter affidavit it is alleged that the petitioner was found to be irresponsible in his duty and because of indiscipline and carelessness he was found guilty of the charge and he was rightly dismissed. In paragraph 14 of the counter affidavit it is stated that all the genuine documents have been provided to the petitioner as per rules and also had been allowed for inspection of the preliminary enquiry file and other documents. In paragraph 17 it is stated that the enquiry officer has touched every corner of the legal aspect in completing the enquiry and there is no illegality in the enquiry report.

13. It is not necessary to go into the merits of the incident in question and examine whether the finding of guilt against the petitioner was justified or not. In our opinion, the punishment given to the petition is disproportionate to the offence. At best it was a case of negligence on the part of petitioner and not a case where he indulged in any financial irregularity or committed serious misconduct. Hence on the facts and circumstances of the case we are of the opinion that the dismissal order was disproportionate to the offence. Hence the petition is allowed. We quash the order dated 23.1.1987 as well as the appellate order and the impugned order of Tribunal and direct that the petitioner shall be reinstated within two months of production of a certified copy of this order before the authority concerned but he will be given a severe warning and he shall be given only half his back salary for the period from the date of termination till the date of reinstatement. However, he will be given continuity of service and all other consequential benefits.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 24.1.2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE SHITLA PD. SRIVASTAVA,J.

Civil Misc. Writ Petition No.3864 of 2000

Avadhesh Kumar Sharma ...Petitioner
Versus
Union of India through Secretary Ministry of Defence , New Delhi and others ...Respondents

Counsel for the Petitioner:
Shri N.K. Dwivedi

Counsel for the Respondents:
S.C.

Appointment--Selection as Mazdoor in C.O.D.- No mention in application from applicant that he was facing criminal trial- Hence selection cancelled- subsequent acquittal Effect.
Held-(Para3)

In our opinion when the petitioner was acquitted in the criminal case it has to be deemed in law that in fact he was never involved in any criminal case. It is settled Law that every statute ordinarily operates prospectively (unless expressly made retrospective) where as every judgment of a court of law operates retrospectively (unless expressly made prospective). The only material against the petitioner was the criminal case in which he was acquitted. Since he has been selected he must now be allowed to join duty.

Case relied on;
1997 (2) U.P.L.B.B.C. (20)

By the Court

1. Heard learned counsel for the parties.

2. The petitioner is challenging the impugned orders of the Central Administrative Tribunal dated 26.2.1997 and

24.12.1999 Annexures 8&9 to the writ petition.

3. The petitioner applied for appointment as Mazdoor in the Central Ordinance Department, Kanpur and thereafter he was interviewed and selected on the post of Mazdoor by letter dated 7.1.1989 Annexure 2 to the petition. However, in the relevant form the petitioner did not mention that he was facing a criminal case under Section 147/323/352/504 I.P.C. which was later converted into Section 307 I.P.C. Hence his selection was cancelled vide Annexure 3 to the petition. In that Criminal case he was acquitted wide judgment dated 7.7.1989 true copy of which is Annexure 4 to the writ petition. Hence he made representation dated 4.8.1999 vide Annexure 5 to the writ petition stating that he has been acquitted in the criminal case and hence he should be permitted to join duty. He made another representation dated 5.9.1989 vide Annexure 6 but he was informed by letter dated 12.10.1990 that he can be considered as a fresh candidate as and when the vacancies are released. The petitioner has alleged that there is no other case pending against him. He filed a petition before the Central Administrative Tribunal which was dismissed and the review application was also dismissed. Hence this writ Petition. In our opinion when the petitioner was acquitted in the criminal case it has to be deemed in law that in fact he was never involved in any criminal case. It is settled law that every statute ordinarily operates prospectively (unless expressly made retrospective) where every judgment of a court of law operates retrospectively (unless expressly made prospective). The only material against the petitioner was the criminal case in which be was acquitted. Since he has been selected he must now be allowed to join duty.

4. A similar view was taken by a Single Judge of this Court in Qamrul Huda Vs. Chief Security Commissioner 1997 (2) UPLBEC 1201 and we fully agree with the aforesaid decision. In the circumstances this petition is allowed. The impugned orders dated 26.2.1997 and 24.12.1999 are quashed. A mandamus is issued to the respondents to appoint the petitioner as Mazdoor within six weeks of production of a certified copy of this order in accordance with law in pursuance of selection letter dated 7.1.1989.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2000

BEFORE
THE HON'BLE R.H.ZADI, J.

Civil misc. Writ Petition No. 3636 of 2000

Raja Ram Singh ...Petitioner
Versus
The District Magistrate, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Shri A.P. Tewari
Shri S.S. Tripathi

Counsel for the Respondents:
S.C.

U.P. Panchayat Raj Act, 1947, Ss. 5-A, 6 and 95 (1) (g)- petitioner holding post of part-time tube-well operator i.e. an office of profit under State Government- Hence disqualified to act as Pradhan and ceased to hold the said office.
Held- (Para6)
Even the part-time tube well operators are paid their salaries by the State Government, therefore, it cannot be said that post of part-time tube-well operator is not an office of profit under the State Government. The petitioner having incurred disqualification for being chosen as and for being the Pradhan and a member of Gram Panchayat, and he in terms of Sub-section (2) of Section-6 of Act also cease to hold the office of Pradhan to which he was elected. The District Magistrate, Gorakhpur was thus right to serve upon him a notice under Section –95(1)(g) of the Act and

simultaneously to cease his financial powers by the impugned order.

By the Court

1. By means of this petition filed under Article 226 of the constitution of India, Petitioner challenges the validity of order dated 11.1.2000 whereby the financial administrative powers of the petitioner, who is holding office of Pradhan, have been ceased by the Competent Authority, i.e. District magistrate Gorakhpur

2. Learned counsel for the petitioner submitted that before passing of said order the petitioner has not given an opportunity of hearing, therefore, the said order is illegal and is liable to be set aside. It is not disputed by the learned counsel for the petitioner that the petitioner was also holding the post of tube-well operator, but it was contended that he was a part-time tube-well operator, therefore, he does not come within the purview of clause-A, Section-5 of the Act. It was urged that the petitioner not being a full-time tube-well operator was legally entitled to hold the office of Pradhan and his financial and administrative powers could not be ceased by the District Magistrate.

3. I have considered the submissions made by the learned counsel for the petitioner and also gone through the material on the record.

4. The charge against the petitioner was that he was holding the post of tube-well operator which is an office of profit under the State Government of U.P., therefore, he was disqualified in terms of Section-5-A© read with Section-6 of U.P. Panchayat Raj Act, 1947 for short the Act, to act as pradhan and ceased to hold the said office.

5. Section-5-A(C) and Section-6 of the Act provide as under:

5-A: *Disqualification of Membership: a person shall be disqualified for being chosen as, and for being, the Pradhan or a Member of a Gram Panchayat, if he-*

(c) holds any office of profit under a State Government or the Central Government or a local body, other than a Gram Panchayat or Nyaya Panchayat ora Board, body of corporation owned or controlled by a state Government or the Central Government;

6. Cessation of Membership: (1) A member of a Gram Panchyat shall cease to be such member if the entry relating to that member is deleted from the electoral roll for a territorial constituency of Gram Panchayat;

(2) where any person ceases to be a member of Gram panchyat under Section (1) he shall also cease to hold any office to which he may have been elected, nominated or appointed by reason of his being a member thereof.

6. Even the part-time tube-well operators are paid their salaries by the State Government, therefore, it cannot be said that the post of part-time tube-well operator is not an office of profit under the State Government. The petitioner having incurred disqualification for being chosen as and for being the Pradhan and a member of Gram Panchayat and he in terms of Sub-section (2) of Section-6 of Act also cease to hold the office of Pradhan to which he was elected. The district Magistrate, Gorakhpur was thus right to serve upon him a notice under Section-95 (1)(g) of the Act and simultaneously to cease his financial powers by the impugned order.

7. Submissions made by the learned counsel for the petitioner to the contrary therefore cannot be accepted. I do not find any illegality or infirmity in the impugned order passed by the District Magistrate the writ petition has got no merit, the same fails and is dismissed in limine.

8. A copy of the said order may be communicated to the District Magistrate, Gorakhpur, by the office.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.1999

BEFORE
THE HONB'LE D.K.SETH, J.

Civil Misc. Transfer Application No.135 of 1994

Shri Revindra Kumar Sharma ...Defendant/ Applicant
Versus
Smt. Preeti Archana Sharma ...Plaintiff / Respondent

Counsel for the Applicant:
Shri S.K. Verma
Shri Siddhartha Verma

Counsel for the Respondent:
Shri Vivek Mishra

Code of Civil Procedure, 1908, S.24-Transfer application-maintainability.
Held-(Para9)

On the other hand it seems that since the petitioner had been pursuing his remedy at Vellore he did not pursue his remedy at Mainpuri. This fact having not been disclosed by the petitioner, which fact, however, has been admitted by the learned counsel for the petitioner, in his usual fairness, it is open to the Court to presume that the petitioner has not come with clean hands and as such there are sufficient grounds for not believing the assertions of the petitioner, though however in a proceeding under Section 24 of the Code for Civil Procedure, the Court is not supposed to decide disputed question of fact.

By the Court

1. After hearing Sri S.K. Verma counsel for the applicant and Sri Vivek Mishra, Counsel for the respondent it appears that the suit for divorce which was originally in Allahabad was transferred to Mainpuri. Mr. Verma contended that the entire bar was supporting the respondent and therefore he could not get any lawyer to contest the case at Mainpuri ultimately it was dismissed in default and thereafter the application for restoration was also dismissed All records have been made untraceable He contends that the farther of the respondent was one of the leading lawyer and very influential in Mainpuri and that two brothers of the respondent are also practising lawyer in Mainpuri and therefore it was not possible for the applicant to get assistance at Mainpuri even any lawyer who had appeared on behalf of the applicant at Mainpuri was also threatened. Therefore in such situation the present suit No.83of 1993 filed under the Hindu Adoption and Maintenance Act by the respondent should be transferred to Allahabad since it is not possible for the applicant go and contest the suit at Mainpuri. He has also contended that the suit is not maintainable since there has been a decree of divorce between the parties. After the decree of divorce the suit under the Hindu Adoption and Maintenance act is not maintainable since it is the wife who can maintain the suit. After the decree of divorce the respondent cannot be treated as wife of the applicant to maintain such suit. He had also raised the question regarding the maintainability of the suit no.83 of 1993.

2. Mr. Vivek Mishra counsel for the respondent on the other hand contended that the father of the respondent is no more and two other brothers are living separately from the respondent. In the counter affidavit all such allegations raised a non-availability of counsel are denied. He has also pointed but that initially two of the counsel were representing the applicant. He has also contended it is not on account of non-availability of lawyer the divorce suit was dismissed. On the other hand according to him the petitioner had discontinued the suit

for divorce at Mainpuri and had got a suit filed at Vellore and obtained a decree of divorce and therefore the applicant did not proceed with the suit for divorce at Mainpuri. Therefore according to him the application should be dismissed.

3. Mr. S.K. Verma, learned counsel for the applicant on the other hand contended that the submission of Mr. Mishra cannot be sustained and had repeated his submission giving rise to the making of this application for transfer. However, in his usual fairness he had submitted that in the meantime a decree for divorce has since been obtained at Vellore by the applicant against the respondent and on the basis were of he has raised the question of maintainability of the suit.

4. I have heard both the learned counsel at length.

5. Admittedly while deciding an application for transfer under Section 24 of the Code of Civil Procedure it is not open to the Court to look into the merit of the case. Whether the suit is maintainable or not, is a question which is to be gone into at the hearing of the suit. Such a question cannot be looked into while deciding the question of transfer application. The maintainability of the suit also cannot from a ground of transfer. Whether the decree obtained at Vellore is binding or not is a question that is to be gone into at appropriate stage. But in the course of deciding the application under Section 24 of Code of Civil Procedure such question cannot be gone into.

6. It appears from the application that the applicant was posted at Bombay as Commissioner, Textile. Now it is submitted in Court by Mr. Verma that he is now posted at Tamil Nadu. It is also an admitted position that the applicant had obtained a decree of divorce at Vellore. In the application for transfer Various facts have been disclosed, but this fact was no-where mentioned. It is also not mentioned as to how the court at Vellore could assume Jurisdiction. Inasmuch as in the application nothing has been disclosed about any fact which relates to the rising of the cause of action at Vellore. Be that as it may since within the scope of this application such question cannot be gone into it is not necessary to deal with the same.

7. But the fact remains that the applicant had dragged the proceeding to Vellore against the respondent. Now he claimed that he may not be dragged to Mainpuri. In the application for transfers it has been mentioned that the father and brother of the respondent are practicing lawyer at Mainpuri. The respondent appears to have been married at Mainpuri therefore the court at Mainpuri has jurisdiction and such jurisdiction cannot be questioned.

8. So far as the allegation with regard to threat there is nothing to show that about such threat any first information report has been lodged. At the same time, even if the or others of the respondent are practicing lawyer. It is very difficult to presume that all the lawyers would be refusing to accept the brief of the applicant. There appears to be some substance in the contention of Mr. Vivek Mishra to the extent that since the applicant had been pursuing his remedy for divorce at Vellore he may not have pursued his proceedings at Mainpuri.

9. In such circumstances when there are assertions by both the parties against each other it is not possible for this Court to decide such question. On the other hand it seems that since the petitioner had been pursuing his remedy at Vellore he did not pursue his remedy at Mainpuri. This fact having not been disclosed by the petitioner, which fact, however, has been admitted by the learned counsel for the petitioner, in his usual fairness, it is open to the court to presume that the petitioner has not come with clean hands and as such there are sufficient grounds for

not believing the assertions of the petitioner, though however in a proceeding under Section 24 of the Code of Civil Procedure, the Court is not supposed to decide dispute question of fact.

10. Having regard to the entire facts and circumstances of the case I find no reason to interfere. The application for transfer is therefore, dismissed.

11. However the trial court when deciding the suit may appreciate the situation that the applicant is posted out side the State and if any prayer for accommodation is made the same may be considered on the basis of the merit of such prayer if occasion so arise. This position should be borne in the mind of the learned trial court, but not at the cost of delay which might defeat justice and without allowing the petitioner to stagger or stall the proceedings.

12. There shall be no order as to costs.

Application Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2000

BEFORE
THE HON'BLE M. KATJU, J.
THE HON'BLE D.R.CHAUDHARY, J.

Civil Misc. Writ Petition No. 7670 of 1997

Dr. Manvendra Misra ...Petitioner
Versus
Gorakhpur University & others ...Respondents

Counsel for the Petitioner:
Shri Prakash Padia
Dr. R.G. Padia

Counsel for the Respondents:
Shri Dilip Gupta

Constitution of India- Article 226 - Alternative Remedy writ petition admitted - counter and Rejoinder affidavits exchanged between the parties- whether the petition can be dismissed on the ground of alternative remedy entirely a matter of discretion - specially because of heavy arrears in High Court - ordinarily a writ petition should not entertained.
Held - para 5
What to say of a writ petition which has been entertained or admitted even if the writ petition is later allowed thereafter also the Court can dismiss the writ petition itself on the ground of alternative remedy. Hence there is no such absolute legal principle that a writ petition can not be dismissed on the ground of alternative remedy once it has been entertained or admitted or counter and rejoinder affidavits have been exchanged. Entirely a matter of discretion, though of course the discretion should not be exercised arbitrarily. Since writ jurisdiction is discretionary jurisdiction hence if here is an alternative remedy the petitioner should ordinarily be relegated to his alternative remedy. This is especially necessary now because of the heavy arrears in the High Court, and this Court can no longer afford the luxury of entertaining writ petitions even when there is an alternative remedy in existence.

Case law discussed
AIR 1996 SC 691

By the Court

1. Against the impugned order of the Vice Chancellor Gorakhpur University dated 31.01.1997 (copy of which is Annexure-12 to the writ petition) the petitioner has an alternative remedy of approaching the chancellor under section 68 of the U.P. State Universities Act.

2. The learned counsel for the petitioner has submitted that this writ petition had been admitted by order dated 26.11.97 and hence it cannot be dismissed on the ground of an alternative remedy. We are not in agreement with the submission. There is no such hard and fast principle that if a writ petition has entertained or admitted or if counter affidavit and rejoinder affidavits have been exchanged then the writ petition cannot be dismissed on the ground of alternative remedy.

3. Learned counsel for the petitioner relied on the decision of this Court in **Suresh Chandra Tewari vs. D.S.O.AIR 1992 All 331**. In that decision this Court held that it was not inclined to reject the writ petition on the ground of alternative remedy having regard to the fact that the petition had been entertained and an interim order had been passed. In our opinion this decision does not lay down any absolute rule that a writ petition cannot be dismissed on the ground of alternative remedy after it had been entertained or after an interim order had been passed. The said decision does not lay down any universal principle, and must be confined to its own facts.

4. In **Dr. Bal Krishna Agarwal vs. State of U.P.,1996 (2) UPLBEC 1055** the Supreme Court observed that the High Court was not right in dismissing a writ petition on the ground of availability of alternative remedy under section 68 of the U.P. State Universities. Act when the writ petition had been admitted and was pending for more than five years, and the controversy was purely legal. This decision, too, in our opinion does not lay down any universal principle that a writ petition which has been once entertained cannot later be dismissed on the ground of alternative remedy.

5. There are a large number of cases where not only the writ petition was admitted by the High Court but thereafter it was even allowed, but subsequently the respondents filed an appeal before the Supreme Court and the Supreme Court not only allowed the appeal but dismissed the writ petition on the ground of alternative remedy observing that the High Court should not have entertained the writ petition at all e.g. **Executive Engineer vs. Ramesh Kumar, AIR 1996 SC 691, etc**. Hence what to say of writ petition which has been entertained or admitted later allowed thereafter also the Court can dismiss the writ petition itself on the ground of alternative remedy. Hence there is not such absolute legal principle that a writ petition cannot be dismissed on the ground of alternative remedy once it has been entertained or admitted or counter and rejoinder affidavits have been exchanged. It is entirely a matter of discretion though of course the discretion should not be exercised arbitrarily. Since writ jurisdiction is discretionary jurisdiction hence if there is an alternative remedy the petitioner should ordinarily be relegated to his alternative remedy. This is especially necessary now because of the heavy arrears in the High Court, and this Court can no longer afford the luxury of entertaining writ petitions even when there is an alternative remedy in existence. No doubt alternative remedy is not an absolute bar, but ordinarily a writ petition should not be entertained if there is an alternative remedy.

6. With these observations the writ petition is dismissed on the ground of an alternative remedy before the Chancellor. However, if the petitioner approaches the Chancellor, the Chancellor should decide the reference under section 68 of the U.P. State Universities Act preferably within two months from the date of production of a certified copy of this order after hearing the parties concerned in accordance with law by a speaking order.

Petition Dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.1.2000

BEFORE
THE HON' BLE D.K. SETH, J.

Civil Revision No. 17 of 2000

Civil Revision before this Hon'ble Court challenging the legality and validity of the order dated 9.12.1999 passed by the First Additional Civil Judge (Senior Division) Dehradun by which the application 89 - C filed by the defendant- revisionists before the learned Civil Judge, Dehradun was dismissed.

M/s Wipro Limited and another
...Defendant/Revisionists
Versus
M/S Baba Enterprises ...Respondent

Counsel for the Revisionist:
Shri Ranjit Saxena

Counsel for the Respondent:
Shri Shyam Sunder Tripathi

Code of Civil Procedure, 1908, O.XIV read with OX Scope.
Held - Para 13
It may, however, be noted that order 14 does not provide for any provision for any provision for pronouncing of judgement or for passing such order as to fixing of date for ex parte hearing. Rule 4, Order 14 also omits to incorporate what is provided in order 10, Rule 4. It is only when order 10 is resorted to the proposition may follow. In the absence of the party the Court has to resort to Rule 4 order 14, read with Rules 2 and 4 of order 10, as the case may be. It cannot assume jurisdiction to fix a date for ex parte hearing without resorting to Rule 4, Order 14, read with Rules 2 and 4 of Order 10.
Case referred
(1988) ILR 15 cal 533 : 15 IA 119 35 CWN 925: AIR 193 IPC 175 AIR 1949 mad 707 : 1949 MLJ 373.

By the Court

1. Leave is granted to amend the preamble to the Section 115 application.

2. Original Suit No. 274 of 1996 pending before the learned Additional Civil Judge (Senior Division), First Court, Dehradun was fixed for framing of issues on 9th September,1998. On the said date, no one on behalf of the defendant was present. The suit was fixed for hearing ex parte on 9th November,1998. On the said date, an application was filed for recalling the order for hearing ex parte. On the ground that the said application was not affirmed by an affidavit as well as on the question of merit, the said application was dismissed by an order dated 9th December, 1999. This order has since been challenged in this revision.

3. Mr. Ranjit Saxena, learned counsel for the revisionists submits that since the date was fixed for framing issues, it was open to the court to settle the issues even if the parties were not present on the basis of the issues that might have been suggested or proposed by the plaintiff. Non-appearance of the defendants on the date fixed for framing issues cannot be a ground for fixing the suit for hearing ex parte. He further contends that even then before the ex parte hearing an application was made. It was the duty of the court to given an opportunity to the defendant to contest the proceedings since even today the date is fixed on 15th February, 2000 for hearing ex parte. He further contends that court should not have taken a technical view on account of absence of affirmation of the application affidavit. Therefore, the order should be set aside and the revisionists should be given opportunity to contest the proceedings.

4. Mr. Shyam Sunder Tripathi, learned counsel for the respondent on the other hand contends that unless the application is affirmed on oath, there is no material before the court to ascertain the truth of the statement made in the application in order to find out a ground for setting aside the order for hearing ex parte. He further contends that it is apparent from the order sheet that the defendant had been guilty of misconduct to the extent of delaying the process. In fact, the defendant is not interested in the hearing of the suit. They are out to delay the process. According to him, there is no infirmity in the order itself. The defendant had dragged the process for the last four years in one way or the other through ingenious method. Therefore, no indulgence should be shown to them. The revision should be dismissed.

5. I have heard both the learned counsel at length.

6. In the present case the date was fixed for settlement or framing of issues. The procedure for framing of issues are provided in order 14 of the Code of Civil Procedure. Rule 1.Sub-rule (1) thereof provides that issue arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Material proposition is defined in sub-rule (2) as those propositions of law or fact alleged by the plaintiff in order to show his right and the defendant allege to constitute his defence. In view of sub -rule (3) each proposition affirmed by one and denied by other forms distinct issue, which in terms of sub-rule (4) be of fact or of law. The method or mode through which issues are to be framed is prescribed in sub-rule (5) frame or record issues after reading the plaint and the written statement, if any, and after examination under Order 10, Rule 2 and after hearing the parties or their pleader ascertaining upon what material proposition of fact or law the parties are at variance.

7. Thus it is apparent that it is the duty of the court to frame issue after reading the plaint and written statement. So far as examination of the party or parties are concerned, the same is governed under Order 10,Rule 2.

8. Under Order 10, Rule 1, the court is supposed to ascertain from the party or his pleader or the person accompanying the pleader the admission or denial of the case of the either of the parties. Rule 2 is resorted to for elucidating the matter in controversy from the pleader or person accompanying him. The object of this Rule as held in Ganga. Vs. Tilukram (1888) 1 LR 15 Cal 533: 15 IA 119) is to determine the disputes between the parties. "But this power is intended", as observed in Manomohan. Vs. Msst. Ramdei (35 CWB 925: AIR 1931 PC 175), "to be used by the judge only when he finds it necessary to obtain from such party information on any material question relating to the suit and ought not to be employed so as to supersede the ordinary procedure of trial as prescribed in Order 18". As held in Arunagiri. Vs Vasantharoya (AIR 1949 Mad.1949 MLJ 373), this does not provide for an examination on oath and does not contemplate the defendant being put into the box, and examined and cross-examined before the plaintiff concludes his evidence. Rule 4 prescribes the consequence of refusal or inability of the pleader to answer. In such case the court may postpone the hearing and direct the party to appear in person. Sub-rule (2) prescribes the consequence of failure of the party to appear without lawful excuse by enabling the court to pronounce judgement.

9. Thus the question of examination under Order 10 is somewhat informal. The purpose of examination can be served if the pleader is able to answer. It is not necessary that the party must be examined if the pleader can answer, the presence of the party would not be necessary. The presence of the party would be mandatory only when the pleader is unable to answer. Even then in such a case the date is to be postponed with a direction to a party to appear on a date appointed. Only when on such appointed day if the party fails to appear without lawful excuse, then only the question of pronouncement of judgement arise. However, the court may, instead of pronouncing judgement, may pass such orders in relation to the suit as the court may think fit and which may include fixing date for ex-parte hearing. But if sufficient cause is shown for non-appearance which is a lawful excuse, then the order may be recalled. Thus without there being orders under Rule 4, court has no jurisdiction either to pronounce judgement or to fix date for exparte hearing.

10. Then again, Order 10 is a stage before the issues are framed under Order 14. If the court has not resorted to Order 10 earlier before framing issues, then the court has to signify after having examined the plaint and written statement that it requires to resort to Order 10, Rule 2 and on such date, if the

pleader is unable to answer, it has to resort to Rule 4 of Order 10.

11. Rule 3, Order 14 prescribes the materials from which issues are to be framed, such as (a) allegations made on oath by the parties or by any person present on their behalf or made by the pleader of such parties; (b) allegations made in the pleadings or in answer to interrogatories delivered in suit; (c) the contents of the documents produced by the parties.

12. Rule 3, Order 14 enables the court while framing issues to take into account besides the pleadings and replies to the interrogatories, the allegation made by the parties or by their pleaders and the documents produced by the parties. Thus it is not always necessary that in the absence of the party issues cannot be framed. In case it cannot be framed in that event the party is to be directed to appear on a date appointed. This proposition stands clear and ratified by reason of Rule 4, Order 14 which provides that "where the court is of opinion that the issues cannot be framed without the examination of some persons not before the court or without the inspection of some document not produced in the suit, it may adjourn the framing of issues to a future day, and may…. Compel attendance of any person or the production of any document…."

13. It may, however, be noted that Order 14 does not provide for any provision for pronouncing of judgment or for passing such order as to fixing of date for ex parte hearing. Rule 4, Order 14 also omits to incorporate what is provided in Order 10, Rule 4. It is only when Order 10 is resorted to the proposition may follow. In the absence of the party the court has to resort to Rule 4 Order 14, read with Rules 2 and 4 of Order 10, as the case may be. It cannot assume jurisdiction to fix a date for ex parte hearing without resorting to Rule 4, Order 14, read with Rules 2 and 4 of Order 10.

14. If the date is fixed for framing the issues, it is not necessary that the parties should appear before the court. The issues are to be framed if suggested by the parties on the basis of suggestion. But the court is not bound to accept the suggestions. It has to frame issues from the materials specified in Order 14, Rule 3. Even if the parties do not appear, it is open to the court to frame issues according to its own wisdom even without the issues being suggested by the parties from the materials referred to in Rule 3, Order 14. No-appearance of the parties on the date fixed for framing issues cannot be a ground for fixing date for hearing ex parte or passing order for ex parte hearing.

15. Be that as it may. An application was filed. The court could have put the defendant on terms in order to set aside the order for ex-parte hearing though, however, unless the application is affirmed on oath, it can very well be said that there is no material before the court to ascertain the truth made in the application. Signing of the application by the counsel does not satisfy the requirement. Inasmuch as the statements made in the application are the statements of the party which requires verification on oath by the party or its agent. The signature of the counsel appended to the application does not amount to affirmation of the contents of the application. Thus it seems that the defendant was not very serious about the matter. At the same time, it is apparent on the examination of the order sheet that the defendants have not deposited the cost awarded on account of certain adjournments.

16. Be that as it may. Since the order for ex parte hearing was passed on a wrong premise, therefore, the technical infirmity in the application should not be allowed to over shadow the situation. In view of the situation the order dated 9th September, 1998 appears to be an order passed illegally and with material irregularity and as such, the same is liable to be set aside and recalled.

17. Learned counsel for the opposite party, however, contends that the order dated 9th September, 1998 has not been challenged by the revisionists. But the challenge of the order dated 9th December, 1998 is also an order which refused to recall the order dated 9th September, 1998 and as such the said order is very much within the scope and ambit of the revisional application. The challenge thrown to the order dated 9th December, 1998 is also a challenge to the order dated 9th September, 1998. Then again in a revisional application, when it is brought to the notice of the court, the court is empowered to look into any orders even if it is not challenged and set the things right when it appears that the court had exceeded its jurisdiction.

18. In the facts and circumstances of the case, therefore, the order dated 9th December, 1998 as well as the order dated 9th September 1998 are hereby, set aside. The suit be heard on merit by giving opportunity to the parties to adduce evidences in support of their respective cases.

19. Since it is found that the defendant had been delaying the process, therefore, the defendant be put on terms and is directed to deposit in the court a sum of Rs.65,000/-, which shall be invested in a term deposit by the learned trial court for a term as the learned trial court may decide and such deposit shall be renewed from time to time to time subject to the result of the suit. The defendant shall also furnish security to the satisfaction of the learned trial court for a further sum of Rs.65,000/-. Such deposit is to be made within a period of three months from today. The security may be furnished within the same period. The defendant shall not take further adjournment unless it is extremely necessary. The hearing of the suit be expedited, if possible the learned trial court may endeavour to dispose of the suit within a period of one year.

20. With these observations, this revision is allowed to the extent indicated above.

Revision Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD FEBRUARY 18, 2000

BEFORE
THE HON'BLE S.K. AGARWAL,J.

Criminal Revision No.844 of 1998

Revision against the judgment and order dated 10.4.98 passed by Sri R.N. Singh, VII Additional Sessions Judge, Deoria in Criminal Revision No.30 of 1990.

Ram Lachhan and others ...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Shri J.P. Gupta

Counsel for the Respondents:
A.G.A.
Shri Shiv Shanker Tripathi
Shri Adya Prasad Tewari

Code of criminal procedure, 1973-S.146(1)-Exercise of power under, during pendency of two transfer applications by Magistrate to his knowledge—Held, illegal – Hence set aside – Revision against Magistrate's order attaching the property in dispute, before Sessions Judge, held, maintainable – Maximum—Justice must not only be done, but should also appear to have been done – applied.
Held –(Para 3 and 5)

In my opinion, it is always conducive in the interest of justice that if such a fact is brought to the notice of the enquiry court, it must stay the proceeding and await for the decision of such a transfer application. It must not hurry through the proceedings. The justice must appear to have been done not only in black and white but also must so appear from the conduct of the proceedings by the Judicial Officer.

I have perused the counter and rejoinder affidavits also. It has been contended before me that the revision was not maintainable before the learned Sessions Judge as the order passed by the learned Magistrate is an interlocutory order. With due regard, I do not agree with this contention of the learned counsel for the applicant. It was an intermediary order, in my opinion, and not an interlocutory order. By this order the attachment of the property could easily have been effected to and the respondent, would have been divested of his possession. It is common knowledge that such proceedings are generally initiated by persons, who are desirous of dispossessing some one out of his lawful possession.

By the Court

1. This revision has been preferred against an order allowing the revision preferred by Shanker against the order of the learned Magistrate. Dated 23.09.1989. By the aforesaid order dated 23.09.1989 the order passed by the predecessor of the present Magistrate dated 19.12.1988 was directed to be sent for compliance to the concerned police.

2. The order dated 19.12.1988 was for the attachment of the disputed house under Section (146(1) by the S.H.O., P.S. Salempur. The lower revisional court, in my opinion, has not committed any error in remanding the case back to the concerned court to deal with it in accordance with law. The orders dated 19.12.1988 and 23.09.1989 both were quashed by it.

3. On the basis of a report submitted by P.S. Salempur dated 16.09.1988 to the effect that a dispute, giving rise to the apprehension of breach of peace, is going on between the rival parties in connection with the residential house and the house, in the circumstances, should be attached. This order for attachment of the house was passed on 19.12.1988. The property, after attachment, was directed to be handed over in custodia legis to any reliable person. The respondent Shanker, had moved an application (paper no.95-Ga) for staying the operation of its above order dated 19.12.1988. The application was accepted on that very day itself and the operation of that order was stayed by that court. An application was moved by the second party before the District Judge for transfer of the proceedings. This application was moved on 18.09.1989. The District Judge had summoned the record of this case and fixed 30.09.1989. The record was to reach there within this time. This fact, according to the contention of the learned counsel, was brought to the notice of the court concerned, but yet, without paying any heed to all these facts and circumstances, in an illegal manner, the order dated 23.09.1989, for giving effect to the attachment order dated 18.12.1988, was passed by the court of the Sub-Divisional Magistrate. It is an important fact, as available from the judgment of the learned Sessions Judge, that before the passage of attachment order 19.12.1988 an application for transfer of the case was pending before the District Magistrate and without waiting for the order in that transfer application the Magistrate has passed the order dated 19.12.1988. In my opinion, it is always conducive in the interest of justice that if such a fact is brought to the notice of the enquiry court. It must stay the proceedings and await for the decision of such a transfer application. It must not hurry through the proceedings. The justice must appear to have been done not only in black and white but also must so appear from the conduct of the proceedings by the Judicial Officer.

4. The above were the circumstances, which merited with the learned Sessions Judge, who allowed the revision of the other party, viz. Shanker. It has been very clearly recorded by the learned Sessions Judge that the learned S.D.M., Salempur, had acted contrary to the principles of law and principles of equity and natural justice in passing the above said order dated 23.12.1989 as well as the order dated 19.12.1988. All

these orders, according to his opinion, were passed ignoring the facts that orders, according to his opinion, were passed ignoring the facts that he himself stayed the implementation of the order dated 18.12.1988 and that a transfer application, before the above said order could be passed, was already pending before the District Magistrate, pendency of which he as aware of. Another transfer application was also pending before the learned Sessions Judge in which the record of the case was summoned. This fact was also in his notice. Therefore, the conduct of the learned S.D.M., Salempur, was beyond comprehension. In view of these facts and circumstances the revision came to be allowed.

5. I have perused the counter and rejoinder affidavits also. It has been contended before the learned Sessions Judge as the order passed by the learned Magistrate is an interlocutory order. With due regard, I do not agree with this contention of the learned counsel for the application. It was an intermediatory order, in may opinion, and not an interlocutory order. By this order the attachment of the property could easily have been effected to and the respondent, would have been divested of his possession. It is common knowledge that such proceeding are generally initiated by persons who are desirous of dispossessing some one out of his lawful possession.

I, therefore, do not find any merit in the contention of the learned counsel for the revisionist. In may opinion, there is no infirmity in the order passed by the learned Sessions Judge. This revision is, thus dismissed. The office is directed to send a copy to the concerned court forthwith.

Revision Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.2.2000

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 10855 of 1982

Mala Ram & others ...Petitioners
Versus
The Additional Civil Judge, Ghaziabad and others ...Respondents.

Counsel for the Petitioners:
Sri A.D. Saunders
Shri Ratnakar Bharti

Counsel for the Respondents:
S.C.

Code of Civil Procedure, 1908, O. XVII R.3, O.IX r.9 and O.III rr. 1 and 2- Dismissal of suit for arrears of rent and damages after rejection of adjournment application by plaintiffs pairokar- Application for restoration rejected on ground that orders had become final under O.17 r.3 as suit was decided on merits- Appeal dismissed- Restoration application's maintainability.

Held- Para 9 and 10)

The petitioners had not executed any power of Attorney authorising Laxmi Narain to make appearance or filing any application in Court. He was instructed to contact their counsel for doing pairvi in the case. His appearance in the court and filing the application before the court for adjournment cannot be treated as appearance by the petitioners or their counsel. The appearance of Laxmi Narain as Pairokar of the petitioners and filing application on their behalf cannot be treated as appearance of their authorised agent. The restoration application in these circumstances was maintainable.

Case referred to:
1988 (2) ARC 327

By the Court

1. This writ petition is directed against the order dated 23.7.1981 passed by respondent

No. 1 rejecting the application of the petitioners for restoration of the suit and the order of the appellate court, respondent No.2 dismissing the appeal against the aforesaid order.

2. The petitioners filed Suit No. 174 of 1978 for recovery of arrears of rent, ejectment and damages against the defendant-respondent Nos. 3 and 4 with the allegations that they had let out a plot of land measuring 12'X20' to one Bhagat Ram on a monthly rent of Rs. 250/-. They gave a notice to the tenant and to his partner Gyan Chand demanding arrears of rent and terminating his tenancy. Defendant Bhagat Ram contested the suit and asserted that the rate of rent was Rs. 50/- per month and not Rs. 250/- per month as claimed by the plaintiff-petitioners.

3. The trial court had fixed 7.8.1980 for final hearing. The case was adjourned for 27.8.1980. on the said date, the petitioners did not attend the court and their counsel also did not appear in the Court. One Laxmi Narain, filed application in the Court with the allegations that the counsel was out of station and could not appear in the court. On the same day the court rejected the adjournment application with the reasons that the ground mentioned in the application was insufficient. Thereafter he proceeded with the suit and passed the following order:-

> "No evidence adduced by the parties. The suit is dismissed with costs for want of evidence.
>
> Sd/-
> 27.8.1980"

4. The petitioners filed an application for restoration of the suit under Order 9 Rule 9, C.P.C. with the allegations that they could not appear in the court as they had to attend the marriage of one of the petitioners' daughter. They had, however, sent their Pairokar Lakshmi Narian to contact their counsel and instruct him to get the case adjourned. The counsel was out of station and in that circumstance, Lakshmi Narain moved an application before the Court for adjournment but that was rejected.

5. It was stated that the petitioners could not appear in the case in the facts and circumstances mentioned in the application. The trial court rejected the application on 23.7.1981 holding that as the suit was decided on merits under Order 17 Rule 3, C.P.C. the application was not maintainable under Order 9 Rule, 9 C.P.C. The petitioners filed appeal No. 124 of 1981. Respondent No. 2 has dismissed the appeal affirming the view taken by the trial court. These orders have been challenged in the present writ petition.

6. I have heard Sri A.D. Saunders, learned counsel for the petitioners.

7. The core question is as to whether the application under Order 9 Rule 9, C.P.C. is maintainable on the facts and circumstances of the present case.

Under the Explanation added to by Allahabad High Court, no party shall be deemed to have failed to appear if he is either present or represented in Court by agent or pleader, though engaged only for the purpose of making an application. The meaning of the word 'appearing' has to be considered keeping in view of the provisions of Order 3 Rule 1, C.P.C. which reads as under:-

"1. Appearances, etc., may be in person, by recognized agent or by pleader- Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader on his behalf."

8. The application for adjournment was filed by one lakshmi Narain. He was only a Pairokar, instructed by the petitioners to approach their counsel to get the case adjourned. He contacted the counsel for the petitioners but he was out of station. Lakshmi Narain, in these circumstances, filed an application before the court for adjournment on the ground that the petitioners' counsel is out of station. Admittedly, he was not authorised by the petitioners to act on their behalf in Court Rule 2 of Order 3 provides that the recognized agents of parties by whom such appearance, applications and acts may be made or done are:-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, application and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within such limits the appearance, application or act is made or done, in matters connected with such trade or business."

9. The petitioners had not executed any power of Attorney authorising Laxmi Narain to make appearance or filing any application in Court. He was instructed to contact their counsel for doing pairvi in the case. His appearance in the court and filing the application before the court for adjournment cannot be treated as appearance by the petitioners or their counsel. In Fariduddin and others Vs. IInd Additional District Judge, Varanasi and others, 1988(2) ARC 327 it has been held that where a person alleging himself to be as Pairokar of a party, filed an application for adjournment and the same was rejected, it was held that the appearance of Pairokar cannot be treated as appearance of the party concerned for the purpose of Order 17 Rule 2, C.P.C.

10. The appearance of Laxmi Narain as pairokar of the petitioners and filing application on their behalf cannot be treated as appearance of their authorised agent. The restoration application in these circumstances was maintainable.

The Writ petition is allowed and the impugned order dated 23.7.1981 and 3.5.1982 are hereby quashed. Respondent No.2 is directed to decide the application of the petitioners on merits.

Petition Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.3.2000

BEFORE
THE HON'BLE G.P. MATHUR, J.
THE HON'BLE A.K. YOG, J.

Special Appeal No. 496 of 1999

Special Appeal against the judgment and order dated 15.4.1999 delivered on 157.1999 passed by the Hon'ble Mr. Justice D.K. Seth in Civil Misc. Writ Petition No. 15098 of 1999.

Shashi Dutt Pandey ...Appellant/Petitioner.
Versus
Sri Baleshwar Tyagi & others...Respondents

Counsel for the Appellant:
Shri Dinesh Dwivedi

Counsel for the Respondents:
Shri N.D. Rai

Chapter VIII Rule 5 of the Rules of the Court-Transfer order passed on the direction of the Minister of the department concerned-challenged-Minister of the department concern has the jurisdiction to direct transfer of the employees of the department if he receives some complaints against him. Held- Para 4)

Even assuming that the Minister had passed an order for transferring the appellant outside the district, we do not find any illegality in the same. If the Minister received

some complaints against an employee of his department, it will be perfectly within his jurisdiction to issue any direction, which the interest of administration may require.

Case law referred-

1990 (2) U.P.L.B.E.C. p. 905

By the Court

1. The appellant, an employee of U.P. Basic Shiksha Parishad was transferred from district Ballia to district Gonda by the order dated 8.2.1999 passed by Secretary, U.P. Basic Shiksha Parishad, Allahabad. The order was challenged by him by filling writ petition no. 15098 of 1989, which was dismissed by a learned Single Judge on 15.7.1999. Feeling aggrieved by the dismissal of the writ petition, the appellant has preferred this special appeal.

2. Sir Dinesh Dwivedi has submitted that the appellant was appointed as Assistant Clerk in Zila Parishad, Ballia on 4.7.1967 and after the enforcement of U.P. Basic Education Act, 1972, he became an employee of U.P. Basic Shiksha Parishad. Thereafter, he could not be transferred to any place outside Ballia. The relevant parts of sub-sections (1) and (3) of section 9 of U.P. Basic Education Act, 1972 read as follow:-

"Transfer of Employees – (1) On and from the appointed day every teacher, officer and other employees serving under a local body exclusively in connection with basic schools (including any supervisory or inspecting staff) immediately before the said day shall be transferred to and become a teacher, officer or other employee of the Board and shall hold office by the same tenure, at the same remuneration and upon the same other terms and conditions of service as he would have held the same if the Board had not been constituted and shall continue to do so unless and until such tenure, remuneration and other terms and conditions are altered by the rules made by the State Government in that behalf.

Provided…….under the Board.
(Omitted as not relevant)

Provided …… accordingly.
(Omitted as not relevant)

(3) Notwithstanding any timing in sub-section (1), any person referred to therein, who becomes an employee of the Board shall be liable to be transferred from the school or from the local area in which he was employed immediately before the appointed day to any other school or institution belonging to Board or, as the case may be to any other local area at the same remuneration and on the same other terms and conditions of service as governed him immediately before such transfer until such tenure, remuneration and other terms and conditions are altered by the rules referred to in sub-section (1).

Provided ……consent.

3. Sub-section (3) of section 9 of the Act is a complete answer to the submission made by the learned counsel for the appellant. It clearly provides that after the appointed day any teacher, officer or an employee of a Zila Parishad, who becomes an employee of the Board, can be transferred from one local area to another local area. Therefore, the transfer of the appellant from Ballia to Gonda is clearly permissible under the provisions of the Act by which he is governed.

4. Sri Dwivedi has next urged that the transfer order had been passed by the Minister and therefore the same is illegal. The record of the writ petition shows that the Secretary of U.P. Basic Shiksha Parishad had transferred the appellant from Ballia to Firozabad by order dated 26.11.1997. By the order dated 1.1.1998 the transfer order was cancelled. Thereafter, another order was passed by the Secretary of U.P. Basic Shiksha Parishad, Allahabad, on 8.2.1999 by which the appellant was transferred from Ballia to Gonda and another person Ajay Kumar was

transferred from Ballia to Agra. Annexure –5 to the writ petition purports to be an extract of an order dated 5.2.1999 passed by Sri Baleshwar Tyagi, Minister of State, Basic Education (independent Charge), Lucknow, and addressed to Additional Director, Basic Shiksha, Allahabad. It mentions that the appellant Shashi Dutt Pandey and Ajay Kumar, who were working in Ballia may be transferred outside the district. The document filed as Annexure –5 does not appear to be a complete copy of the original order but merely an extract thereof. It is no where stated in the writ petition as to how the appellant secured a copy of an order passed by the Minister which was addressed to Additional Director, Basic Shiksha Allahabad. The appellant being a clerk in the office of Basic Shiksha Parishad at Ballia could not have got a copy of an order passed by the Minister of the department which was addressed to Additional Director, Basic Shiksha, Allahabad. That apart, as already stated, the document annexed as Annexure-5 to that writ petition is not a complete copy of the whole order but is merely an extract running into three and half lines. We are, therefore, not prepared to place reliance upon the aforesaid document. Even assuming that the Minister had passed an order for transferring the appellant outside the district, we do not find any illegality in the same. Annexure-5 to the writ petition shows that in has been passed by Sri Baleshwar Tyagi, Minister of State, Basic Education (independent Charge Lucknow. Sri Baleshwar Tyagi is the Minister of the same department namely, Basic Education. If the Minister receives some complaints against an employee of his department, it will be perfectly within his jurisdiction to issue any direction, which the interest of administration may require. We are fortified in our view by a Full Bench decision of our Court rendered in **Tara Prasad Misra Versus State of U.P., 1990 (2) U.P.L.B.E.C. 905**.

5. For the reasons mentioned above, we do not find any ground which may warrant interference with the impugned judgment and order of the learned Single Judge. The special appeal lacks merit and is dismissed at the admission stage.

Special Appeal Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD MARCH 2, 2000

BEFORE
THE HON'BEL D.S. SINHA, J.
THE HON'BLE RATNAKAR DASH, J.

Special Appeal No. 148 of 2000

Special Appeal against the judgment and order dated 8.2.2000 passed by Hon'ble Single Judge in Writ Petition No. 35414 of 1996.

Ram Swaroop Sharma ...Petitioner
Versus
State of U.P. through Secretary Department of Education, Govt. of U.P. Lucknow & Others. ...Respondents

Counsel for the Appellant:
Shri S.K. Chaturvedi

Counsel for the Respondents:
Shri Rajendra Rai
Shri Vinay Malviya
S.C.

Chapter 8 Rule 5 of the Rules of High Court- Dismissal of writ petition with certain directions- the directions given by the learned Single Judge were abs olutely justified to restitute and adjust equities between contesting party to the writ petition. (Held Para 14)

By giving the impugned directions while dismissing the writ petition on 8th February, 2000, the learned Single Judge only adjusted equities between the contesting parties to the petition. The directions are aimed at redressing the injury caused to Sri Kamlesh Niranjan, the respondent no. 4 by the interim order of the Court dated 5th November, 1996.

By the Court

Heard Sri S.K. Chaturvedi,, the learned counsel appearing for the appellant, Sri Rajendra Rai , the learned counsel appearing for the respondent no.4, and Sri Vinay Malviya, the learned Standing Counsel of the State of U.P., representing the respondents no.1,2 and 3, at length and in detail.

The appellant filed Civil Misc. Writ Petition No. 35414 of 1996 Ram Swarup Sharma v. The State of U.P. and Others, urging the court to direct the respondents not to interfere with his functioning on the post of Principal of Uchattar Madhyamilk Vidhyalaya, Kargawan, District Jhansi. He also prayed in the writ petition that the selection and appointment of Sri Kamlesh Kumar Niranjan, the respondent no. 4, on the post of Principal of the institution be quashed.

The appellant was functioning on the post of Principal on ad hoc basis pending regular selection. Sri Kamlesh Kumar Niranjan is duly selected candidate for appointment on the post of Principal of the Institution which had fallen vacant consequent upon the retirement of the permanent incumbent on 30th June, 1992.

"*Learned counsel for the respondents No. 1 to 3 may file counter affidavit within three weeks. Petitioner is directed to serve respondents nos. 4 & 5 personally and they may file their counter affidavit within two weeks thereafter. List in the week commencing 9th December, 1996.*

Since the validity of U.P. Secondary Education Service Commission Act and vires of Rule 12 (3) has been referred by me to a larger Bench , I direct that the petitioner shall be permitted to continue as ad hoc Principal of the Institution in question provided the person selected by the Commission has not joined.

(Emphasis supplied)

1. On the strength of the aforesaid ad interim order of the court, the petitioner continued to function as Principal of the Institution and Sri Kamlesh Kumar Niranjan, the respondent no.4, was prevented from joining the post of Principal notwithstanding his selection made in accordance with law.

2. On 11th February,1999, the Joint Director of Education, Jhansi Division, Jhansi passed an order No. 478/98-99 dated 11th February 1999, a copy whereof is Annexure-2 to the affidavit of Sri Ram Swarup Sharma, the petitioner-appellant, filed in support of the stay application moved in this appeal, regularizing the ad hoc appointment of the petitioner on the post of Principal .

3. Armed with above order dated 11th February,1999 the petitioner through his counsel, intimated the court that he did not want to prosecute the writ petition and same might be dismissed. Thus, the other learned Single Judge who was seized of the case dismissed the petition vide order dated 8th February, 2000.

4. While dismissing the petition the learned Single Judge gave the following directions:

"It is further directed that the petitioner will not be entitled to any benefit of his having worked under ad interim order dated 5.11.1996 and consequently, respondents are directed to ensure that respondent no. 4 joins the post of Principal forthwith Respondent no. 4 shall be entitled, while computing seniority on the post in question, to count for the period during the which period this petition was pending in this Court and shall be treated to have deemed continued in service on the post in question. It will be deemed that he had held the post. Respondent no.4 shall, however, not be entitled to any financial advantage under this order for deeming period."

5. Feeling aggrieved by the above directions given by the learned Single Judge the appellant has preferred instant intra-court appeal under Chapter VII Rule 5 of the Rules of the Court, 1952.

6. From perusal of the order dated 8th February, 2000, wherein are contained the impugned directions, it appears that the learned counsel of the petitioner was "unable to point out any fact or circumstance, which" rendered the petition infructuous. No reason for not prosecuting the petition or getting it dismissed was or is assigned by the appellant.

7. It is true that the appellant had liberty of not prosecuting his petition and getting the same dismissed. But the liberty was not unbridled. The enjoyment of the said liberty was subject to justice and equity between the contesting parties to the writ petition.

8. With the dismissal of the writ petition, the interlocutory orders, including the ad interim order dated 5th November,1996 lapsed. With the lapse of the ad interim order dated 5th November, 1996 Sri Kamlesh Kumar Niranjan, the respondent no.4, became entitled to join on the post of Principal of the Institution for which he was duly selected and had not been able to join on account of the interim order dated 5th November, 1996. Further effect of the lapse of the ad interim order dated 5th November, 1996 was that the legitimacy of the benefits enjoyed by the petitioner by virtue of the ad interim order was forfeited.

9. Under the circumstances noted above, the directions given by the learned Single Judge in his order dated 8th February,2000, were absolutely justified. Indeed, it was the duty of the learned Single Judge to restitute and adjust equities between the contesting parties to the writ petition, and to remedy the disadvantage suffered by Sri Kamlesh Kumar Niranjan, the respondent no.4, on account of the interim order dated 5th November, 1996. Similarly, it was the duty of the learned Single Judge to clarify that with the lapse of the interim order dated 5th November,1996 the petitioner became disentitled to benefits enjoyed by him on account of the interim order.

10. Relying upon the provisions of sub-section (1) of Section 33-C of the U.P. Secondary Education (Services Selection Boards) Act, 1982 (as amended by U.P. Act No. 25 of 1998), hereinafter called the 'Act', Sri S.K. Chaturvedi, the learned counsel of the appellant, contends that the appointment of the petitioner having been made on 25th September, 1992 i.e. after July 31, 1988 and not later than August 6, 1993 on ad hoc basis against the substantive vacancy in the post of Principal of the Institution and having continuously served the Institution and having continuously served the Institution from the date of his appointment upto the date of commencement of the U.P. Act No. 25 of 1998, he stood regularized by operation of law. According to Sri Chaturvedi, the impugned directions given by the learned Single Judge are illegal in as much as they have the effect of nullifying the regularization of the appointment of the petitioner by operation of law, namely, the provisions of Section 33-C of the Act.

11. For proper appreciation of the contention of Sri Chaturvedi, it is apposite to extract and reproduce below Section 33-C of the Act, as introduced by U.P. Act No. 25 of 1998, which came into force on 20th April, 1998:-

"33-C Regularization of certain more appointment.- (1) Any teacher who-
(i) was appointed by promotion or by direct recruitment on or after May 14, 1991 but not later than August 6, 1993 on ad hoc basis against substantive vacancy in accordance with Section 18, in the Lecturer grade or Trained Graduate grade;

(ii) was appointed by promotion on or after July 31, 1998 but not later than August 6, 1993 on ad hoc basis against a substantive vacancy in the post of Principal or Headmaster in accordance with Section 18;

(a) possesses the qualifications in accordance with, the provisions of the Intermediate Education Act, 1921;

(b) has been continuously serving the Institution from the date of such appointment up to the date of the commencement of the Uttar Pradesh Secondary Education Service Commission (Amendment) Act,1998;

(c) has been found suitable for appointment in a substantive capacity by a Selection Committee constituted under sub-section (2);
shall be given substantive appointment by the management.

(2) (a) For each region, there shall be a Selection Committee comprising :-
(i) Regional Joint Director of Education of that region, who shall be the Chairman.

(ii) Regional Deputy Director of Education (Secondary) who shall be member;

(iii) Regional Assistant Director of Education (Basic) who shall be member;

In addition to above members the District Inspector of Schools of the concerned district shall be co-opted as member while considering the cases for regularization of that district.

(b) The procedure of selection for substantive appointment under sub-section (1) shall be such as may be prescribed.

(3) (a) The names of the teachers shall be recommended for substantive appointment in order of seniority as determined from the date of their appointment;

(b) If two or more such teachers are appointed on the same date, the teacher who is elder in age shall be recommended first.

(4) Every teacher appointed in a substantive capacity under sub-section (1) shall be deemed to be on probation from the date of such substantive appointment.

(5) A teacher who is not found suitable under sub-section (1) and a teacher who is not eligible to get a substantive appointment under that sub- section shall cease to hold the appointment on such date as the State Government may by order specify.

(6) Nothing in this Section shall be construed to entitle any teacher to substantive appointment, if on the date of commencement of the Ordinance referred to in clause © of sub-section (1) such vacancy had already been filled or selection for such vacancy had already been filled or selection for such vacancy has already been made in accordance with this Act"

(Emphasis added)

12. The contention of Sri Chaturvedi, the learned counsel of the petitioner, that the ad hoc appointment of the petitioner against the substantive vacancy in the post of Principal of the Institution stood regularized by operation of law, in the opinion of the Court, betrays utter ignorance of the provisions contained in sub section (6) of the Act. It is to be noticed that sub- section (6) of Section 33-C of the Act provides that nothing in the section shall be construed to entitle any teacher to a substantive appointment if on the date of the commencement of the Ordinance, which is admittedly 20th April, 1998, such vacancy had already been filled or selection for such vacancy had already been made in accordance with the Act. This provision clearly saves and protects the action of filling of vacancy prior to the commencement of the U.P. Act No. 25 of 1998. It also saves and protects the

selection for such vacancy already made in accordance with the provision of the Act.

13. It is not disputed that the selection of Sri Kamlesh Kumar Niranjan, the respondent no.4, for the vacancy in the post of Principal of the Institution in accordance with the provisions of the Act had already been completed on the date commencement of U.P. Act. No. 25 of 1998. Therefore, the selection of Sri Kamlesh Kumar Niranjan, the respondent no. 4, acquired statutory finality and ceased to be open to challenge. It cannot be gainsaid that consequent upon his due selection for filling the substantive vacancy in the post of Principal of the Institution, caused upon retirement of the permanent incumbent. Sri Kamlesh Kumar Niranjan, the respondent no. 4, was deprived of the benefit of the statutory right of being appointed as Principal of the Institution, on account of interim order of the Court dated 5th November, 1996, passed at the behest of the petitioner. But for the interim order Sri Kamlesh Kumar Niranjan, the respondent no. 4, would have been appointed and would not have lost the attending benefits of the appointment during the period between the passing of the interim order dated 5th November, 1996 and the impugned directions given by the learned Single Judge contained in the order dated 8th February, 2000.

14. By giving the impugned directions while dismissing the Writ petition on 8th February, 2000, the learned Single Judge only adjusted equities between the contesting parties to the petition. The directions are aimed at redressing the injury caused to Sri Kamlesh Kumar Niranjan, the respondent no.4, by the interim order of the Court dated 5th November, 1996. It is well settled that an act of the Court shall prejudice no man (Actus curiae neminem gravabit). This maxim, which is founded on justice and good sense, has to be the Pole Star for administration of law by the Court in exercise of special and Extraordinary jurisdiction under Article 226 of the Constitution of India, the main objective of which is promotion of justice and prevention of injustice.

15. From what has been said above, the irresistible conclusion is that the learned Single Judge was perfectly justified in giving the impugned directions ex debito justiciae, not exgratia, and in doing so he committed no error warranting interfere in this intra-court appeal.

16. The special appeal lacks merit. It is rather frivolous and vexatious. It is, therefore, dismissed with costs, payable by the petitioner-appellant to Sri Kamlesh Kumar Niranjan, the respondent no.4, which is quantified at Rs. 10,000/-. The costs shall be paid within a period of three months to be computed from today.

Special Appeal Dismissed.
