ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.11.1999

BEFORE
THE HON'BLE ALOK CHAKRABARTI, J.

Civil Misc. Writ Petition No. 26995 of 1999

M/s Chhota Bhai Munna Bhai & Company, Naini, Allahabad through its Partner Manzoor Ahmad ...Petitioner

Versus

State of U.P. through Secretary, Labour Department, Government of U.P., Lucknow and others ... Respondents

Counsel for the Petitioner:
Shri Mewa Lal Shukla
Shri Vidya Bhushan Upadhyay

Counsel for the Respondents:
S.C.

Child Labour (Prohibition and Regulation) Act, 1986, S-3- Petitioner/contractors served with notice for violation of the Act by engaging child labour as found in survey- Notice quashed by Division Bench as the survey was held not to be according to law- Second notice admittedly, on same survey- Compensation imposed in violation of principles of natural justice- No fresh survey conducted- Impugned notice and recovery order quashed.
Held-
It is apparent that the respondents are frustrating the direction of the Apex court. A survey, which has been already held, to be irregular, is still being relied on and is attempted to be justified by the respondents when admittedly, the findings of the Division Bench have not been altered or quashed by any superior forum. Therefore, it is not proper for the authority concerned to further justify the said survey and to take action on the basis of findings in such survey. Apparently, any action including the notice and the recovery proceeding on the basis of imposition of penalty following the said survey can not stand. (Para 18)
Case Law referred.
AIR 1997 SC 699
1998 All.C.J. 1371

By the Court

1. The petitioner carries on business of manufacturing Biri and is registered partnership firm. It has been contended in the writ petition that the petitioner appointed contractors for supplying Tendu leaf and tobacco for the purpose of rolling Biri to various persons in their residences and said persons after having rolled Biri supply the same to the Contractors who in turn brings the same to the Factory of the petitioner which is ultimately sold as finished product. The petitioner was served with notices contending that in survey it was found that the petitioner/contractors had engaged child labour in violation of provisions contained in the Child Labour (Prohibition and Regulation) Act, 1986. The notices were challenged in writ petition No. 17034 of 1998, M/S Chhota Bhai Munna Bhai & Company Vs. State of U.P. and others. The Division Bench allowed the writ petition by order dated 11.11.1998 and quashed the notices challenged. In the said judgment various findings have been arrived at including the findings whereby survey held was deprecated strongly holding that Inspectors involved in the survey did not satisfy the requirement of law and therefore survey was bad. Observation was made therein that demands on compensation and notices to prosecute must be based on a diligent and accurate survey and take into account two orders of Hon'ble Supreme Court.

2. Subsequent notice issued to the petitioner again was challenged in Writ Petition No.7601 of 1999, M/S Chhota Bhai Munna Bhai & Company Vs. State of U.P. and others wherein taking into consideration the aforesaid judgment of the apex court in the case of M.C.Mehta Vs. State of Tamil Nadu and others reported in AIR 1997 SC 699 and aforesaid Division Bench judgment in the case of the present petitioner and decision of the learned Single Judge of this

court in the case of A.K. Agarwal Vs. Assistant Labour Commissioner and others reported in 1998 All CJ 1371, petitioner was granted liberty to file objection against the report of the Inspector and authority concerned was directed to decide the same. In terms of aforesaid direction, the impugned order dated 21.6.1999 at annexure no. 1 to the writ petition was passed whereby the contentions of the petitioner were rejected and recovery was directed on the basis of notices already issued. Challenging the same, present writ petition has been filed.

3. State Respondents filed counter affidavit and in view of their contentions raised in course of earlier hearing, liberty was granted and accordingly supplementary counter affidavit was filed. The petitioner filed rejoinder affidavit and supplementary rejoinder affidavit.

4. Heard Mr. V.B. Upadhyay, learned counsel for the petitioner and the learned S.C.

5. The contention of the petitioner is that when survey in respect of present proceeding was already deprecated by Division Bench and had been found to be not in accordance with law, the present notices issued on the basis of self-same survey are liable to be quashed. Learned counsel for the petitioner refereed to the counter affidavit and supplementary counter affidavit for the purpose of contending that the respondents admitted of holding no fresh survey and on the basis of old survey, present notices have been issued.

6. The list annexed at annexure no. 2 to the supplementary counter affidavit has been relied on behalf of the petitioner for the purpose of showing the designation of the persons holding the survey which have already been held to have been conducted by persons not satisfying prescriptions and such findings by Division Bench have not been dislodged by any appropriate forum. With reference to section 3 of the aforesaid Act, contention has been made by the learned counsel for petitioner that the proviso to said section exempts the petitioner even if children had been employed by the various persons engaged by the contractors for rolling Birj as such children being members of family of those persons are exempted by proviso to section 3 of the said Act.

7. With regard to impugned notice it has been further contended that before imposing compensation upon the petitioner, no notice had been issued and even though there is no provision in the said Act, the principle of natural justice requires such opportunity.

8. The impugned order at annexure no. 1 to the writ petition has been also challenged on the ground that in the earlier writ petition filed by the present petitioner Hon'ble Single Judge directed consideration of judgment of Division Bench which in any event remains binding and therefore on the basis of survey which was disapproved by Division Bench, the present notices could not have been prepared nor the petitioner could be saddled with compensation.

9. Learned standing counsel for the respondents contended that the list at annexure no. 3 to the supplementary counter affidavit shows that a number of notices had been issued by the Labour Enforcement Officer and such notices can not be challenged on the ground of irregularity in survey as Labour Enforcement Officers are duly authorized Officers in terms of prescription of law. Learned SC also contended with reference to sections 16 and 17 of the said Act that inspector duly appointed rightly held survey and this could not have been questioned by the petitioner.

10. It has been further contended on behalf of the respondents that certain notices have been challenged in duplicate and a list

of such notices had been supplied at the time of hearing.

11. After hearing learned counsel for parties and perusing the materials on record, it appears that presently the impugned notices have been issued on the basis of a survey which came up for consideration before the Division Bench in writ petition No. 17034 of 1998, M/S Chhota Bhai Munna Bhai and Company Vs. State of U.P. and others and considering the entire circumstances in detail the Division bench made its observation with regard to the said survey as follows:

"Before the court, documents have been placed to show to tenor of the Survey work. The example chosen by the State respondents is from the survey conducted in the district of Allahabad. The court notices from the information which has been given by the record that the survey teams were constituted to represent Inspector, were in fact, Chaprasis, Nayab Moharrir, Skilled Fitters, Section Record Clerks, Asstt. Teachers, Vaccinators and Urdu Translators etc. The court is weeding out persons bearing the nomenclatures as principals of Schools or revenue officials, but of those which the court has mentioned between Chaprasis and Translators only one aspect is relevant; whether they were officials as Gazetted Government Officers. A Specific enquiry was made from learned CSC to take instructions and give an answer, in the affirmative or negative, on the status of these officers. It was stated before the Court that these persons were neither gazetted government staff nor officers. The court is mentioning this aspect of the matter as the Secretary to the Government of India himself expressed concern in the lack of quality in the contents of survey. The Secretary, Government of India, has already observed that a head counting exercise would yield no result. He has virtually labeled the survey as an exercise in mediocrity. The Labour Commissioner, U.P. was already sending out a caution that the samples, which are coming in from the field officers on the survey, were not satisfactory.

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"All these circumstances, put together, render the state of the record in such a state that it does not inspire confidence, regard being had to the circumstances that the survey was being conducted on the directions of the Supreme Court, which, under the Constitution (re: Article 144) obliges all authorities, civil and judicial, in the territory of India to act in aid of the Supreme Court, when the exercise was put into execution, it was one of mediocrity."

12. Upon observation as aforesaid, the final conclusion was reached by the Division Bench as follows:

"In reference to these cases, it is now acknowledged by learned CSC that the survey were not conducted with due diligence and regard being had to these cases if the subsequent order of the Supreme Court is taken into account, in some cases the notice need to be modulated, more so, in the matter of non-hazardous processes. If that be the case, then, the notice so issued in these cases, qua the petitioner, will need to be quashed. Hereinafter, the demands on compensation and notices to persecute must be based on a diligent and accurate survey, and take into account the two orders of the Supreme Court, of 10 December 1996 and 18 December, 1996. The survey must take into consideration the concern which has been expressed by the Secretary, Ministry of Labour, Government of India, and the Labour Commissioner, U.P.. The notices, thus, are quashed."

13. After the aforesaid judgment recovery certificate was issued against the petitioner and they were compelled to move the writ petition no. 7601 of 1999, M/S Chhota Bhai Munna Bhai and Company vs. State of U.P.

and others. Taking note of the decision of Division Bench and the judgment of the apex court in the case of M.C. Mehta (supra) as also the judgment in Civil Misc. Writ Petition No. 26373 of 1998, learned single judge of this court disposed of the writ petition grating liberty to the petitioner to file objection against the report of the Inspector with a direction upon the authority competent to dispose of the same by a speaking order after giving an opportunity of hearing to the petitioner.

14. Following such direction when objection was filed, the impugned order was passed deciding and ultimately rejecting the said objection.

15. A categorical statement was made in paragraph no. 28 of the writ petition that the impugned notices have been issued without holding any fresh survey and in paragraph 21 of the counter affidavit the said paragraph no 28 has been dealt with as follows:

"That the contentions of paragraph no. 28 of the writ petition are misconceived and false, and as such, are denied. It is stated in reply that so far the impugned notices are concerned, this Hon'ble Court has not examined the same in the earlier writ petition which has to be examined by this Hon'ble Court on merits."

16. At the stage of hearing a supplementary counter affidavit was filed. Therein nothing has been disclosed as regards fresh survey. With regard to earlier survey, which came up for consideration before Division Bench, justification has been adduced in paragraph nos. 3 and 4 of the said supplementary counter affidavit.

17. At the time of hearing on behalf of petitioner instances have been shown from the record indicating that findings of the Division Bench were correct on facts. It is contended on behalf of petitioner that the Division bench in its judgment was rather mild in observation and said survey requires deprecation in a very strong language.

18. In view of aforesaid circumstance, it is apparent that the respondents are frustrating the direction of the apex court. A survey, which has been already held, to be irregular, is still being relied on and is attempted to be justified by the respondents when admittedly, the findings of the Division Bench have not been altered or quashed by any superior forum. Therefore, it is not proper for the authority concerned to further justify the said survey and to take action on the basis of findings in such survey. Apparently, any action including the notice and the recovery proceeding on the basis of imposition of penalty following the said survey can not stand.

19. Technical contention that all the persons participating in the survey were Labour Enforcement Officers and therefore such survey is fit and proper, can also not be accepted after findings of the Division Bench.

20. In the result, the writ petition is allowed. The impugned notices and the order dated 21.06.1999 at annexure no. 1 to the writ petition are hereby quashed. Respondents are directed to take steps strictly in accordance with the judgment of the apex court in the case of M.C. Mehta (supra) and the judgment and order dated 11.11.1998 in writ petition no. 17034 of 1998 (M/S Chhota Bhai Munna Bhai & Co. Vs. State of U.P.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED :ALLAHABAD : DECEMBER 2, 1999

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

Civil Misc. Writ Petition No. 41526 of 1999

Hari Narain ...Petitioner
Versus
IV Additional District Judge, Azamgarh & others ...Respondents

Counsel for the Petitioner:
Pradeep Kumar Rai

Counsel for the Respondent:
S.C.

Specific Relief Act, S.38 readwith U.P.Z.A. & L.R. Act, 1951, Ss.331, 229-B and Registration Act, S.17 jurisdiction of civil court vis a vis Revenue Court – suit for permanent Injunction on basis of unregistered family settlement, without declaration of title even though plaintiff's right was not admitted.
Held-

It appears that it was not the admitted case of the title of the plaintiff over the suit property, even according to the mere reading of the plaintiff. Thus, the plaintiff was obliged to allege how he obtained a right on the suit property or what was the obligation in his favour in respect thereof before he could make a prayer for a permanent injunction. That could have been established by a declaration of the right claimed by the plaintiff and once we come to this conclusion, the irresistible inference would be that the suit was really in the nature of one spoken of under section 229-B of the U.P.Z.A & L.R. Act and was, thus, cognizable by the revenue court and, as such, the jurisdiction of the civil court stood ousted.(para 13)

Case law discussed-
1998 (89) R.D. 467
1981 A.W.C.469.
A.I.R. 1966 S.C. 1718
1982 (8) A.L..R. 517

By the Court

1. The petitioner had filed Suit No. 1230 of 1986 for permanent injunction against the present respondents, Kamala and others. It was his case that he was the sole owner of certain agricultural plot and was in possession thereof. It was stated that previously he was having only one-third share in the suit property, a second one-third belonged to one Rampat Rai and the rest one-third belonged to the respondent Kamala and his brother Subedar . The plaintiff purchased the share of Rampat through a registered instrument and there had been a family settlement through which Kamala and Subedar transferred their share in the suit property in favour of the petitioner through a written instrument dated 24.12.1971. Subsequently, however, kamala and Subedar transferred their land to other defendants on the basis of which they were trying to interfere in the land in dispute and that gave the cause of action to the plaintiff-petitioner for permanent injunction. The petitioner asserted that for the Fasli year 1389 khatauni was prepared in his name for certain plots and for the Fasli years 1390 and 1395 khatauni was prepared in his name for some other plots. The defendants, however, denied that title of the petitioner on the suit property. The defendant Kamala also contested the suit and asserted that the plaintiff had not been the bhumidhar for one –third share in the suit property and the suit was really one for a relief for a declaration of his right and title to the extent of that one-third share and only the shape of an injunction suit was given although the real relief was of a declaration of title.

2. The trial judge framed several issues including one touching the jurisdiction of the civil court to take up the matter. The issue was decided by the trial judge on 1.9.1992 in the affirmative, holding that the civil court had a jurisdiction to entertain the suit as the relief sought for was for permanent injunction that could have been granted only by the civil court. A revision application, however, was

preferred and by an order dated 27.5.1999 the IVth Additional District Judge, Azamgarh, allowed the revision, set aside the order of the trial judge dated 1.9.1992 This order has given rise to the present writ petition.

3. It was contended on behalf of the petitioner that the jurisdiction of a court is to be determined from the allegations made in the plaint and from the relief's claimed therein. When it was a suit for a permanent injunction, none but the civil court could have taken cognizance of the suit. Moreover, the cause of action had arisen only on account of attempts on the part of the defendants to interfere in the possession of the plaintiff over the suit property. It was submitted that the revisional court had gone beyond its jurisdiction to take up the question of registration or absence of registration of the alleged family settlement.

4. The U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short, the ZA & L.R. Act) makes certain provision for entertainment of suits by revenue courts to the exclusion of the jurisdiction of the civil court. Section 331 of this Act states that except as provided by or under this Act no court other than a court mentioned in column 4 of schedule 2 shall, notwithstanding anything contained in the CPC, take cognizance of any suit, application or proceedings mentioned in column II thereof or of a suit, application or proceedings based on a cause of action in respect of which any relief would be obtained by means of any suit or application. It further provides that where a declaration has been made under Section 143 in respect of any holding or a part thereof, the provisions of schedule 2 in so far as they relate to suits under chapter 8 shall not apply to such holding of part thereof. Chapter 8 of this Act deals with tenure. Section 331 furthers gives an explanation that if the cause of action is one in respect of which relief may be granted by the revenue court, it is immaterial that the relief asked for from the civil court may not be identical to that which the revenue court would have granted.

5. Schedule 2 as spoken of in Section 331 of this Act gives a table of the nature of the proceedings, the name of the court of first instance and the names of the courts of first and second appeal (where lies). In item no. 34 .it speaks of a suit for declaration of rights under Section 229-229-B and 229C of the Act and the proper forum for a suit is the court of Assistant Collector first Class. Section 229-B deals with declaratory suits by persons claiming to be asami of a holding or a part thereof. Any person claiming to be a asami of a holding or any part thereof whether exclusively or jointly with any other party, may sue the land-lord for a declaration of his rights as asami in such holding or the part as the case may be, and any other person claiming to hold as asami is to be impleaded as a defendant. These provisions would apply mutatis mutandis to a suit by a person claiming to be a bhumidhar and in such a suit the word land-holder would mean the State Government and the Gaon Sabha Section. 229-D of the Act also provides for injunction under certain circumstances in suits filed under Section 229-B,

6. Permanent injunctions are relief's thought of under the Specific Relief Act and perpetual injunctions have been dealt with in chapter 8 of this Act. Section 38 speaks that a perpetual injunction may be granted to the plaintiff to prevent a breach of an obligation existing in his favour, whether expressly or by implication, and when a defendant invades or threatens to invade the plaintiffs right to or enjoyment of a property the court may grant a perpetual injunction where the invasion is such that a compensation in money would not afford an adequate relief or where injunction was necessary to prevent a multiplicity of judicial proceeding. It is, thus clear that a permanent injunction in the nature of a perpetual restraint on the defendant from doing anything could be issued in favour of

the plaintiff only if there is an obligation existing in his favour in respect of the suit property of if there is a threatened invasion to the plaintiffs right to or enjoyment of a property. Thus there cannot be a mere injunction suit as there is always a built-in implication of an obligation existing in his favour or his right to or enjoyment of a property. Before making a claim for an injunction of a permanent nature the plaintiff must have that obligation or right in his favour.

7. Admittedly, in the instant case the plaintiff claims that obligation in his favour or the right to the suit property by dint of a family settlement and the only question that arises for determination is whether in reality he sought a relief of a declaration of a right over one-third of the suit property by way of family settlement.

8. The plaintiff relied on a decision of the Allahabad High Court in the case of Mangal Lal Chaturvedi, as reported in 1998(89) RD 467. The Hon'ble Single judge held in this case that when it was a suit simply for an injunction and possession, foundation of which was on the transfer by the defendant to the plaintiff it was not a suit involving an adjudication of right title or interest between the parties and the suit did not come within the ambit of Section 331 and the relief lay before the civil court only. On fact it was held that foundation of the suit was laid on the basis of a sale –deed executed by the defendant-petitioner for the purpose of construction of a house and possession thereof was delivered to the plaintiff. But , subsequently, the defendant had illegally constructed a wall on a part of the land and entered into possession thereof . No question of title was involved in the matter and, as such, there was no question of proving the obligation in favour of the plaintiff or his right to the plaintiff as required under Section 38 and, as such, no adjudication was necessary on those points. Only under these circumstances the above decision was given . But the facts in the instant case are not parallel as the one-third share was claimed on the basis of a family settlement which was not registered.

9. A reference may also be made in this regard to a Division Bench decision of the Lucknow Bench of the Allahabad High Court in the case of Dr. Ayodhya Prasad, as reported in 1981 AWC 469. Here was a suit filed before the civil court for a relief of certain declarations and possession as also for a relief for cancellation of a sale-deed touching the suit property, and also for an injunction. It was held by the Division Bench that the suit was cognisable by the revenue court and not by the civil court. The plaintiff had alleged in the suit that he was the son of the deceased land-holder. There had been a deed of transfer of the widow of the land holder, although under Section 171 of the ZA & L.R. Act the son was a preferential heir and his widowed mother was down in the list of heirs. The transfer made by the widow was alleged to be void and as such, it required no cancellation through a decree of the civil court. The High Court found the revenue court to be the proper forum as even the relief for injunction could have been given by the revenue court under the effective relief of a declaration.

10. The Supreme Court had in the case of Abdul Wahid Khan, as reported in AIR 1966 SC 1718 had a question before it regarding ouster of the jurisdiction of a civil court under the provisions of the Bhopal State Land Revenue Act. It was held that a statute ousting a jurisdiction of a civil court must be strictly construed. The court had dealt with different provisions of the concerned state Act of Madhya Pradesh and upon such analysis came to the conclusion that the civil court's jurisdiction had not been ousted for a declaration of title and possession of a khatedar against a trespasser. The provisions of the U.P.Z.A. & L.R. Act have already been indicated and the instant suit is admittedly

against a co-sharer and/or his transferees and a right has been claimed through a family settlement which had never been registered. Thus even with a strict interpretation of Sections 229-B and 331 of the Z.A. & L.R Act read with Section 38 of the Specific Relief Act the relief prayed for is one covered by the provisions of the Z,A & L.R. Act.

11. The learned counsel for the petitioner further relied on another decision of the Allahabad High Court (Lucknow Bench) in the case of Indra Deo Vs. Ram Pyari, as reported in 1982 (8) Alld. Law Reports 517. It was a suit for cancellation of a sale-deed in respect of an agricultural bhumidhari and the civil court had returned the plaint for its presentation before the revenue court. The order was set aside in first appeal. Patently, the facts of this case are not at all parallel to the instant matter. It was a mere suit for cancellation of a sale-deed and the civil court's jurisdiction was certainly not ousted under the different provisions of the U.P. Z.A. & L.R. Act.

12. An objection was taken by the petitioner that the appellate court had wrongly given a finding about the requirement of registration of the family settlement by which the plaintiff had allegedly acquired the one third share of the defendant no.1 Provisions of Section 17 of the Registration Act are clear on this point. This section speaks of documents for which registration is compulsory. Under this section a document must be registered if it is a non-testamentary one and purports or operates to create, assign, limit or extinguish right on an immovable property whether vested or contingent, of the value of Rs. 100. Through the family settlement claimed by the petitioner, the plaintiff-petitioner certainly proposed to extinguish the title of defendant no.1 and to create a title in his favour. Thus, it was necessary to get that alleged family settlement registered. The court below had not acted wrongly in opining that the so-called family settlement required registration.

13. From what has been discussed above, it appears that it was not the admitted case of the title of the plaintiff over the suit property, even according to mere reading of the plaintiff. Thus, the plaintiff was obliged to allege how he obtained a right on the suit property or what was the obligation in his favour in respect thereof before he could make a prayer for a permanent injunction. That could have been established by a declaration of the right claimed by the plaintiff and once we come to this conclusion, the irresistible inference would be that the suit was really in the nature of one spoken of under section 229 -B of the U.P.Z.A. & L.R. Act and was, thus cognizable by the revenue court and as such, the jurisdiction of the civil court stood ousted.

In view of the above there is no reason to interfere with the order impugned, and the writ petition, accordingly, stands dismissed

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 1.12.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 50013 of 1999

Pramod Kumar Verma ...Petitioner
Versus.
VIth Additional District Judge, Bijnor and others ...Respondents

Counsel for the Petitioner:
Shri S.N. Singh
Shri A.K. Rai

Counsel for the Respondents:
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, Sec. 21(1)(a)-Landlord's release application for indepent business by his second son allowed by both the court's below-Landlord's need found to

be genuine and bonafide and that rejection of release application would cause greater hardship-Mere fact that Landlord's second son is assisting his father in business as he in unemployed will not establish that his son will not carry on independent business.
Held-

On the facts in the present case, both the authorities have recorded finding that Atul Kumar son of respondent no. 3, requires the disputed shop for carrying on independent business and I do not find any legal infirmity in the finding.

The son of respondent no. 3 is unemployed while the petitioner is carrying business for the last more 25 years where he must have earned the amount and could have made efforts to find out alternative accommodation. In view of the above, I do not find any merit in the writ petition. It is accordingly dismissed. (Paras 10,12 & 13)
Case Law discussed.
AIR 1999 SC 3089
1984(1) ARC 113.
AIR 1974 SC 1596
AIR 1979 SC 272
1979 ARC 73.
1979 U.P.RCC 132.
1991(1) ARC 41
1998(2) ARC 373.
1999 (6) SCC 222
1990 (1) ARC 103
1996 (1) ARC 559
1982 (1) ARC 440
1999(1) ARC 365
1999(1) ARC 371

By the Court

1. This writ petition is directed against the order of the Prescribed Authority dated 13.11.1998 whereby the application filed by landlord Respondent No. 3 against the petitioner for release of the disputed shop has been allowed and the order of the Appellate Authority dated 20.10.1999 affirming the said order in appeal.

2. Briefly stated the facts are that respondent no. 3 filed application under section 21(1)(a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the Act) on the allegation that he has two sons namely Mukesh Kumar and Atul Kumar. His son Mukesh Kumar is doing independent business. His younger son, Atul Kumar is unemployed and requires shop to carry on independent business. The petitioner contested the said application. It was denied that Atul Kumar was unemployed and requires the disputed shop for carrying on business. The Prescribed Authority recorded a finding that the need of respondent no. 3 to set up his son in business in the shop in question is bona fide and genuine and in case the application is rejected he would suffer a greater hardship. The application was allowed. The petitioner preferred an appeal and the Appellate Authority has dismissed it on 20.10.1999.

3. Learned counsel for the petitioner contended that respondent no. 3 is carrying on business and his son Atul Kumar is assisting him in the business and, therefore, the need of respondent no. 3 to establish his son cannot be treated as bona fide. The facts, as found by both the authorities, are that respondent no. 3 has a shop in Mohalla Sanwaldas. He is carrying on cloth business in the said shop. His elder son Mukesh Kumar is carrying on independent business and has a medical shop. His second son, Atul Kumar, passed B.Com. Examination. He is unemployed but as there is no other business he is assisting his father in the business.

4. The petitioner suggested that Atul Kumar is carrying on lending business but he did not lead any cogent evidence to prove this fact. It was also suggested that he was carrying cloth and Sarafa business but it was also not established. One of the arguments raised was that respondent no.3 has a cane crusher in village Mandawali, Pargana Najibabad and his son Atul Kumar is looking after that crushing work. Respondent no. 3 filed a partnership deed which proved that there are four partners namely Shiv Charan

Das, Satendra Kumar, Rajendra Kumar (Respondent no. 3) and Virendra Kumar. This Firm has cane crusher in the name of M/S Agarwal Sugar Factory. Respondent no.3 is not exclusive owner of that factory. This work is done in partnership and there are other three partners. It was found that Atul Kumar has no right to carry on the said crushing business in his own right.

5. It was further suggested that one Chandra Prakash was tenant and he vacated the accommodation in his tenancy and it was available to the respondent no.3 but it was not established. It was further argued that one Yogendra Kumar Bishnoi was a tenant but the shop fell vacant. It has been found that it is not proved that there is any existing shop which can be occupied by Atul Kumar to carry on business. The petitioner further suggested some of the ancestral properties of respondent no . 3 . Admittedly Suit No. 427 of 1982 for partition is pending. In absence of any evidence that there is any suitable shop in exclusive possession of respondent no.3. it will not be available for Atul Kumar to carry on business. These are questions of fact which have been discussed by both the authorities and they have found that their is no vacant suitable accommodation to establish Atul Kumar in independent business.

6. Learned counsel for the petitioner vehemently urged that Atul kumar is assisting his father in business and this has been established by producing the photographs and the Appellate Authority also found that he was found in the shop of his father. It is contended that he is assisting his father in business and he does not require the disputed shop for carrying on business. The mere fact that his son is assisting his father in business as he is unemployed, will not establish that his son will not carry on independent business .One of the sons of respondent no.3 namely Mukesh Kumar is carrying on independent business and the version of respondent that his second son Atul Kuiar will also carry on independent business has been found to be correct.

7. In Smt. Ram Kubai v. Hajari Mal Dholak Chand, AIR 1999 SC 3089, where the landlady set up the case that she requires the premises to set up one of her sons in grocery business but it was found that he subsequently started the work of construction contractor, the Court observed that it does not militate against his intention to start the family business. It was observed :-

"It is correct that Bhikhchand was unemployed on the date of filing of the suit but he could not be expected to idle away the time by remaining unemployed till the case is finally decided. It has already taken about 25 years. Therefore, we do not think that taking up contract work in the meanwhile will militate his carrying on business of Kirana which is his family business which was carried on by his father and is being carried on by his brothers."

8. In N.S. Datta and others V. The VIIth Addl. D.J., Allahabad and others, 1984 (1) ARC 113, where release application was filed on the ground that landlord's younger son wants to start a Three Star Hotel in the accommodation in dispute. It was held that mere fact that the son is assisting in jewellery shop of his father as a stop gap measure will not affect the claim.

9. The expression of the words "bona fide required" under Section 21 (1)(a) of the Act has been judicially interpreted in various decisions of the Supreme Court and this Court vide Mattu Lal v. Radhey Lal, AIR 1974 SC 1596; Bega Begum and others v Abdul Ahmad Khan and others, 1979 SC 272; Ajit prasad v. IVth ADJ, Meerut 1979 ARC 73; Jayant Kumar v. Prescribed Authority and others, 1979 UP RCC 132. The mere desire without a necessity cannot be treated as bona fide but on the other hand it is also not necessary that unless there is absolute or

extreme necessity, the need cannot be treated as bona fide. The word "bona fide" means genuinely, sincerely i.e. in good faith in contradiction to mala fide. The requirement of an accommodation is not bona fide if it is sought for ulterior purposes on fanciful whim but once it is established that the landlord requires the accommodation for the purpose which he alleges and there is no ulterior motive to evict the tenant, the requirement should be treated as bona fide.

10. In Chakresh Chand Jain v. VIIth ADJ and others, 1991 (1) ARC 41, where the landlord had filed application to release the godwon as he required it for a Motor Garage after purchasing the shop, it was held that the need was bona fide and the contention of the tenant that open space can be used by the landlord was repelled. In Chhetriya Sri Gandhi Ashram, Meerut v. IInd ADJ, Meerut and others, 1998 (2) ARC 373, it was found on the facts that the need alleged by the landlord to set up a factory for manufacturing various articles from cement was not established. In Shiv Sarup Gupta v. Dr. Mahesh Chand Gupta, 1999 (6) SCC 222, the Apex Court upheld the need of the doctor landlord bona fide on the ground that he required the space for family including growing grand-children and also for visiting patients. It depends upon the facts of each case. In Mattulal v. Radhe Lal, AIR 1974 SC 1596, it was observed mere assertion on the part of landlord that he requires the non-residential accommodation in the occupation of the tenant for the purpose of starting and continuing his own business is not decisive. It is for the court to determine the truth of the assertion and also whether it is bona fide. The test which has to be applied must be an objective test and not a subjective one. On the facts in the present case, both the authorities have recorded finding that Atul Kumar, son of respondent no. 3, requires the disputed shop for carrying on independent business and I do not find any legal infirmity in the finding.

11. Learned counsel for the petitioner then contended that the authorities below have not properly considered the comparative hardship while releasing the disputed shop in favour respondent no. 3 He has placed reliance upon the decision Rameshwar Kumar v. IInd ADJ, Muzaffarnagar and another, 1990 (1) ARC 103, wherein it was held that it is the duty of the Prescribed Authority to consider the comparative hardship keeping in view the guidelines laid down in Rule 16 (2) of U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Rules, 1972. This decision has been explained by a Division Bench of this Court in Shiv Dev Raj v. ADJ and others, 1996 (1) ARC 559, wherein it was held that the rule requires that the Prescribed Authority "shall have regard to" which means it is only a guideline while taking into consideration the need of the landlord and determining the comparative hardship of the landlord and the tenant and the authorities are to determine their hardship keeping in view the facts and circumstances of each case.

12. In Bishan Chand v. ADJ, 1982 (1) ARC 440, the Apex Court held that where hardships of the landlord and tenant are found to be equal unless additional circumstances justifying the release order in favour of the landlord exists, the order of release should not be passed in his favour. It has been found that the son of the landlord having passed B.Com examination is unemployed. His elder brother has independent business and the father is also carry8ing on independent business. He also requires a shop to carry on independent business. On the other hand the petitioner is Goldsmith and carrying on manufacturing and sale of ornaments for the last many years. The burden was upon him also to establish as to what effort he did make to find out alternative accommodation. The application under Section 21 of the Act was filed by respondent no. 3 in the year 1992 and almost five years have already elapsed. He has not shown as to what efforts did he make to find alternative accommodation. One of the test to consider

comparative hardship is to find out as to whether the tenant has made efforts to find out alternative accommodation vide Hark Singh v. IV ADJ, 1999 (1) ARC 365, Kuldip Kumar v. IX ADJ and others, 1999 (1) ARC 371. The son of respondent no. 3 is unemployed while the petitioner is carrying business for the last more 25 years where he must have earned the amount and could have made efforts to find out alternative accommodation. In Bega Begum v. Abdul Ahad Khan, AIR 1979 SC 272, it was observed that the tenant will have to be ousted from the house if a decree for eviction is passed but such an event will happen whenever a decree for eviction is passed and it was fully in contemplation of the legislature when Section 11 (1) (h) of J & K Houses and Shops Rent Control Act was introduced. In deciding the extent of hardship that may be caused to one party or the other, in case the decree for eviction is passed or refused, each party has to prove its relative advantages and disadvantages and the entire onus cannot be thrown on the plaintiff to prove that lesser disadvantages will be suffered by the defendant and that they were remedial.

13. In view of the above. I do not find any merit in the writ Petition. It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED : ALLAHABAD 29.11.99

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

Civil Misc. Writ Petition No.24414 of 1997

Rajesh Mohan Shukla & another ..Petitioners
Versus
Union of India ,Ministry of Human Resources, Department of Youth Affairs and Sports, New Delhi through the Secretary and another ...Respondents

Counsel for the Petitioners :
Shri K.B.Mathur
Shri P.K.Misra

Counsel for the Respondents:
S.C.
Sri S.K.Dwivedi

Constitution of India, Article 14-Equal Pay for Equal work-Principles applicable to allowances and other benefits too.
Held-
The petitioners have filed a supplementary rejoinder affidavit in which it is stated that the same pay scale has been granted to the petitioners as were granted to their counter-parts appointed by the Central Government, and hence the remaining claim now is about payment of same allowances and other benefits.
In our opinion the aforesaid decisions of the Supreme Court squarely apply to the facts of this case. The writ petition is accordingly allowed and a mandamus is issued to the respondents to give the benefits as prayed for by the petitioners.(paras. 3,5)
Cases referred
AIR 1988 SC 1504
AIR 1987 SC 2049

By the Court

1. Heard Sri K.B.Mathur for the petitioner and Sri S.K. Dwivedi for the respondent No.2.

2. The petitioners are youth co-ordinators and their prayer is to grant equal pay and allowances and other benefits which are being given to other youth co-ordinators on the basis of the principle of Equal pay for equal work. It may be mentioned that Nehru Yuva Kendra originally was controlled by the Ministry of Human Resources Development Department of Youth Affairs and Sport of the Central government. The petitioners' appointments were made in the said Scheme. The grievance of the petitioners is that they are not paid the same salaries allowances and other benefits as are being given to the Coordinators appointed by the Central Government whereas they are discharging the same functions. This fact has not been denied in the counter-affidavit., rather it has been admitted in para-21 of the

counter-affidavit. The only difference in the two categories is in the mode of recruitment. In our opinion this can not make any difference in respect of their salaries and allowances since both the categories do the same work and functions.

3. The petitioners have filed a supplementary rejoinder affidavit in which it is stated that the same pay scale has been granted to the petitioners as were granted to their counter-parts pointed by the Central Government and hence the remaining claim now is about payment of same allowances and other benefits.

4. Learned counsel for the petitioners has relied on the decisions of the Supreme Court in Jaipal & others v. State of Hariyana & others, reported in AIR 1988 Supreme Court 1504 and Bhagwan Das and others v.State of Hariyana reported in AIR 1987 Supreme Court 2049.

5. In our opinion the aforesaid decisions of the Supreme Court squarely apply to the facts of this case. The writ petition is accordingly allowed and a mandamus is issued to the respondents to give the benefits as prayed for by the petitioners.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED , THE ALLAHBAD 24 .11 .1999

BEFORE
THE HON'BLE V.M.SAHAI, J.

Civil Misc. Writ Petition No. 17512 of 1995

Rama Nand Pandey ...Petitioner
Versus
The Director, Harijan Evam Samaj Kalyan Vibhag, U.P. Lucknow and others ... Respondents

Counsel for the Petitioner
Shri R.C. Singh
Counsel for the Respondents
S.C.
Shri V.K, Rai

Natural Justice-Principle of –Non Compliance with Effect.

Held-

Therefore, in absence of the notice on the record of the enquiry officer the petitioner's claim that no notice was served on him appears to be correct. Since the time fixed by the High Court in the order dated 4.11.1993 had expired the committee adopted a novel procedure of sending for petitioner. When he came to the college after 22..3.1988. It is denied by the petitioner . Even assuming that petitioner was sent for, no enquiry could be held without intimating the petitioner that the committee proposed to hold inquiry on the date fixed by it. The entire proceedings conducted by the committee after 22.3.88 were against principles of natural justice. (para 4)

By the Court

1. The petitioner was appointed on 20.7.1964 as Assistant Teacher in C.T. grade in Mook Vadhir Vidyalaya, Gorakhpur city which was a private institution established in the year 1956 for imparting education to deaf and dumb students. The institution received grant-in-aid from the State Government since 1958. The petitioner was suspended by the manager of the institution on 29/30.3.87 A charge sheet was served on the petitioner. The petitioner submitted his reply on 13.4.1987/14.4.1987. He denied the allegations. It is alleged by the petitioner that the enquiry officer did not hold any enquiry nor gave any opportunity of hearing to defend himself and submitted the report against him.

2. Before a final decision could be taken in the matter of the petitioner the institution was taken over by the state government by G.O. dated 11.7.88 It was renamed as Rajkiya Mook Vadhir Vidyalaya, Gorakhpur. Since the institution was taken over by the government, the petitioner became an employee of the state government and by

order dated 5.4.91 the petitioner was appointed in suspension animation w.e.f. 11.7.88 as teacher in the institution. It was also ordered that the petitioner shall be paid subsistence allowance but the petitioner alleges that no subsistence allowance was paid to him. The petitioner filed civil suit no. 1723 of 1987 which was subsequently withdrawn by him on 15.2.92 and thereafter he filed Civil Misc. Writ Petition No. 5968 of 1992 This petition was disposed of by this court on 4.11.93 with a direction to the respondents to take decision with regard to enquiry within a period of three months and if the respondents feel that a fresh enquiry was necessary they may hold it within the period of three months and in case the orders are not passed by the respondents the suspension order shall be ceased to be operative. The respondent no. 1 by his order dated 15.5.95 dismissed the petitioner from service. It is this order dated 15.5.95 which is under challenge in the instant writ petition.

3. I have heard Shri R.C. Singh , Learned counsel for the petitioner and Sri V.K. Rai brief holder State of Uttar Pradesh appearing for the respondents. Learned counsel for the petitioner has urged that the enquiry conducted by the Manager was ex-parte and no opportunity of hearing was given to him nor any date for enquiry was fixed by the enquiry officer nor he was supplied copy of the enquiry report. He further urged that the respondents did not hold any enquiry themselves, though this court permitted the respondents to hold the enquiry but they relied on the earlier ex-parte report which was submitted without following principles of natural justice. He further urged that this enquiry report dated 28.3.88 was never served on the petitioner. It was ex-parte , therefore, it could not have been accepted. On the other hand learned state counsel appearing for the respondents has produced the records in compliance of the order of the court as well as the enquiry report dated 28.3.88. He urged that from perusal of the enquiry report it is established that the petitioner did participate in the enquiry proceedings. Therefore, there was no violation of principles of natural justice and the petitioner having been dismissed from service by the respondents the impugned order does not call for any interference.

4. The petitioner in paragraph 33 and 34 of the writ petition has clearly stated that the enquiry officer did not call the petitioner to appear before the enquiry committee to defend his case. It has further been stated that the copy of the enquiry report was not supplied to the petitioner. In paragraph 22 of the petition it has been stated that the enquiry officer did not sent any notice or letter to the petitioner requiring him to appear before him to defend and the enquiry report was ex-parte. In paragraph 22 of the counter affidavit the facts stated in paragraph 22 of the writ petition are vaguely denied by the respondents. The denial is not supported by any document. Even from the records produced by the state counsel there is no evidence to show that the enquiry officer fixed any date for enquiry or issued any notice or letter to the petitioner for appearing in the enquiry .The enquiry report dated 28.3.88 has been produced by the state counsel. Since it was not served on the petitioner he could not refute the allegations that he refused to accept the notice sent through Ram Deo peon fixing 10.3.88 and therefore failure to challenge the recital could not lead to an adverse inference against the petitioner. As stated earlier the alleged notice sent through Ram Deo peon does not form part of the record of enquiry proceedings. The enquiry thus was held without intimating the petitioner . But since the state counsel has vehemently relied on the recital in the enquiry report to substantiate his submission that the petitioner participated in the enquiry it may be examined. From the recital in the report it is clear that the sub-committee fixed 10th and 22 nd March 1988 . And the petitioner did not appear on these dates. In paragraph 4 of the report it is stated

that when the petitioner came to college after 22.3.88 he was sent for and when asked about the charges he denied . It is thus clear that the committee did not take any action due to absence of petitioner in response to notice sent by it. Rather as mentioned in paragraph 4 of the report it sent for the petitioner after 22.3.88 when he came to the college. Therefore, in absence of the notice on the record of the enquiry officer the petitioner's claim that no notice was served on him appears to be correct. Since the time fixed by the High Court in the order dated 4.11.93 had expired the committee adopted a novel procedure of sending for petitioner. When he came to the college after 22.3.88. It is denied by the petitioner. Even assuming that petitioner was sent for no enquiry could be held without intimating the petitioner that the committee proposed to hold inquiry on the date fixed by it .The entire proceedings conducted by the committee after 22.3.88 were against principles of natural justice.

5. In the result this writ petition succeeds and is allowed. The order dated 15.5.1995 passed by respondent no 1, Annexure-9 to the writ petition is quashed with all consequential benefits of service to the petitioner. The respondents are directed to reinstate the petitioner and pay his entire arrears of salary w.e.f. 5.4.91 within a period of two months from the date a certified copy of this order is produced before respondent no.1

6. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD:3.12.1999.

BEFORE
HON'BLE SUDHIR NARAIN,.J.

Civil Misc.. Writ Petition No.16592 of 1994

Km. Asha Raina ...Petitioner.
Versus
The Rent Control and Eviction Officer, Dehradun and others ...Respondents.

Counsel for Petitioner :
Mr.Rajesh Tandon

Counsel for Respondents :
S.C.

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972, S.12 (1) (a) & (b) readwith R.8(2)- Deemed vacancy – Inspection without notice and in absence of petitioner, who was in possession of the accommodation in question- Effect.
Held-
The deemed vacancy occurs under section 12(1) (a) & (b) of the Act when the landlord or tenant has substantially removed his effects from the building or has allowed it to be occupied by any person who is not a member of his family. The Rent control Inspector found that the house was locked and it was in the possession of the petitioner. It could not have been treated as vacant unless it was found that it was occupied by the tenant and he had vacated. Major Nirmal alias Nimmu was not found to have vacated the disputed accommodation as tenant, it could not have been declared as vacant. On the other hand, it was stated that Major Raman Bahadur had sold the property and his name was wrongly mentioned in the report as Major Nirmal alias Nimmu.(Para 6)

By the Court

1. This writ petition is directed against the order dated 16.2.1994 passed by the Rent Control and Eviction Officer declaring the vacancy of the premises in question.

2. The petitioner is admittedly landlady of the premises in question. An application for allotment of the premises was filed on the ground that the landlady is not occupying the premises. The Rent Control and Eviction Officer directed the Rent Control Inspector to submit his report. The Rent Control Inspector submitted his report on 1.6.1992 stating that at the time of inspection he found that the house was closed and one Smt. Somti was living in out houses of the building. In the building there were six rooms, one hall, one verandah etc. and one room on first floor. She informed that Major Nirmal alias Nimmu had vacated the accommodation and gave its possession to Smt. Asha Raina, the owner of the house who was not found on the spot but it was reported that she was residing at Sri. A.N.Kaul Dilaram Baradari chaupatiya, Lucknow and the notice may be given to her.

3. The petitioner having come to know of the proceedings filed an objection before the Rent Control and Eviction Officer alleging that the Rent Control Inspector made the inspection of the house in question in her absence without any prior notice. The previous owners of the house in question were Smt. Kaushilya Devi and Major Raman. They have sold the property to the petitioner's mother. The name of Major Nirmal alias Nimmu had been wrongly stated in the report of the Inspector instead of showing his name Major Raman Bahadur. The Rent Control and Eviction Officer relying upon the report of the Rent Control Inspector dated 21.6.1992 declared the accommodation in question as vacant by his order dated 16.2.1994 and thereafter allotted the same to respondent No.2 on 21.2.1994.

4. The Rent Control and Eviction Officer declared the vacancy only on the basis of the report of the Rent Control Inspector dated 1.6.1992. The Rent Control Inspector had never given any notice to the petitioner, though according to him the petitioner was residing at Lucknow. He indicated that the notice may be sent to the petitioner. The Rent Control Inspector should have first given the notice to the petitioner and only thereafter should have inspected the premises. Rule 8(2) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the Act) provides that the inspection of the building, so far possible shall be made in the presence of the landlord and the tenant or any other occupant. The inspection without notice to the petitioner was invalid and on the basis of the said report the vacancy could not have been declared.

5. Even taking into consideration the report of the Inspector, it cannot be held that there was vacancy when Smt. Somti was found in occupation in the out house of the disputed house. The main house was locked and in possession of the landlady. He was told by Smt. Somti that one Major Nirmal alias Nimmu after vacating the house had given possession to the petitioner. The Rent Control Inspector did not submit any report that the said Major Nirmal alias Nimmu was the tenant of the premises in question. The petitioner had filed an objection clearly stating that Major Nirmal alias Nimmu was never tenant of the disputed house. In fact previous owners were Smt.Kaushilya and Major Raman Bahadur from whom her mother had purchased the property. The name shown as Major Nirmal was incorrect. The Rent Control and Eviction Officer did not record any finding as to whether Major Nirmal alias Nimmu was tenant of the petitioner and he had vacated the accommodation after delivery of its possession to the petitioner.

6. The deemed vacancy occurs under section 12(1) (a) and (b) of the Act when the landlord or tenant has substantially removed his effects from the building or has allowed it to be occupied by any person who is not a member of his family. The Rent Control Inspector found that the house was locked and it was in the possession of the petitioner. It

could not have been treated as vacant unless it was found that it was occupied by the tenant and he had vacated. Major Nirmal alias Nimmu was not found to have vacated the disputed accommodation as tenant, it could not have been declared as vacant. On the other hand, it was stated that Major Raman Bahadur had sold the property and his name was wrongly mentioned in the report as Major Nirmal alias Nimmu.

7. In view of the above, the writ petition is allowed. The order declaring the vacancy dated 16.2.1994 and subsequent allotment order passed in favour of respondent No.2 are hereby quashed.

8. The parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 8.12.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No.1156 of 1999.

Manohar Lal and others ... Petitioner
Versus
The Rent Control and Eviction Officer and another. ...Respondents

Counsel for the Petitioner:
Shri P.N. Khare

Counsel for the Respondents:
S.C.
Shri S.C. Tripathi

U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, S.12 (1)(b)-Declaration of vacancy-Exclusive possession-Nature and Presumption of.
Held-
The Court is to examine the nature of possession of such person who is alleged not to be member of family. If his possession is in the nature of a licensee without putting him in exclusive possession, it cannot be taken his occupation as contemplated under section 12(1)(b) of the Act. The Rent Control and Eviction Officer before declaring the vacancy is to examine all of the aspects of the matter. (Para 10)
Case Law discussed-
1979 U.P.R.C.C. 107
AIR 1959 SC 1262
AIR 1999 SC 3087
AIR 1960 All 395

By the Court

1. This writ petition is directed against the order dated 19.12.1998 passed by the Rent Control and Eviction Officer, respondent no.1, declaring the disputed accommodation as vacant.

2. Briefly stated the facts are that the petitioner is admittedly tenant of House No.8/198 Arya Nagar, Kanpur Nagar. Respondent no.2 purchased this property from its erstwhile owner by registered deed dated 23.8.1997. He filed an application for release on 27.3.1998 alleging that the petitioner has inducted his brother in the disputed accommodation under his tenancy after 1977 and, therefore, the accommodation in question should be deemed as vacant. The petitioner contested the application. It was denied that he had inducted his brother in the year 1977 but in fact they were living since the year 1969. The Rent Control and Eviction Officer took the view that the petitioner failed to prove that he was a Karta of the family, therefore, he had no right to permit his brother to occupy any portion of the house with him. He declared the vacancy by the impugned order dated 19.12.1998.

3. I have heard Sri P.N. Khare, learned counsel for the petitioner and Sri S.C. Tripathi, learned counsel for contesting respondent.

4. The question is whether the accommodation can be declared as vacant on the facts of the present case. The version of the petitioner is that his father was tenant of

house no.8/200 Arya Nagar Kanpur Nagar. He vacated the same in the year 1969 and thereafter his father and brothers started living jointly with the petitioner. It was denied that the father of the petitioner started living with him since 1977. The petitioner had filed the affidavit of the landlord of house No.8/200 Arya Nagar, Kanpur Nagar wherein it has been stated that the father of the petitioner had vacated the house No.8/200 Arya Nagar in the year 1969. The Rent Control and Eviction Officer referred to two affidavits filed by Darshan Kumar Mango and Satya Prakash Pandey wherein they have stated that the petitioner had permitted his brother to live with him since 1977.

5. There was no documentary evidence to indicate that the father of the petitioner or his brother continued to occupy house No.8/200 Arya Nagar after 1969. On the other hand the owner of house no.8/200 Arya Nagar filed an affidavit stating that the father of the petitioner had vacated it in the year 1969. The Rent Control and Eviction Officer had not considered this aspect but took into consideration the fact that the petitioner, not being Karta of the family, had no right to permit his brothers to live with him.

6. Secondly, it is to be further ascertained whether the brothers of the petitioner are in exclusive possession of the disputed accommodation or in other words they are living jointly with the petitioner. If a guest or servant of the tenant lives with him, certainly the accommodation cannot be treated as vacant but if some of his relation live jointly with him for certain reasons, where the tenant has not given exclusive possession to him, the Rent Control and Eviction Officer has to consider that in those circumstances the accommodation should be treated as vacant.

7. Section 12(1)(b) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (in short the Act) provides that a landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if he has allowed it to be occupied by any person who is not member of his family. The meaning of word "occupation" must relate to exclusive possession of such person. In P.C. Jain v. District Judge and others, 1979 (U.P.) RCC 107, the Court considered the meaning of the word "occupy" used in clause (b) of sub-section (1) of Section 12 of the Act and it was held that the word occupation includes possession as it is primary element but it must be held that the premises has been occupied by another person after the possession is transferred to him. In case there is no element of transfer of possession, it will not be an occupation within the meaning of Section 12(1)(b) of the Act.

8. In Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, while examining the difference between the words lease and licence it was pointed out that if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The Court quoted with approval the following observation of Lord Denning reflected in Errington v. Errington, 1952-1 All ER 149:

"The result of all these cases is that, although a person who is let into exclusive possession is, 'prima facie' to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

9. The question was whether the tenant had sublet the accommodation, the Apex Court emphasised that it is not mere possession but there must be other relevant circumstances particularly exclusive possession of such person. In Resham Singh v. Raghubir Singh and another, AIR 1999 SC 3087, where the brother of the tenant was carrying on the business and it was found that he was only looking after the business particularly when

his brother was involved in a criminal proceeding and absconding, it was held that subletting was not proved. In Ram Prakash v. Shambhu Dayal, AIR 1960 Alld 395, where the parties were close relations and one of them came from Pakistan to take shelter with the other, there was no presumption that a sub-tenancy was created merely because the host and his wife allowed the refugee guest to live with them and then, for the sake of enlarging available accommodation shifted to another house but left a part of their family in the old house.

10. The court is to examine the nature of possession of such person who is alleged not to be member of family. If his possession is in the nature of a licensee without putting him in exclusive possession, it cannot be taken his occupation as contemplated under Section 12(1)(b) of the Act. The Rent Control and Eviction Officer before declaring the vacancy is to examine all of the aspects of the matter.

11. In view of the above the writ petition is allowed and the order dated 19.12.1998 is quashed. The Rent Control and Eviction Officer shall re-determine the matter on the question of vacancy afresh keeping in view the observations made above and in accordance with law. It will be open to the parties to lead evidence before him.

The parties shall bear their own costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.1.2000

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

Civil Revision No. 166 of 1999

Pradeep Narain Sharma Son of Late Bhola Nath Sharma and another ...Revisionist/ Defendant

Versus

Satya Prakash Pandey ...Opposite party/ Plaintiff

Counsel for the Revisionist:
Sri P.K.Ganguly

Counsel for the Opposite party:
Shri A.K.Upadhaya

Code of Civil Procedures,1908, o.VIII Rr.10 and 1 readwith Provincial Small Causes Courts Act, 1887,S.17-Ex-parte decree Power under R.10, held, discretionary and not mandatory-Discretion to be exercised judicially-In ex-parte proceeding even in absence of written statement, plaintiff has to prove his case by examining himself-Failure defendant to file W.S. does not ipso facto entitle plaintiff to a decree.
Held-
Thus it appears that the court had proceeded illegally and with material irregularity in decreeing suit ex-parte the ground, with as mentioned in Rule 10 of order VIII of Code, which is applicable by reason of section 17 of the Provincial Small Cause Court's Act as well as in the ground of merit if the case itself without referring to the statements made by the plaintiff to support the plaint case in order to entitle him to the relief prayed for. Therefore, the order dated 3rd December, 1999 is liable to be set aside and is hereby, set aside accordingly. (para.14)

Case Law discussed –
AIR 1971 Punj 435
AIR 1989 Pat 139
AIR 1987 Cal 111:90 CWN 904
AIR 1987 Gau 85
AIR 1987 M.P.110
AIR 1990 All. 49
AIR 1982 NOC 33(All)

By the Court

1. By an order dated 3rd december,1999, the learned District Judge, Varanasi had decreed the S.C.C. Suit No.15 of 1999 ex-parte. In the said order, the rate of rent was found as Rs.2,000/-per month and that the revisionists defendants were defaulter for the period January,1997 till march,1999 and he accordingly directed payment of arrears of rent at the said rate. Mr. P.K. Ganguly, learned counsel for the revisionists contends that even if an ex-parte decree is passed, the

learned court has to apply its mind and it cannot accept the pleadings made out in the plaint as a gospel truth. Even in case of ex parte decree, the plaintiff has to prove his case and show that he is entitled to the relief sought for. From the judgement, it does not appear that the court had applied its mind. On the other hand, it suffers from various infirmities as is evident from the order itself. He further contends that the court had failed to comply with the provisions of Rule 10, Order VIII of the Code of Civil Procedure in that the said provision of the Code of Civil Procedure is applicable in a proceeding before the court of small causes by virtue of Section 17 of the Provincial Small Causes Courts' Act, 1887 as applicable in Uttar Pradesh. He further points out that the date that was fixed was third 3rd date. On two earlier occasions, the defendant had appeared and had obtained adjournment for filing written statement. On 3rd December, 1999, again an application for adjournment was filed, which was rejected on the ground that the defendant had obtained time on two occasions earlier. According to him, said rejection was not justified. In as much as the application for adjournment has to be rejected on its own merit and not on the ground that on earlier occasions, adjournment was obtained. On these grounds, he prays for setting aside the impugned order dated 3rd December,1999.

2. Mr. A.K. Upadhaya, learned counsel for the opposite party on the other hand strongly opposes the contention of Mr. Ganguly. He contends that the court was right in rejecting the application for adjournment since in the application itself, no sufficient ground was made out. According to him, even on the merit of the application for adjournment, the same could not have been allowed. He further contends that the court had applied its mind, which is reflected in the order itself. The plaintiff was examined and his statement was believed. Therefore, there was no infirmity in the order itself. He further contends that even in the application in support of the present revisional application, the revisionists themselves had admitted that the rent was originally Rs.2,000/- per month. He has sought to make out a different case to the extent that the rent was Rs.700/-per month , which is altogether an after-thought. He further contends that the revisionists are not disputing that they were defaulter for the period mentioned above. Therefore, according to him, there is no infirmity in the order and the said order should not be interfered with.

3. Mr. Ganguly, however, contends that the rent at the rate of Rs.2,000/- per month is not an admitted position in view of the subsequent agreement referred to in paragraph 7 of the said application and he also disputed the period of default.

I have heard both the learned counsel at length.

4. After having perused the impugned order, it seems that the learned trial court had proceeded on the basis that the statements made in the plaint are correct since it was supported by the plaintiff but the said order does not show that the plaintiff was examined and that in his statement he has supported the statement made in the plaint. Though Rule 10, Order VIII of the C.P.C. permits pronouncing ex parte judgement if the defendants fails to file the written statement, yet it does not empower the court to decree the suit without having regard to the statement made in the plaint supported by materials, which might include oral evidence. There is nothing to indicate, even though it was a decision by the Small Cause Court, that the court is supposed to accept the statement made in the plaint as gospel truth. The plaintiff has to establish his case even by examining himself orally and the court has to refer to the same. The same time, it further appears that an application for adjournment was filed and that was rejected. From the dated 3rd December, 1999, by which the application for adjournment was rejected, it appears that the reason for rejection was

simply the making of adjournment applications on two earlier occasions. The question of grant of adjournment is dependant on the case made out on the application for adjournment. It is to be decided on the merit of the application it may be one of the factor to be weighed with while considering such application.

5. Section 7 of the Code precludes the application of the Code in relation to suits triable by Small Causes Court in respect of the matters prescribed in clauses (a) and (b) thereof. Order 50 of the Code similarly precludes the application of the Schedule to the Code in the relation to suits cognizable by Small Cause Courts in respect of the matters mentioned in clauses (a) and (b) thereof. Section 17 of the Provincial Small Causes Courts Act, 1887 prescribes application of the Code in relation to suits cognizable by the Court of Small causes to the extent as prescribed in the Code and in the said Act. Application of Order VIII, Rules 1,9 and 10 has not been precluded by reason of Order 50. Therefore, non-filing of written statement within the meaning of Order VIII, Rule 1, as in the present case, definitely attracts the application of Rule 10.

6. But then in order to apply the said provision, the situation emerging in a given case has to be brone in mind. It is not a straight jacket formula; that whenever there is a default written statement, Rule 10 is to be applied. Order VIII, Rule 10 prescribes that in the failure to file written statement, judgement shall be pronounced against the defendant or it shall pass such order in relation to the suit as it thinks fit.

7. Thus, Order VIII, Rule 10 does not prescribe that whenever there is a failure to file written statement, the Court shall pronounce judgement against the defendant. On the other hand, it confers a discretion on the court either to pronounce a judgement or to pass such order as it may think fit. In case an extension of time is asked for, court has power to extent the time to file written statement within the scope and ambit of Rule of Order VIII, which provides for filing of written statement by the defendant at or before the first hearing or within such time as the court may permit. Such extension of time is also implicit in rule 10 within the expression "or make such order in relation to the suit as it think fit." It is not mandatory to pronounce judgement on the failure to file written statement. It is discretionary. The discretion of the court is always a judicial discretion to be exercised judiciously.

8. This proposition finds support in the case of Mehar Chand v. Suraj Bhan (AIR 1971 Puj.435) and Dineshwar Prasad Bakshi. v. Parameshwar Prasad Sinha (AIR 1989 Pat 139). On the other hand, the High Court at Calcutta took a liberal view in Ramesh Chandra Bhattacharya v. Corporation of Calcutta (AIR 1987 Cal.111 :90 CWN 904) holding that the defendant can file written statement even after conclusion of ex-parte evidence and before pronouncement of judgement.

9. In the case of State of Assam v. Basanta (AIR 1987 Gauhati 85), it was held that adjournment should not be rejected simply because the defendant obtained similar adjournments earlier. Admittedly, it was not a case within the meaning of Order VIII, Rule 9. The case is one under Order VIII, Rule 1 of the Code. Rule 1 refers to first hearing or within such time as the court may permit. This extension of time is a discretion of the court which is required to exercise the same judicially.

10. The above principle is based in the right to trial within a reasonable time. This principle travels back to the modern community from the date of Magha Carta when in 1225 the great charter given by King Hanry III stated in Clause (40) that " to no one will we sell, deny or delay right to

justice." This principle finds reiteration in the statement of Sri Jacob on 'reform of Civil Procedural Law (1982) at P 93: "The fundamental need for expedition in the legal process from the general recognition that delay in the administration of justice is a denial of justice, and a denial of justice is equivalent to the deprivation or abstraction of the legal right of the citizen. The plaintiff has to suffer the delay of obtaining satisfaction of his legal rights the defendant enjoys the benefit of his own legal wrong; and the State suffers because of its legal process is being abused." At the same time Sir Jacob was not oblivion of the other side of the coin. At page 94, he states that " while the need of accelerating the legal process is fundamental and over-whelming, there may be a danger of going to the opposite extreme in providing remedies and reforms to expedite the process. It is danger of the 'back-lash' or 'over-kill', whereby the procedural remedies to overcome delay may be worse than the decease and may even aggravate it. It is, therefore, necessary to guard against this danger and to see the problem of accelerating the legal process in balanced way and in its true perspective. Sir Jacob lastly warned that the passion for expedition in the trial may bring forth 'second class justice.' This was also the view of Prof. George de Leval of Belgium expressed in his report submitted in the First International Congress on the Law of Civil Procedure held in Belgium in 1977. Referring to this report, Sir Jacob concluded that " the Belgium Reporter has warned against the danger that accelerating the process of law might lead, not to attainment of justice but to arbitrariness in the legal process."

11. The maximum that 'delay defeats justice' is definitely a correct proposition recognized by the judiciary. But it is to be kept in mind that each party has a right to demand reasonable opportunity, though none has the right to stagger or stall the progress of the suit. The High Court of Madhya Pradesh in Ramesh Chandra v. Rameswar Dayal (AIR 1937 MP 110), following the Gauhati case had expressed the same view. In Surendra Kumar v. Rajendra Kumar Agarwal (AIR 1990 All 49), this Court dealing with a case arising out of a suit for ejectment held that there is a tendency of the tenants to delay the proceeding by seeking adjournments. They seek time to file written statement. Still the court should not refuse adjournment and decree the suit merely because several adjournment were avialed of in the past by the tenant. Opportunity to file written statement should be given to him.

12. Thus the principle that emerges is that the court is supposed to dispense justice to both and not to one and to endeavour for expedition but not at the cost of denial of justice. It's discretion is to be exercised judicially having regard to the facts and circumstances of the case. The court has to strike a balance. In the process of giving opportunity, the court cannot allow one of the party to stagger or stall the progress of the suit. At the same time, it can not deny reasonable opportunity to either of the parties. The question is dependent on the facts and circumstances of each case.

Now let us examine the question whether Rule 10, Order VIII empowers the Courts to pass a judgement accepting the plaint case as gospel truth. Even if the defendant does not file written statement, the plaintiff has to prove and establish his case. He cannot succeed on the weakness of defence or absence of the defence. Failure to file written statement does not ipso facto entitle the plaintiff to a decree. There is an essential distinction between the phrases, burden of proof as a matter of law and pleadings on the one hand and as a matter of leading evidence on the other. In the former sense it is upon the party who comes to court for a decision on the existence of certain facts which he asserts. That burden is constant through- out the trial. The burden to prove in the sense of adducing evidence shifts from time to time. But such

shifting rakes place only when the initial burden is discharged. Therefore, it is for the plaintiff to establish his case by discharge of the initial burden and take advantage of the shifting of onus in the absence of written statement. But then it is for the plaintiff to ascertain the facts establishing his right or entitlement to the relief even though there may not be a written statement.

13. The above view may find support in the decision in Prem Daya Srivastava v. Moti Chand Lal (AIR 1982 NOC 33 (Au), to the extent that non-filing of written statement does not ipso facto entitle the plaintiff to a decree.

14. Thus it appears that the court had proceeded illegally and with material irregularity in decreeing the suit ex-parte on the ground as mentioned in Rule 10 of Order VIII of the Code, which is applicable by reason of Section 17 of the Provincial Small Cause Courts' Act as well as on the ground of merit of the case itself referring to the statements made by the plaintiff to support the plaint case in order to entitle him to the relief prayed for. Therefore, the order dated 3rd December, 1999 is liable to be set aside and is hereby, set aside accordingly.

15. The revision is allowed. The learned trail court shall proceed with the suit as expeditiously as possible after giving opportunity to the revisionists to file their written statement. The revisionists shall file their written statement within one month from this date. Mr. Ganguly submits that his client will not seek unnecessary adjournments. This order is subject to the condition that the revisionists shall go on depositing the rent month by month at the rate of Rs.2,000/-per month from the month of January,2000 onwards payable on 15th of the succeeding month subject to the result of the suit. So far as the arrears is concerned, the revisionists shall deposit the sum of Rs.25,000/- within a period of three months from today. In default of any of the above conditions, this order shall stand recalled. If the said amount is deposited, in that event, the court will proceed to disposed of the case accordingly, as early as possible. The opposite party shall be entitled to withdraw the sum of Rs.25,000/- as well as the monthly deposited in the learned trial court. However, he will furnish an undertaking in the learned trial court that in case the rate of rent and the arrears is decided otherwise, in that event, he will refund the excess amount to the revisionists after forthwith after the decree is passed. No cost.

16. Let a copy of this order be issued to the learned counsel on payment of usual charges within 7 days.

Revision Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: NOV. 25, 1999

BEFORE
THE HON'BLE N.K. MITRA, C..J.
THE HON'BLE S.R. SINGH, J.

Special Appeal No. 387 of 1998

State of U.P. & others ....Appellants
Versus
Ramagya Chaubey ....Respondents

Counsel for the Appellants:
S.C.

Counsel for the Respondents:
Sri C.B. Yadav

Constitution of India , Article 226- Recruitment on the post of Sub- Inspector- advertisement specifically provided a bout participation in interview of only those who have secured maxim aggrigeate marks in written test- petitioner obtained highest marks but denied for interview on the per text as has not obtained 40% marks in every paper / subject- Held illegal.
Held-
In the absence of any statutory rules, the recruitment has to be governed by what is provided in the advertisement pursuant to

which the recruitment is sought to be made .The advertisement in the present case, as already noticed, clearly postulates that only those candidates should be qualified for interview who have secured maximum marks, in the final written examination . It nowhere prescribes any minimum mark in the aggregate or any minimum in each subject i.e. it nowhere provides that candidates will have to secure 40% marks in each subject and 50% in the aggregate in order to be able to make way for interview. Therefore, the according to the advertisement, the criterion for calling the candidates for interview is the merit to be determined in the bases of total aggregate marks obtained in the final written examination. Accordingly, no exception can be taken to the view taken by the learned Single Judge. (para 7)

case law discussed
AIR 1965 .SC –77
M.P. 1986 L.I.C. 1990
(1994) 1SCR 165 =AIR 1973.S.C.-2216
AIR 1988- SC. 162

By the Court

1. The above three appeals are knit together by common questions of law and fact and hence for convenience sake, they have been taken up for disposal by a composite judgment.

2. Special Appeal nos. 240 of 99 and 410 of 99 stem from an order of the learned Single Judge thereby allowing Civil Misc. Writ Petition No. 44649 of 1993 on the lines of judgment rendered in **Civil Misc. Writ Petition No. 24976 of 1993, Ramagya Chaubey v. State of U.P. and Ors** validity of which has come to be canvassed in Special Appeal No. 387 of 1998. The disputation pertains to recruitment to the posts of Sub Inspector Civil Police, numbering 630- 570 (male) and 60 (female) vide advertisement dated 4.10.91 (annexed as Annexure-1 to the affidavit in support of the stay application) as amended vide notification dated 26.10.1991. According to the initial advertisement, 525 vacancies were publicised out of which 475 were ear-marked for male candidates and 50 for female candidates but the initial advertisement was subsequently modulated which made an accretion of 105 more vacancies as a consequence of which the number of vacancies to be filled by male and female candidates rose to as high as 570 and 60 respectively. It brooks no dispute that the recruitment is not circumscribed within any statutory service rules and as per the advertisement, it was to be made on the basis of written examination preceded by a preliminary test which was held on 28.6.1992 and by physical test held between 4th Jan. and 9th Jan 1990. In all 36353 candidates applied for recruitment to the posts in question but as a result of screening by means of preliminary examination and physical test, 4649 candidates appeared in the final examination the result of which was declared on 19.7.93. The final examination culminated in qualifying 723 candidates for interview (viva voce) test. The respondents in the two appeals secured enough marks in the aggregate in the final written examination but they were reckoned out of consideration for interview due to the reason that they failed to secure 40% marks in one of the subjects. As a sequel to it, the respondents invoked the jurisdiction of this Court under Art. 226 for the relief of a mandamus commanding the respondents to declare them successful for the posts of Sub Inspector, Civil Police on the premises that according to the advertisement, it was not essential for the candidates to secure 40% marks in each subject in order to qualify for interview. The learned Single Judge held the view that the result of the final examination was to be declared on the basis of total aggregate marks irrespective of whether a candidate had secured 40% marks in each subject or not and accordingly, allowed the petition directing the appellants herein to declare the result of the writ petitioner attended with a command that he would not be declared unsuccessful ***"merely because he has not obtained 40% marks in one paper i.e.***

in Hindi if he has been found otherwise fit and successful."

3. We have heard learned Standing counsel appearing for the appellants and **Sri C .B. Yadav,** learned counsel representing the respondents. The question that surfaces for consideration is whether it was imperative for the candidates to have secured 40% marks in each subject in order to make way for interview. The learned Standing counsel relied upon the Govt notification dated July 10, 1986(Annexure 2 to the affidavit in support of the stay application) to enforce his submission that it was incumbent for the candidates to have secured 40% marks in each subject in order to qualify for interview. The notification on which the learned Standing counsel has placed credence relates back to the selection of Sub Inspector, Civil Police for training for the year 1986-87. The notification referred to, embodied specific provision that candidates had to secure 40% marks in each subject and a minimum of 50% in the aggregate. No such condition is stipulated in the advertisement dated 4.10.91 as modified by subsequent advertisement dated 26.10.91 pursuant to which the recruitment in question is sought to be made. The relevant provision of the advertisement reads as under:

" Ukta Parikshaon Me Safal Ghaushit Abhiyarthiyon/ Abhiyarthini Ko Sakshatkar Hetu Amantrit Kiya Jayega. Yadi Safal Abhiyarthi/Abhiyarthini Adhik Sankhiya Me Hote Hain To Sakshatkar Ke Liye Keval Vahi Abhiyarthi/Abhiyarthini Bulayen Jayenga, Jinhone Pariksha Me Adhiktam Ank Prapta Kiya Ho. Up Nirikshak , Nagrik Police Ke Jitne Pad Rikta Honge, Us Sankhya Ke Lagbhag Teen Guna Adhik Abhiyarthi Sakshatkar Ke Liye Bulaye Jayenge. Kisi Bhi Dasha Me Asaphal Abhiyarthi Sakshatkar Me Bulaye Nahi Jayenge. Sakshatkar Me Bulate Samaye Arakshan Sambandhi Niyamo Ka Bhi Poora Dhyan Rakha Jayega."

4. The learned Standing counsel placed reliance on a decision of the Supreme Court in **M.P. Public Service Commission v. Navnit Kumar Potdar**[1]**.** In that case, advertisement was issued inviting applications for appointment to the post of Presiding Officer of the Labour Court constituted under the provisions of M.P. Industrial Relation Act, 1960. In view of sec. 8(3) (c) of the said Act, it was prescribed in the advertisement that the applicants should have put in practice as an advocate or a pleader for a total period of not less than five years. It would transpire that in view of large number of applications received from the general category candidates against four posts, a decision was taken by the Commission to call for interview only those applicants for interview who had completed 7, 1/2 years of practice although in view of Sec. 8 (3) (c) of the Act, only five years of practice as an Advocate or a Pleader in the Madhya Pradesh was a minimum eligibility requirement as per the statute. It was canvassed that according to the statutory requirement, only five years of practice as an Advocate or Pleader was essential for qualifying for interview and therefore, it was not open to the Commission to enlarge the said period to 7,1/2 years and debar the applicants who fulfil statutory requirement of five years of practice as Advocate or Pleader. The High Court allowed the writ petition taking the view that as the statutory qualification in respect of practice was only five years, raising the said period to 7,1/2 years was equivalent of laying down a criterion in violation of the prescribed statutory criterion. A direction was given either to call the applicants for interview who have completed five years of practice required by sec. 8(3) (c) of the Act or to screen the candidates through some other tests and thereafter to call only such candidates who qualify at the said screening test. The Supreme Court where the matter was taken, allowed the appeal and held as under:

[1] AIR 1995 SC 77

"According to us, the High Court has not appreciated the true implication of the short-listing which does not amount to altering or changing of the criteria prescribed in the Rule, but is only a part of the selection process. The High Court has placed reliance on the case of **Praveen Kumar Trivedi v. Public Service Commission, [2]M.P. 1986 Lab 1C 1990,** where it has been pointed out that Commission cannot ignore a statutory requirement for filling up a particular post and cannot opt a criteria whereby candidates fulfilling the statutory requirements are eliminated from being even called for interview. As we have already pointed out that where the selection is to be made purely on basis of interview, if the applications for such posts are enormous in number with reference to the number of posts available to be filled upon, then the Commission or the Selection Board has no option but to shortlist such applicants on some rational and reasonable basis."

5. On the question as to whether in the process of short-listing, the Commission had altered or substituted the criteria or the eligibility of a candidate to be considered for being appointed against the post of Presiding officer Labour Court, the Supreme Court held in the case aforestated as under;

"It may be mentioned at the very outset that whenever applications are invited for recruitment to the different posts, certain basic qualifications and criteria are fixed land the applicants must possess those basic qualifications and criteria before their applications can be entertained for consideration. The Selection Board or the Commission has to decide as to what procedure is to be followed for selecting the best candidates amongst the applicants. In most of the services screening tests or written tests have been introduced to limit the numbers of the candidates who have to be called for interview. Such screening tests or written tests have been provided in the concerned statutes or prospectus, which govern the selection of the candidates. But where the selection is to be made only on basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview."

6. In **State of Haryana v. Subhash Chander Marwaha[3]** , the Supreme Court was called upon to consider as to whether the appointments could have been offered only to those who had scored not less than 55% marks when Rule 8 which was under consideration, in that case, made candidates who had obtained 45% or more in competitive examination eligible for appointment. The Apex Court held that Rule 8 was a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit and the one higher in rank is deemed to be more meritorious than the one who is lower in the rank. Accordingly, it was propounded that there was nothing arbitrary in fixing the scoring of 55% for the purpose of selection although a candidate obtaining 45% was eligible to be appointed. In **State of U.P. v. Rafiquddin[4]**, the question was as to whether the Public Service Commission was competent to fix minimum marks under Rule 19 of U.P. Civil Services (Judicial Branch) Rules 1951 as it then stood. Rule 19 of the rules under consideration in that case visualised that Commission would prepare a list of candidates who had taken the examination for recruitment to the service ***"in order of their proficiency as disclosed by aggregate marks finally awarded to each candidate".*** And further that ***"if two or more candidates obtain equal marks in the aggregate the Commission shall arrange them in order of merits on the basis of their general suitability for the service."*** The proviso to the rule read as under:

[2] M.P. 1986 Lab 1C 1990,

[3] (1974) 1 SCR 165: (AIR 1973 SC 2216)

[4] AIR 1988 SC 162

"Provided that in making their recommendations the Commission shall satisfy themselves that the candidate-
(i) has obtained such an aggregate of marks in the written test that he is qualified by his ability for appointment to the service:
(ii) has obtained in the viva voce test such sufficiently high marks that he is suitable for the service."

It has been held by the Apex Court in that case as under:

"Where selection is made on the basis of written as well as viva voce test, the final result is determined on the basis of the aggregate marks. If any minimum marks either in the written test or in viva voce test are fixed to determine the suitability of a candidate, the same has to be respected. Clause (ii) of the proviso to R. 19 clearly confers power on the Commission to fix minimum marks for viva voce test for judging the suitability of a candidate for the service. Thus even if a candidate has obtained higher aggregate marks in written and viva voce test but if he had failed to secure the minimum marks in the viva voce test his name could not be included in the list prepared by the Commission under R. 19."

7. There is no quarrel with the principles laid down by the Apex Court in the cases referred to above but the decisions afore stated bear no resemblance for application to the facts of the present case. The advertisement in question herein clearly postulates that if a large number of candidates have qualified in the written examination, then only such candidates would be called for interview who have secured '**maximum marks**'. The notification dated July 10,1986 reliance on which has been placed by the learned Standing Counsel, was in respect of a particular recruitment year. It cannot be attributed any force of the statutory rules. In the absence of any statutory rules, the recruitment has to be governed by what is provided in the advertisement pursuant to which the recruitment is sought to be made. The advertisement in the present case, as already noticed, clearly postulates that only those candidates should be qualified for interview who have secured "**maximum marks**" in the final written examination. It nowhere prescribes any minimum mark in the aggregate or any minimum in each subject i.e. it nowhere provides that candidates will have to secure 40% marks in each subject and 50% in the aggregate in order to be able to make way for interview. Therefore, according to the advertisement, the criterion for calling the candidates for interview is the merit to be determined on the basis of total aggregate marks obtained in the final written examination. Accordingly, no exception can be taken to the view taken by the learned Single Judge.

As a result of foregoing discussion, the appeals fail and are dismissed in limine.

Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD NOVEMBER 24, 1999

BEFORE
THE HON'BLE RAVI S.DHAVAN, J.
THE HON'BLE B.DIKHSIT, J.

Civil Misc. Writ Petition No. 44252 of 1998

Shiv Nath Seth ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri H.N. Singh
Shri R.N. Upadhya
Shri R.S. Chauhan

Counsel for the respondents:
S.C.
Shri K.B. Mathur

Constitution of India, Article 300 A- Deprivation of- Property- usurption of agricultural land of petitioner for public purpose neither the land acquired in accordance with law nor compensation paid for about 20 years- dispite of time granted no. C.A. filed nor the responsible authority appear before the Court- exumplary cost emposed- direction given to the Accountant General of U.P. with certain observations.
Held-
In present case also the finance for the public project for setting a pump house and for anti pollution measures for the Gomti River had been sanctioned as a public scheme. Acquisition proceedings had been taken out. The Court would not know compensation had been deposited or not. The respondents do not reply to the petition. The petitioner has not received compensation, even though his land had been 'acquired' more than 20 years ago. In the present case it would be appropriate that this matter is reported to the Accountant General, U.P. Public moneys must be accounted for the must be used strictly in accordance with the procedure established under the law. If the money is sanctioned for a public scheme and such a scheme has been executed on the petitioner's plot, then, the law expects and the Constitution of India obliges the respondents to take out acquisition proceedings. The petitioner, at every given time, had the protection of Article 300-A that he would not be deprived of his property in total violation of the law and the Constitution, both. The respondents could not justify the acquisition proceedings under any procedure established by law and further violated Art 300-A.(para 20

Constitution of India to deprive a person of his property nakedly in violation of the due process of the law. Further the respondents despite and order of the Court, did not file the counter affidavit by a responsible officer neither the U.P. Jal Nigam nor the State of U.P. which did not file a reply at all. In these circumstances, the Court considers it appropriate that each set of respondents, that is the U.P. Jal Nigam as well as the State of Uttar Pradesh shall be subject to costs, to be deposited with the Registrar, High Court, within fifteen days from today. These costs will stand as Rs.10,000/- against the U.P. Jal Nigam, one set and Rs. 10;000/- against the State of Uttar Pradesh second set to be paid by the District Magistrate, Jaunpur, who had knowledge of the acquisition proceedings, but would not file the counter affidavit, despite an order of the Court (para 20 and 21)

By the Court

1. In Uttar Pradesh, the Court has had several occasions noticing usurpation and illegal occupation of the properties of citizens in violation of the procedure established by law. This is another case. The Court will revert to other cases subsequently in this order.

2. The petitioner, Shiv Nath Seth, Resident of Kerakat, Post Office Sadar, District Jaunpur had his Bhumidhari plots no. 12/164 area 32 decimal and plot no. 2 area 3 decimal walked into by the respondents without any authority and on the property of the petitioner, the U.P. Jal Nigam, established under the U.P. Water Supply and Sewerage Act, 1975, constructed a pumping set and sewerage drain under the Gomti Pollution Control Project.

3. The petitioner complains that after the plot had been occupied and taken, ostensibly for establishing a public project, the 'acquisition' should have been made under the procedure established by law so that the petitioner could object to the acquisition, which, if rejected , would have entitled him, as of might, to compensation. The contention, on behalf of the petitioner, is that this usurpation of his property has deprived him to object against the illegal occupation of his property and compensation both. The petitioner contends that 20 years have passed and he is getting on in years as he is 75 years old today and has been left with no choice except to accept the compensation which also is not forthcoming. The petitioner contends that his land had been possessed for a public project is not an issue and as late as 5 October, 1997 (Annexure-1 to the petition), the Tehsildar certified the occupation of the

petitioner's plots for the purposes of executing a public project. The petitioner also contends that of an occupation which was made 20 years ago, the records are being certified after two decades. Then, the petitioner contends that the District Magistrate, Jaunapur, has written to the General Manager, U.P. Jal Nigam, Lucknow, by his communication of 2 April, 1998 (Annexure-2 to the writ petition) that the petitioner be paid compensation in accordance with law for the 'acquisition' which has been made for executing the project under the Gomti Pollution Control Project. The Petitioner submits that the District Magistrate repeated his request to the General Manager, U.P. Jal Nigam, Lucknow, by his communication of 13 May, 1998 (Annexure-3 to the writ petition) that the compensation against the 'acquisition' be processed without any further delay, yet, the petitioner has not received the compensation. The petitioner further pleads that the Chief Engineer (East), U.P. Jal Nigam, Allahabad, had even been advised by a member of the Legislative Assembly, the Hon'ble Mr. Reoti Raman Singh, that the delayed compensation ought to be paid to the petitioner. This aspect is to be found in a communication (Annexure 4 to the writ petition) written by the Superintending Engineer (Ganga) to the Chief Engineer (East), U.P. Jal Nigam, Allahabad. The petitioner submits that no attention has been paid to this matter of payment of compensation to the petitioner. The petitioner further submits that irrelevant correspondence is being made and this is evidenced by the fact that the Executive Engineer, U.P. Jal Nigam, Jaunpur, is writing to the Executive Engineer, VII Region, Varanasi, and seeking clarification whether the petitioner's plot had in fact been acquired for the public project and that a report be submitted on this aspect (Annexure –5 to the writ petition).

4. On behalf of the petitioner, it is contended that this is a frustrating exercise that once it is on record that even the project has been executed and complete on the petitioner's land, there should be no question of seeking further reports whether the land had in fact been possessed by the State respondents. The State of Uttar Pradesh has not replied to the writ petition. Though, if an acquisition of land has been done under the procedure prescribed by law, the sovereign powers of the State could be utilised and that also by an acquisition under the Land Acquisition Act, 1894. On behalf of the U.P. Jal Nigam, the petition has been answered by a counter affidavit by a Noter and Drafter of the Construction Division, U.P. Jal Nigam, Jaunpur. This in itself implies that the high officials are evading the responsibility to reply to the writ petition.

5. In the counter affidavit, which has been sworn by aNoter and Drafter, basically a clerk with the U.P. Jal Nigam, Jaunpur, it is estimated that the project was prepared at an estimated cost of Rs. 18.44 lacs in 1970-71. The funds were provided by the State government. The project was executed by the U.P. Jal Nigam, at the site which was made available by the Nagar Palika, Jaunpur. It is accepted that the land on which the project was executed, belongs to the petitioner, Shiv Nath Seth. It is contended that the petitioner did not raise any claim or make any complaint about possession having been taken of his land nor any complaint about non-payment of compensation. The counter affidavit submits that the Jal Nigam was under the impression that the matter of compensation may have been settled between the Nagar Palikaa, Jaunpur and the petitioner and that the U.P. Jal Nigam merely executed the scheme under the project. It is also contended in its counter affidavit that the petitioner is not entitled to claim compensation at the present market value. A technical plea is raised that the petitioner has not impleaded the Nagar Palika, Jaunpur. The counter affidavit also mentions that as in accordance with the record available, the U.P. Jal Nigam did not acquire the land of the petitioner nor is there any

liability to pay compensation to the petitioner by U.P. Jal Nigam. Simultaneously, it is contended in the counter affidavit that when the District Magistrsate, Jaunpur, by his letter of 2 April 1998 wrote to the U.P. Jal Nigam' the matter was referred to respondent no. 3 ' The respondent no. 3 happens to be the General Manager, Gomti Pollution Control Unit, U.P. Jal Nigam, Lucknow. A technical plea is raised that the petitioner has filed a case before the Consumer Protection Forum, Jaunpur and has not stated that he has withdrawn the case and that the petitioner has complained to the Additional District Magistrate (Finance and Revenue), Jaunpur, about not having received the compensation. The counter affidavit which has been filed and a clerk has been required to affirm it, is a bundle of contradictions. The only conclusion the Court can draw from this counter affidavit is that the records are being shuttled inter office. There is no urgency to process the payment of compensation to the petitioner. It is accepted that the scheme was executed by the U.P. Jal Nigam and , simultaneously, this corporation asserts that it has no liability or responsibility to arrange for compensation to the petitioner.

6. In the rejoinder affidavit, the petitioner asserts that he is a poor citizen and he expects that in a welfare State, the State and its constituents would function by the rule of law, so provided under the Constitution, and the compensation would be forthcoming, after his land has been 'acquired'. The petitioner also mentions in his rejoinder affidavit that at one stage the Executive Engineer, Construction Division, U.P. Jal Nigam, Jaunpur , had written to the General Manager, Gomti Pollution Control Unit, by assessing the compensation at Rs.4,85,340/- (Annexure 1 to the Rejoinder Affidavit). In answer to the technical pleas taken in the counter affidavit of U.P. Jal Nigam, the petitioner asserts that he may have filed a case before the Consumer Forum incorrectly as this may not be the competent authority to look into the matter of compensation. In arguments counsel for the petitioner has asserted that the land of the petitioner has not been acquired, but possessed illegally in violation of all procedures relating to acquisition.. It is submitted that the rule of law has been violated. It is reiterated that the petitioner is being harassed by officials of U.P. Jal Nigam as well as the State in being denied compensation when his land was taken 20 years ago. Learned counsel for the petitioner vehemently pleaded before the Court that he would have sought the return of his land and that he is entitled to this relief because there is no land acquisition proceedings. But, it was submitted that the petitioner is, 75 years old, today, and would rather see receipt of compensation in his hands calculated at the market rate and since it has not been paid, it should be deemed that his land has been possessed as a continuing wrong so that it is calculated at the market rate with all the consequences for awarding the compensation under the Land Acquisition Act, 1894.

7. In this regard, the State respondents have evaded reply to the petition, though there was no lack of opportunity to answer the writ petition; certain orders of the Court needs to be noticed. Despite an order of the High Court that the counter affidavit should be affirmed by the Executive Engineer, Construction Division, U.P. Jal Nigam, Jaunpur, or the Superintending Engineer, VII Region, Varanasi, the counter affidavit was not verified by the respondents. The Court required the counter affidavit on behalf of the State to be filed by the District Magistrate, Jaunpur. The District Magistrate, Jaunpur did not reply to the writ petition. The Court issued a rule of mandamus to the respondents that the claim of the petitioner for compensation be processed or cause be shown by the respondents, named in the order of the Court. Cause was not shown by any of the respondents. The record rests with the responsible officers not verifying the counter affidavit and deputing a clerk to reply to the

petition. The District Magistrate chose not to reply to the petition.

In the circumstances, the three orders of the Court reflecting on the manner in which the officers have evaded responding to the petition are reproduced below :

"30th September 1999
Hon'ble Ravi S. Dhavan, J.
Hon'ble B. Dikshit, J.

Standing counsel reports that he has no instructions as of date. Jal Nigam has had an affidavit filed, which affidavit has been affirmed by a Noter and Drafter whose position is not better than a clerk. He has been deputed to file an affidavit on behalf of (1) Executive Engineer, Construction Division, U.P. Jal Nigam, Jaunpur, and (2) Superintending Engineer, 7th Region, U.P. Jal Nigam, Varanasi. As the affidavit is without responsibility, both these respondents will be present in the Court when the matter is fixed next.

8. They are to verify the affidavit which has been filed before the Court. They are put at caution on responsibility before they verify the affidavit that should it need a change in pleadings, then they must first seek permission of the Court.

9. The Court has already recorded in its order dated 24th March 1999 that the Standing Counsel has notice of the petition since 21st December 1998. Standing counsel will ensure that a counter affidavit is filed by the District Magistrate, Jauanpur, forthwith

Enough opportunities have been given to all the respondents to reply the petition.

10. Let respondents be under a rule of interim mandamus to respond to the claim which the petitioner has prayed for payment of compensation or show cause as both the respondents have yet to file affidavit of a responsible officer whereas the State has not filed any affidavit.
Put up on 6th October, 1999.

October 7, 1999
Hon'ble Ravi S.Dhavan, J.
Hon'ble B. Dikshit, J.
Present:
Mr. H.N. Singh, counsel for the petitioner.
Mr. Ashok Mehta, Chief Standing Counsel, .U.P.
Mr. K.B.Mathur, counsel for the U.P. Jal Nigam.

11. Unfortunately, despite the matter being pending for long as to date the State of Uttar Pradesh has not filed a counter affidavit. The counter affidavit which had been filed on behalf of Jal Nigam, the Court had noticed, had been affirmed by a noter and drafter. The Court did not accept this as an affidavit of responsibility, but permitted the same counter affidavit to be verified by those who had been as respondents. The respondents concerned were also required to be present in Court today. The counter affidavit has not been verified by these respondents.

12. In the circumstances, in so far as the State of U.P. is concerned, it has chosen not to reply to the petition. In so far as the U.P. Jal Nigam is concerned, it has not filed an affidavit of responsibility.

13. This state of the record in itself is a very serious matter. The petitioner complains that hiss land had been allegedly acquired 20 years ago. The petitioner had had it submitted that there were no land acquisition proceedings. The petitioners counsel submitted that the petitioner did file a case before the consumer forum and this had been done on wrong advise of the counsel. The legal submission made on behalf of the petitioner is that there is no land acquisition proceedings and the very nature of usurpation which the respondents have done is unlawful as no provision has been made for the alleged

occupation to be followed by consequential proceedings and payment of compensation. This, the petitioner submits in paragraph 9 of the writ petition. The petitioner contends the land which was acquired is his Bhumidhari and was in his personal cultivation and was otherwise within the ceiling limits that is to say that the U.P. Imposition of Ceiling on Land Holdings Act, 1960.

14. The first question which has to be determined is whether the assertion of the petitioner that there were no land acquisition proceedings is correct or incorrect. On this no issue has been raised and it has been accepted both by learned counsel appearing on behalf of U.P. Jal Nigam for whose benefit it was claimed that the land had been acquired that there were no land acquisition proceedings. Learned Chief Standing Counsel, U.P. has also made a statement that there are no land acquisition proceedings. As the solitary affidavit filed before the Court on behalf of the U..P. Jal Nigam is an affidavit without responsibility and the State of U.P. has not filed and affidavit, the Court has no option, but to presume that the respondents have nothing to submit in reply to the petition.

15. The first submission which was made on behalf of the U.P. Jal Nigam by its counsel is that it was not its responsibility to arrange for compensation as this was the obligation of the State of U.P.

On behalf of the State of U.P., learned Chief Standing Counsel offered the following arguments:

(a) It is correct that there were no land acquisition proceedings,

(b) It is accepted that the land of the petitioner had been trespassed by the State of Uttar Pradesh,

(c) It is acknowledged that compensation has not been paid to the petitioner and

(d) That the State respondents would be advised to process the compensation.

16. It was accepted that despite notice on the petition since December 1998, learned Chief Standing Counsel has received no instructions in this matter. Thus; the Court will confine the arguments as have been given against (a),(b) and (c). The last argument submitted by learned Chief Standing Counsel, U.P., is that notwithstanding that there were no land acquisition proceedings and that the respondents have trespassed into the land of the petitioner, yet at best the petitioner is only entitled to compensation and the situation cannot be restituted by returning the land to him. This submission is a cause for concern. When the Chief Standing Counsel, U.P., was required to explain and fortify the submission, he contended that the land had been trespassed for a public project in the larger interest of the public and, therefore, the petitioner can only receive ex post facto compensation, at best, under the Land Acquisition Act, 1894, but no restitution. It was contended by learned Chief Standing Counsel, U.P., that the State is entitled to exercise its sovereign powers for a public project in the public interest, though land acquisition proceedings may not take place. What the learned Chief Standing Counsel, U.P. has contended is that the state may utilise its sovereign powers sans the procedure prescribed by laws. This may be a dangerous argument which will need to be fortified by learned Chief Standing Counsel, who was otherwise busy during the post lunch session. The case was adjourned to tomorrow. The court was obliged to ecord these submissions, regard being had to the seriousness of the circumstance that a citizen has been guaranteed his rights to possess a property which will not be acquired except by the procedure established by law. Simply put land acquisition proceedings may be set in motion and the State may use its sovereign powers strictly under the rule of law.

Put up tomorrow.

October 14, 1999.

Hon'ble Ravi S.Dhavan, J.

Hon'ble B. Dikshit, J.

17. This is a case where the State of Uttar Pradesh has elected not to file a counter affidavit. It is sufficiently recorded in the proceedings that there was no lack of opportunity to reply to the petition. The Court gave indulgences to the District Magistrate, Jaunpur to reply to the petition. In this regard, the Chief Standing Counsel on behalf of the District Magistrate sought adjournments. The petition remains unreplied, as of date. In this matter as a counter affidavit was not forthcoming the action was being justified as taken under the sovereign powers of the State. The Chief Standing Counsel after the order of 7 October 1999 had the matter adjourned because even if compensation is to be processed, then, the District Magistrate and Collector does come into the picture. The case was adjourned on 8 October,,11October,, 12 October and 13 October.

18. The Chief Standing Counsel reports to the Court that it is on record that he had a talk with the District Magistrate and Collector on 10 October, 1999 that this matter may need his presence. Today, the Chief Standing Counsel reports that the District Magistrate and Collector having been advised, regard being had to the circumstances of this case, that her presence would be necessary, is now informed that the District Magistrate and Collector has gone on leave until 16 October. The Chief Standing Counsel also submits that whatever had to be ratified by the District Magistrate and Collector, cannot be done by the Additional District Magistrate (Finance). The writ petition remain unreplied.

First intimating the Court that the District Magistrate and Collector will be available to the Court and then the official takes leave is an act of discourtesy. This leaves the Court with no option but to reserve the judgement on this case.
"Order/judgement reserved"

19. In the net result, the approach of the State respondents is callous, arbitrary and disrespect to the laws of the nation. The word, acquisition, in reference to property, implies that it would be in accordance with the procedure established by law. To usurp the property of a citizen, retain its possession and use it for State use without recourse to acquisition proceedings. As are prescribed by the law, is an anti thesis to the rule of law. It is disrespect to the Constitution of India. Under Article 300-A, the right to property is recognised. This Article, as it appears under Chapter IV, is reproduced:

"Chapter IV
RIGHT TO PROPERTY

300-A Persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law."

A plain reading of Article 300-A under the head 'Right to property' leaves no doubt that the Constitution of India recognises person's right to hold property. The Constitution of India further stipulates that no person shall be deprived of his property, possession or title except under the procedure prescribed by law. The respondents have violated Article 300-A of the Constitution of India with impunity. They have deprived the petitioner of his property and have taken possession from him under a camouflage that it was being done as a State action for a public project. This cannot be done. The argument raised by the Chief Standing Counsel that the property of the petitioner had been taken under the sovereign powers of the State is without satisfying the High Court as to how these powers were utilised without recourse to the law, the Rule of Law. It can only be done in a dictatorship where the rule of law does not hold. Such an argument cannot be made in a democracy, which protects the liberty of a citizen including his right to property and protects its usurpation against an illegal state action. Only if an Act of Parliament permits the State to take action for acquirement of a

property for a public purpose, only then, the property of a citizen may be subjected to acquisition. Even under the law the acquisition, a declaration of intention has to be announced that a public scheme or project is to be executed and it is proposed to acquire certain specified properties. All this did not take place in the present case.

In a recent case,[5] the Court found that there were large scale arbitrary acquirement of agricultural lands in east Uttar Pradesh for the purpose of executing public scheme like irrigation and canals. 2650 people were left without compensation. No land acquisition proceedings were initiated. The Court required the Central Bureau of Investigation to make a report. The CBI reported to the Court that agriculturists had been deprived of their land without acquisition proceedings and about Rs. 775 lacs has yet to be paid as compensation to more then two thousand people. The Court has sent the report of the CBI to the Comptroller and Auditor General of India.

20. In the present case also, the finance for the public project for setting a pump house and for anti pollution measures for the Gomti River had been sanctioned as a public scheme. Acquisition proceedings had not been taken out. The Court would not know compensation had been deposited or not. The respondents do not reply to the petition. The petitioner has not received compensation, even though his land had been 'acquired' more than 20 years ago. Thus, in the present case it would be appropriate that this matter is reported to the Accountant General, Uttar Pradesh. Public moneys must be accounted for and must be used strictly in accordance with the procedure established under the law. If the money is sanctioned for a public scheme and such a scheme has been executed on the petitioner's plot, then, the law expects and the Constitution of India obliges the respondents to take out acquisition proceedings. The petitioner, at every given time, had the protection of Article 300-A that he would not be deprived of his property, except in accordance with law. The petitioner was deprived and dispossessed of his property in to total violation of the law and the Constitution, both. The Court now is left with no option, but to require the District Magistrate, Jaunpur, to cause a statement of compensation to be filed before the District Judge, Jaunpur, with fifteen days from today. On this, the petitioner will be entitled to object. The District Judge, Jaunpur, will settle the claim and ensure that the compensation is compatible with the criteria prescribed in the Land Acquisition Act, 1894. It goes without saying that the compensation is to be paid to the petitioner in accordance with the current market rate , as of date, for the simple reason that it is acknowledged that there were no proceedings for the acquirement of the land of the petitioner in accordance with law. Thereafter, it will be open to the District Judge, Jaunpur, to modulate the solatium and interest, if the law permits, on the compensation as prescribed under the Act, aforesaid. The matter will be settled by the District Judge, Jaunpur within two months of a certified copy of this order being received by him from the Registrar, High Court. The Registrar, High Court, will ensure that this order and judgement reaches the District Judge, Jaunpur, forthwith.

21. The respondents could not justify the acquisition proceedings under any procedure established by law and further violated Article 300-A of the Constitution of India to deprive a person of his property nakedly in violation of the due process of the law. Further the respondents despite and order of the Court, did not file the counter affidavit by a responsible officer neither the U.P. Jal Nigam nor the State of U.P. which did not file a reply at all. In these circumstances, the Court considers it appropriate that each set of respondents, that is, the U.P. Jal Nigam as

[5] Writ Petition No. 32729 of 1998 : Durga Prasad and another v. State of Uttar Pradesh and others, decided on 14.10.1999

well as the State of Uttar Pradesh shall be subject to costs, to be deposited with the Registrar, High Court, within fifteen days from today. These costs will stand as Rs.10,000/- against the U.P. Jal Nigam, one set and Rs. 10,000/- against the State of Uttar Pradesh second set to be paid by the District Magistrate, Jaunpur, who had knowledge of the acquisition proceedings, but would not file the counter affidavit, despite an order of the Court.

A copy of this judgement will be sent by the Registrar, High Court, to the Accountant General, U.P., for an audit on the public project on the manner of initiating it and its execution.

The petition is allowed with costs, as above.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.1999

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

Civil Misc. Writ Petition No. 307 of 1998

Union of India and others ....Petitioners
Versus
Central Administrative Tribunal Additional Bench and others ...Respondents;

Counsel for the Petitioners:
Shri A.K. Gaur

Counsel for the Respondents:
SC

Central Industrial Tribunal S 17 (2) readwith Constitution of India, article 226-award given by the Central Industrial Tribunal validity can not be challenged before the central Administrative Tribunal it can only be challenged under constitutional remedy under Article 226 of the Constitution.
Held-

This means that the award of the Industrial Tribunal or labour Court cannot be challenged by way of any statutory remedy. It can only be challenged by means of the constitutional remedy. It can only be challenged by means of the constitutional remedy under Article 226 of the Constitution. The Central Administrative Tribunal has been created by the Administrative Tribunal Act which is a statutory enachtment and not a constitutional enactment. Hence the award of the Industrial Tribunal can only be challenged in this Court by means of a writ petition under Article 226 of the Constitution and it cannot be challenged before the Central Administrative Tribunal. (para 3)
Case Law discussed
AIR 1997 SC 408

By the Court

1. This Writ petition has been filed against the impugned order of the Central Administrative Tribunal dated 03.10.1997 Annexure 4 to the petition and against the award of the Central Government Industrial Tribunal cum Labour Court, Kanpur dated 18.06.1993 Annexure 3 to the petition.

2. It appears that a reference was made by the central Government to the Central Government Industrial Tribunal-cum-Labour Court, Kanpur regarding the termination of service of respondent no. 2 and the Tribunal an award dated 18.06.1993 in favour of the workman. Against that award of the Central Government Industrial Tribunal –cum-Labour court it appears that the petitioner approached the Central Administrative Tribunal and the Central Administrative Tribunal passed the impugned order dated 03.10.1997.

3. In our opinion, the petition before the Central Administrative Tribunal was wholly misconceived. It may be mentioned that under Section 17 (2) of the Industrial Disputes Act the award of the Industrial Tribunal if final. This means way of any statutory remedy. It can only be challenged by means of the constitutional remedy under Article 226 of the Constitution. The Central Administrative

Tribunal has been created by the Administrative Tribunal Act which is a statutory enactment and not a constitutional enactment. Hence the award of the Industrial Tribunal can only be challenged in this Court by means of a writ petition under Article 226 of the Constitution and it cannot be challenged before the Central Administrative Tribunal. The decision of the Supreme Court in Air 1997 SC 408 in our opinion has no relevance in this case. In that case the Supreme Court only held that the Payment of Wages Authority will continue to have jurisdiction to decide claims under Section 15 of the Act even after establishment of the Central Administrative Tribunal. This has nothing to do with the question whether any petition can be filed before the Central Administrative Tribunal against an award of the Industrial tribunal or labour Court. In our opinion it cannot in view of the bar of s. 17 (2) of the Industrial Disputes Act.

However, since the petitioner has also challenged the award of the Central Government Industrial Tribunal cum labour court we have carefully perused the award and find no illegality in the same. The respondent no. 2 was alleged to be absent unauthorisedly for certain period but the Industrial Tribunal has held that there is no evidence to show that the workman was absenting himself unauthorisedly for the period in question. Moreover, even if the respondent was absenting the remedy of the petitioner was to charge sheet him and hold disciplinary proceeding but the service could not be terminated straightaway of a regular employee without giving him an opportunity of hearing. Thus there is no illegality in the award of the industrial tribunal. There is no force in this petition and it is accordingly dismissed.

Petition Dismissed.

Appellate Jurisdiction
Civil Side
Dated: Allahabad 11.11.1999

Before
The Hon'ble Sudhir Narain, J.

First Appeal No.403 of 1999.

Dinesh Chandra Saxena ...Appellant
Versus
Smt. Nootan Saxena ...Respondent.

Counsel for the Appellant:
Shri S.K. Purwar
Shri Rajesh Kumar Singh

Counsel for the Respondent:
Shri M.D. Singh

Family Court Act 1984-S-19- appeal against the order passed u/s 27 of Hindu Marriage Act 19- whether the fixed court fee on memorandam of appeal is payable under Article 21-A of Schedule II of the Court fee Act or advalorem court fee is liable to paid ? Held- fixed court fee is liable to be paid. The words' application, petition or memorandum of appeal under the Hindu Marriage Act, 1955 must relate to a substantive right of appeal under its section 28 but when the matter is decided by the Family Court exercising power under section 7 of 1984 Act. The forum of appeal will be determined under section 19 of 1984 Act. Under Article 21-A of Schedule II of Court Fees Act as amended by U.P. Act No. 44 of 1958 a fixed court fee of Rs.37.50 is payable on a memorandum of appeal. The appellant shall not be liable to pay advalorem court fee on the basis of valuation contained in section 7 (1)(iv) of the Court Fees Act. The appellant has affixed stamps of Rs. 38/- on the memo of appeal. The Court fee paid by the appellant is held sufficient. (para 9)

By the Court

1. The core question involved here is whether the appellant is liable to pay fixed court fee of Rs.37.50 under Article 21-A of Schedule II of the Court Fees Act as amended in U.P. for the purposes of payment of court

fee in the appeal from final order passed in disposing of the application under Section 27 of the Hindu Marriage Act, 1955 (in short the Act) or advalorem court fee on the basis of valuation fixed in the appeal.

2. Briefly stated the facts are that Dinesh Chandra Saxena, the appellant herein, filed suit for divorce against his wife Smt. Nootan Saxena on the grounds mentioned under Section 13 of the Act before the Family Court. The suit for divorce was decreed. His wife filed an application under Section 27 of the Act to return her stridhan which were in possession of her husband. The Judge Family Court allowed the application and directed the appellant to pay sum of Rs.51,000/- to the respondent for the goods which were returnable by him to his wife. The appellant filed appeal against this order dated 27.7.1999 under Section 19 of Family Court Act, 1984 (in short 1984 Act). The Stamp Reporter reported that the appellant was liable to pay advalorem court fee of Rs.4,195/-. The appellant disputed this demand. The Additional Registrar took the view that the advalorem court fee is payable by the appellant under Section 7(1) (iv) of the Court Fees Act, 1870. The appellant raised an objection against this decision. The matter has now been referred to me by the Hon'ble the Chief Justice.

3. If any decree is passed under the provisions of Hindu Marriage Act, 1955 appeal lies under Section 28 of the said Act. Section 28 reads as under :-

"[**28. Appeal from decrees and orders**.—(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be applicable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."

4. The Court fees payable on such an appeal is given under Article 21-A of Schedule II of Court Fees Act as amended by U.P. Act No.44 of 1958 which reads as under:-

"Application, petition or Memorandum of Appeal under the Special Marriage Act, 1954, or the Hindu Marriage Act, 1955." ……. "Thirty-seven rupees and fifty naye paise."

5. The appellant has filed appeal under Section 19 of the Family Courts Act. Article 21-A does not make any reference to any appeal under the provisions of the Family Court Act.

6. The Family Courts Act confers jurisdiction on the Family Court in regard to substantive rights of a party in respect of family matters covered by provisions of Hindu Marriage Act. Sub-section (1) of Section 7 of 1984 Act lays down that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdiction exercisable by any District Court or any Subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation. Explanation (a) of sub-section (1) refers to a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be,

annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage. Clause (c) provides in respect of a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them. The Family Court gets the jurisdiction to entertain a suit for divorce or other matters provided under Hindu Marriage Act. Similarly it can entertain an application by a party under Section 27 of the Hindu Marriage Act in regard to any direction in respect of the property.

7. Section 28 only gives a right to a party to file an appeal against decrees and certain orders passed under the Act. It is a substantive right given to a party to submit an appeal but it does not refer to a forum of appeal. The forum of appeal, in absence of any other provision, is to be determined by Bengal, Agra and Assam Civil Courts Act, 1887. An appeal from a decree or order of a Subordinate Judge lies to the District Judge under Section 21 of the Act and from a decree or order of a District Judge or Additional Judge to the High Court under Section 20 of the said Act. Section 19 of 1984 Act provides for filing an appeal from every judgment and order not being interlocutory order of a Family Court to the High Court both on facts and law. Sub-section (1) of Section 19 reads as under:-

"Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law."

8. Substantive right of appeal is given under Section 28 of Hindu Marriage Act but the forum of appeal is determined under Section 19 of 1984 Act in respect of such matters which are decided by a Family Court. A Division Bench of this Court in Smt. Sarla Devi Vs. Balwant Singh, AIR 1969 Alld. 601, held that a right of appeal is a substantive right and is not mere matter of procedure. As regards where the appeal will lie, it was held that the words "under any law for the time being in force" occurring in Section 28 of 1955 Act only mean that the appeal shall be governed by the provisions contained in the Act which deals with the forum of Civil Appeals.

9. The words 'application, petition or memorandum of appeal' under the Hindu Marriage Act, 1955 must relate to a substantive right of appeal under its Section 28 but when the matter is decided by the Family Court exercising power under Section 7 of 1984 Act, the forum of appeal will be determined under Section 19 of 1984 Act. Under Article 21-A of Schedule II of Court Fees Act as amended by U.P. Act No.44 of 1958 a fixed court fee of Rs.37.50 is payable on a memorandum of appeal. The appellant shall not be liable to pay advalorem court fee on the basis of valuation contained in Section 7(1)(iv) of the Court Fees Act. The appellant has affixed stamps of Rs.38/- on the memo of appeal. The court fee paid by the appellant is held sufficient.

Appeal Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.11.1999

BEFORE
THE HON'BLE SUDHIR NARAIN, J.

Civil Misc. Writ Petition No. 37063 of 1999

Sri Vijay Kumar Khanna ...Petitioner
Versus
The IInd Additional District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Shri Prabha Kanta Mishra

Counsel for the Respondent:
S.C.

Shri Chandra Prakash

U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act,
1972, S.21 (1) (a) – Petitioner purchased house in question filed application for release Application allowed by prescribed Authority on ground of bonafide personal need Tenant's appeal and writ petition dismissed-Tenant's mother filed injunction suit claiming to be co-tenant No objection was filed by her in release proceedings as co-tenant. Injunction granted earlier was vacated-Appellate court allowing the appeal granted injunction to tenant's mother restrainig her eviction from disputed premises till decision of suit. Order quashed . Held-
In case her son was residing alogwith her, their interest was common and there was no justification not to come forward in the petitio filed by the petitioner under Section 21 (1) (a) of the Act against her son.

Considering the entire facts, the proceedings in the suit filed by her, is abuse of the process of the Court.

On the facts in the present case as indicated, it is clear that respondents no.2 and 3 were in collusion. Respondent no.3 is contesting the matter since the year 1981 and more than 18 years have already passed. (Paras 9, 10, 11)
Cases Law Referred:
AIR 1989 S,C, 1470
1986 (2) ARC 469

By the Court.

1. The petitioner seeks to quash the dated 16.7.1999 passed by respondent No.1 whereby he has granted injunction order restraining the petitioner from taking possession of the property in dispute which has been released in his favour. The chequered history of the case is briefly stated as under:-

2. The petitioner purchased house No.118/211(2-6), Kausalpurj Kanpur Nagar. One Sardar Ram Singh was alleged to be tenant of the house. He got constructed his own house No.8/7, Krishna Nagar ,Kanpur City wherein he shifted his possession. His son Ajeet Singh continued in possession and the rent receipt was issued in his name. The petitioner gave a notice on 20.1.1981 demanding arrears of rent. He failed to comply with the notice. The petitioner filed a notice on 20.1.1981 demanding arrears of rent. He failed to comply with the notice. The petitioner filled a suit No.262 of 1982 on 20.3.82. The suit was decreed exparte. Ajeet Singh filed an application to set-aside the decree. His application was allowed, and the said suit is still pending.

3. The petitioner also filed an application for release of the disputed house under Section 21(1) (a) of the U.P. Act No. XIII of 1972 against Ajit Singh, the tenant on the ground that it was bonafide needed by him. Ajeet Singh contested the application. It was denied that the need of the landlord-petitioner was bonafide. The Prescribed Authority allowed the application on 23.6.86 on the finding that the disputed house was bonafide required by the petitioner Ajeet Singh filed an appeal against the said judgment. The appeal was dismissed on 16.1.1987. He further filed writ petition No.2572 of 1987. But no stay order was passed by the court at the time of filing of the writ petition.

4. As there was no stay order in the said writ petition, mother of Ajeet Singh, namely Trilochan Kaur, respondent No.2 filed suit No.387 of 1987 against the petitioner for injunction alleging herself to be sole tenant of the disputed house. She filed an application for interim injunction. The trial court granted interim injunction. The petitioner filed a application for vacating the injunction order was vacated on 30.5.187. In the meantime, writ petition No.2572 of 1987 was admitted. and the court granted interim stay order staying eviction of Ajeet Singh from the disputed house. Thereafter Trilochan Kaur got her suit No.387 of 1987 dismissed on 17.8.1987 and filed another suit No.1326 of

1987 wherein se alleged that she was co-tenant of the disputed house along with Ajeet Singh and obtained a temporary injunction in her second suit No.1326 of 1987. The petitioner filed an application before the Trial Court to vacate injunction order. The trial court vacated injunction order on 12.4.99. Trilochan Kaur filed Misc. Civil Appeal No.147 of 1999 against the order dated 12.4.99. Respondent No.1 has allowed the appeal vide impugned order dated 16.7.99 and has granted injunction restraining the petitioner from evicting her from the disputed premises till the decision of the suit.

5. In the meantime, writ petition filed by Ajeet Singh s/o Trilochan Kaur has been dismissed on 27.1.99 by this Court.

6. Another limb of the relevent fact is that the petitioner was staying in another premises in house No.118/400 owned by one Shri Ramesh Chand Bhatia. He filed an application before the Rent Control and Eviction Officer that the accommodation in occupation of the petitioner be treated as vacant and be released in his favour. His application was allowed by the Rent Eviction Officer. The petitioner preferred a revision against this order which was dismissed. He further filed a writ petition No.44516 of 1998 and it has been dismissed on 28.1.1999. The petitioner was however, granted six months' time to vacate the accommodation which was owned by Ramesh Chad Bhatia.

7. Now the result is that the petitioner is being sought to be evided from the accommodation which is owned by Shri Ramesh Chand and on the other hand he has not obtained the possession of the house which he got released under Section 21(1) a of the U.P. Act No. XIII of 1972.

8. Trilochan Kaur has filed a suit No.387 of 1987 claiming herself to be sole tenant. She withdraw the suit and filed another suit No.1326 of 1987 alleging that she is co-tenant alongwith her son. Her version was that her husband Ram Singh remarried another lady in the year 1965 and thereafter she continued to occupy the house in question along with Ajeet Singh .It has not been disclosed as to the tenancy tid arise. Ram Singh the alleged tenant is alleged to have constructed his own house in Krishna Nagar. The accommodation has been declared vacant. The Landlord subsequently accepted Ajeet Singh as tenant. He was paying rent. An application was filed against him by the petitioner in the year 1983 under section 21(1)(a) of the Act. A written statement was filed by Ajeet Singh and in that written statement he never alleged that his mother Trilochan Kaur is also one of the co-tenant. The prescribed authority allowed the application of the petitioner on 23.6.93.Ajeet Singh filed an appeal against the said order. The appeal was dismissed on 16.1.87 .He further filed writ petition No.2572 of 1987 and the writ petition was dismissed on 27.1.99. Trilochan Kaur never filed an application in this proceedings that she is co-tenant and she should be impleaded as a party.

9. Even otherwise it she was a joint tenant, her interest represented by her son. It was never the case of Kaur that her son was not residing in the disputed house in case her son was residing alongwith her, their interest was common and there was no justification not to come forward in the petition field by the petitioner under Section 21 (1) (a) of the Act against her son.

10. Respondent no. 1 has taken the view that there are certain rent receipts which are alleged to have been issued by the petitioner in the name of Trilochan Kaur. This fact is denied by the petitioner. It is however, not necessary to go into the question of fact as I have found that the interest of Trilochan Kaur, the respondent and her son Ajeet Singh was common. Considering the entire facts, the proceeding in the suit filed by her is abuse of the process of the court.

11. In H.C. Pandey v. G.C. Paul, AIR 1989 SC 1470, it was held that where the tenant dies, his heirs succeed as joint tenants and not as tenants in common. The incidence of the tenancy would be the same as those enjoyed by the original tenant. There will be no division of the premises of the rent payable thereof. In case the tenants were joint tenants residing together and one of the tenants never raised any objection to the proceeding under section 21(1) (a) of U.P. Act No. 13 of 1972, it will be deemed that the interests ware jointly represented before the prescribed authority. The application filed by the landlord under section 21 (1) (a) of the Act on the ground of bona fide need.

The tenant contested on the ground that it is not bonafde need. He also pleaded his own hardships. On the facts in the present case. as indicated, it is clear that respondents No.2 and 3 were in collusion. Respondent No.3 is contesting the matter since the year 1981 and more than 18 years have already passed.

12. In Smt. Raj Kumari Kapoor v. Civil Judge, Kanpur and others, 1986(2) ARC 469, where the suits were filed seeking injunction against the order passed by the suits were filed seeking injunction against the order passed by the Prescribed Authority, the Court examining the facts, held that the proceedings in the suit may amount to abuse of process of Court and it can be quashed under Article 226 of the Constitution of India.

13. Considering the facts and circumstances of the entire case, the writ petition is allowed, and I quash the order passed by the respondent No.1 dated 16.7.99. The prescribed authority is to execute the release order passed in favour of the petitioner immediately and the senior Superintendent of Police, Kanpur Nagar is directed to take the possession of such premises from respondent No.2 and 3 within one week from the date of production of certified copy of this order and hand-over its possession to the petitioner.

Petition Allowed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD : 2nd November,1999

BEFORE:
THE HON'BLE I.M.QUDDUSI,,J.

Additional District Judge, Agra in suit No.2 of 1995.
Civil Revision No. 89 of 1999.

M/S A.K. Enterprises Applicant/Defendant.
Versus
Sterling Machines Tolls, Agra and another ...Opp.Parties/Plaintiffs.

Counsel for Revisionist:
Mr R.K. Jain
Mr. Madho Jain

Counsel for Respondents :
Mr.R.P. Goel
Mr.Manish Goel

Trade and Merchandies Mark Act 1958,S-105-suit for infringement of Registered Trade Mark-decided by the Additional District Judge-whether the order passed by the Additional District Judge is without jurisdiction? Held-`
Held-Hence, if the District Judge has assigned any work to them or to any of the Additional District Judge, the same shall be deemed to have been discharged, as if the same has been discharged by the District Judge.
There is no restriction to try the suit by any other court of equal status as provided in section8(2)of the Bengal, Agra and Assam civil court Act. In view of this it cannot be said that the Additional District Judge has no jurisdiction to try the suit. Besides this to my mind even if the district Judge takes aid from the Additional District Judge for the purpose of institution of a suit the same is liable to be instituted in the Principal civil court of original jurisdiction as the Additional District Judge is part and parcel of the District Judge. (para 13 and 14)
Case law discussed
AIR 1986 Kerla-12
AIR 1967 Mad- 121
1986(3) AWC-2244
AIR 1986 Alld.-234

AIR 1959 (Mad)-186
AIR 1954 Assam-161
AIR 1962 AP -127
AIR 1961 Cal- I

By the Court

1. Under Section 105 of the trade & Merchandise Marks Act,1958(hereinafter referred to as 'Act'). It has been provided that no suit for infringement of a registered trade mark, or relating to any right in a registered trade mark, or for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiffs' trade mark whether registered or unregistered, shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

2. In this revision, a short question is involved as to whether the court of Additional District Judge can try and decide the suit instituted in the Court of District Judge and later in transferred to it for trial and decision and whether the court to a District Court. The "District Court" has been defined in clause (e) if sub- section(1) of section 2 of the Act. According to which, "district court" has the meaning assigned to it in the Code of Civil Procedure 1908.

3. I have heard Sri. R.K. Jain, learned Senior Advocate assited by Sri Madho Jain for the revisionist applicant and Sri R.P.Goel,learned Senior Advocate assisted by Sri Manish Goel for the opposite parties at quite length.

4. The brief facts of the case are that the opposite parties instituted a Suit for relief of prohibitory injunction restraining the defendants and its agents from manufacturing, selling, offering for sale, advertising or indirectly dealing in diesel Engines, Pumps-sets and generating sets under the Trade Mark "Bharat" or "Bharat Marchal". The suit was instituted in the Court of District Judge, Agra and was registered as suit No.2 of 1995 (M/S Sterling Machine Tools-Plaintiff no.1,Shivas Industries-plaintiff no.2 Vs. A.K. Enterprises defendant). The notice was issued by the District Judge, Agra and the defendant-revisionist filed written statement. The District Judge then transferred the suit to the Court of 2nd Additional District Judge, Agra. Thereafter, the plaintiff filed replication and argument were heard. The matter was fixed for delivery of judgement on 26th May,1998, but the Court of 2nd Additional District Judge was lying vacant from June,1998 as such, the plaintiffs moved an application for transferring the case from that Court. Thereafter, the District Judge transferred the case to the Court of 12th Addl. District Judge, Agra and then the matter was fixed for re-hearing. On 28th May,1998, the revisionist, for the first time, moved application (53-Ga) to the effect that the Court of 12th Addl. District Judge has no jurisdiction to try the Suit which was heard and rejected by the said order dated 23.1.1999. Being aggrieved by the said order, the revisionist has preferred the present revision under section 115 C.P.C.

5. In the Code of Civil Procedure, 1908, the word "district" has been defined as under :-

"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"),and includes civil Jurisdiction of a High Court."

6. The contention of Sri R.K. Jain is that Additional District Judge cannot be a principal Civil Court of original jurisdiction and there can be only one Principal Civil Court of original jurisdiction. It is not possible to say although the Additional district Judge is not "Principal" Civil Court of original jurisdiction", still the suit under section 105 of the Act can be instituted in the Court of Additional District Judge. His, further contention is that the power to transfer of a suit or appeal or other proceedings under section 24 CPC cannot be invoked to transfer

a suit under section 105 of the Act from the Court of Principal Civil Court of original jurisdiction to the Court of District Judge unless there is a provision empowering the District Judge to do so. The object behind under section 105 of the Act is that suit should not only be not instituted in any court inferior to District Court. He has further argued that the words "having jurisdiction to try the suit" in section 105 of the Act denote that the suit should not only be instituted in the district court, but should also be tried by it. Hence, the Additional District Judge has no jurisdiction to try and decide the suit in question which has been filed under section 105 of the Act. In support of his contention, he has cited some case laws. In AIR 1986 Kerala 12 K.I. George and another Vs. C. Cheriyan & others it has held that the Munsif's Court had no jurisdiction to try the suit and in view of S.62 of the same. In AIR 1967 Mad.121 The Daily Calendar Supplying Bureau, Sivakasi Vs. The United Concern, a division bench has held that it will not be proper to resort to the definition given in S.3 of General Clauses Act,1897 of the term "District Judge", may well happen that in certain cases, a District Judge may not be equivalent to the Presiding Officer of a District Court. The Civil Procedure Code, to which reference is made in the definition Cause in some of the other enactment's like Guardians and Wards Act and the Indian Patents and Designs Act already referred to in section 2(4) gives the definition of 'District' and it was held that the term of section 62, specially sub-section(2) imply that the definitions of District and District Court in the Civil Procedure Code will apply for the purpose of determining the jurisdiction under the Copyright Act. We hold that the High Court has jurisdiction to try the Suit. In this connection, decision reported in 1998(3) AWC2244(I.T.I. Naini Vs. District Judge Allahabad)has also been cited by Sri R.K. Jain which is respect of Arbitration Act, and it was held therein that the Additional District Judge is shorn of jurisdiction to entertain and application under Section 34 of the Act and the District Judge cannot by invoking the provisions contained in section 8(2) of the Bengal, Agra and Assam Civil Courts Act, 1887,transfer the application for its disposal to the Court of an Additional District Judge may have the jurisdiction to entertain an application under section 34 of the Arbitration and Conciliation Act, which is transferred to his court by the District Judge under Section (2)of the Bengal, Agra and Assam Act,1887, provided that the transfer of the application by the District Judge to the Court of an Additional District Judge is not inhibited by the former Act. It was held in para.12 therein that an application for setting aside an award under section 34 of the Act is as much an application "with respect to an arbitration agreement" as it is for "setting aside the arbitration award" and it is a matter of statutory compulsion that such application is made to the principal civil court of original jurisdiction in a district or the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the questions forming the subject matter of a suit and it is again a matter of statutory mandate that the Court to which the application is made alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement, and the Court and no other expect the appellate court being in seisin over the matter. The power to transfer assign the application to any other Court, otherwise having jurisdiction to decide the question forming the subject-matter of arbitration, had it been the subject-matter of a suit, has been impliedly taken away by section 42 of the Act which is couched in a language fraught with overriding effect. I am conscious of the fact that the view I am taking, may result in adding burden to the district Judge but the plain or unambiguous words of the statute i.e. words which are reasonably susceptible to only one meaning will have to be given effect' irrespective of consequences (see Nelson Motis Vs. U.O.I. AIR 1992 SC.1981).

7. Sri R.P. Goel, learned senior counsel for the opposite parties contended that sub-section(e) of section-2 of the Act made it clear that the provisions of Code of civil Procedure is applicable to the Act. He has further argued that Section 110 of the Act provides for rule making powers of the High Court. The High Court has made Rules in this regard which are given in Chapter-35-A of the Allahabad High Court Rules. Rule-11 of these Rules provide for application of Civil Procedure Code to the Act. In Civil Procedure Code, the word "district court" has not been defined. Thus, in order to construe the definition as given in section 2(e) of the Act, reference is made to the meaning of the word 'district' and the meaning of the word 'court' as have been used in the Civil Procedure Code. He has further submitted that inferior in grade implies that against an order passed by inferior court, the remedy will lie before the court of superior jurisdiction and as the orders passed by Additional District Judge cannot be challenged before the District Judge in appeal, revision or reference etc. it cannot be said that the Court of Additional District Judge is inferior to the court of District judge. The next higher forum against the orders of Additional District Judge will be the High Court for the reason that Section 3 of Code of Civil Procedure provides that the district Court will be subordinate to the High Court, hence the Additional District Judge cannot be termed separately to the District Judge in exercise of the jurisdiction in judicial side. He has placed reliance on the following cases, details of which are given as under :-

1. AIR 1986 Alld.234 Smt.Shankuntal Devi Vs. Amir Hasan.

In this case, it has been held that whenever any matter is transferred to the Addl. District Judges, then the Addl. District Judges are exercising the same powers as of the District Judges.

2. In AIR 1988 (M) 24 M/S Badrilal Jodhraj & Sons Vs. Girdharilal and another, it has been held that there is no subordination between the additional district Judges and district Judges so as to empower the District Judge to exercise the revisional powers under section 115 C.P.C. in respect of the order passed by the court of Additional District Judge.

3. In AIR 1959 (M) 188 Gauri Shanker Vs. Firm Dulichand Laxmi Narayan, it has been held that Additional District Judge but the court of an Additional District Judge cannot in terms of Section 3 of the Civil Procedure Code be said to be subordinate to the District Court itself as it is in no sense a civil Court of a grade inferior to that of a District Court. The Court of Civil Judge would certainly be such inferior court.

4. In AIR 1954(Assam) 161 G.C.Bezbarua Vs. State of Assam, it has been held that the word "District Judge" in section 7(3) (b) of the Industrial Disputes Act includes an Additional District Judge and it would be, therefore, unreasonable to exclude an Additional District Judge from that category of the District Judge who for all practical purposes discharges the same judicial functions as the District Judge.

5. In AIR 1962(AP) 127, The Western India Match Co.Ltd.Vs. Haji Abbas Hussain Mullah Ehsan Ali, it has been held that City Civil Court whose Presiding Officer is Additional Chief Judge is not Court inferior to the City Civil Court whose presiding Officer is the Chief Judge. It follows that Section 73 of the Trade Marks Act does not bar the trial of the suit by the lower court and that the lower court has jurisdiction to try it.

6. In AIR 1961(Calcutta)-1,Nripendra Nath Bagchi Vs. chief Secy. Govt. of Bengal, it has been held that the expression 'District Judge' includes inter-alia an Additional District Judge in Article 236 of the Constitution.

Before proceeding further, it would be necessary to peruse the relevant provisions of the Act which are quoted below:

SECTION 2(1) (e):

"district Court" has the meaning assigned to it in Code of Civil Procedure,1908.

SECTION 105: Suit for infringement, etc. to be instituted before District Court-No Suit-
(a)for the infringement of a registered trade mark; or
(b)relating to any right in a registered trade mark; or
(c)for passing off arising out of the use by the defendant of any trade mark which is identical with or deceptively similar to the plaintiff's trade mark, whether registered or unregistered; shall be instituted in any court inferior to a District Court having jurisdiction to try the suit."
Likewise, the provisions of code of Civil Procedure are also liable to be persued which are quoted herein below:
SECTION 2(4) C.P.C.
"district" means the local limits of the jurisdiction of a principal Civil court of original jurisdiction (hereinafter called a "District Court") and includes the local limits of the original Civil jurisdiction of a High Court."

Provisions of Section 8 of Bengal, Agra & Assam Civil Courts Act are also relevant which are as under :-
SECTION 8 (1):**Additional Judges:**

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

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

8. Now first of all, the provisions of section 105 of the Act are to be considered which provide that no suit shall be instituted in any Court inferior to a district Court having jurisdiction to try the suit. Here we are concerned with the institution of suit and the district court having jurisdiction to try the suit. In plain and natural meaning in respect of the institution to try the suit and in a district court having jurisdiction to try the suit would be that the suit is liable to be instituted in the district court having jurisdiction to try the suit. Meaning thereby that in case, suit is liable to be instituted within the territorial jurisdiction of a district court due to court due to cause of action etc., the same cannot be instituted in any other district court of different territorial jurisdiction which has no jurisdiction to try suit due to the reason that the cause of action has not arisen within the territorial jurisdiction of that court and the words "having jurisdiction to try the suit" make it clear that no other district court than the district court under whose territorial jurisdiction the cause of action for instituting the suit has arisen in accordance with law. Now coming to the "district court" we have to consider the definition of the 'district' given in sub-section (4) of section 2 CPC according to which "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court. The local limit of jurisdiction of principal civil court of original jurisdiction have been assigned and no separate or independent and the post of Additional Judges have been created under Bengal, Agra & Assam Civil Court Acts for speedy disposal of the cases by the district court with the aid of the additional Judges. The intention of the legislature to create the post of additional Judges according to the requirement in the district is for the speedy disposal of the cases by the District Judge with the aid of the Additional Judges. In view of this, it can be said that the District Judge decides cases with the aid of Additional Judges, they discharge all functions as additional Judges in discharge of the functions of all District Judges. Hence, the Additional district Judge is part and parcel of the District Judge and is covered within the definition of 'district Court. Had there been a separate identity or conferment's of limits of territorial jurisdiction separately to the

Additional District Judges with over all control over all the Additional District Judge with the territorial jurisdiction conferred to them, by the District Judge conferring upon them total territorial jurisdiction of all the Additional Judges, it could have been said that the Principal Civil Judge of original is the District Judge and under his control with the small territorial jurisdiction, the Addl. District Judge cannot be termed as Principal Civil Court of original jurisdiction. For example, the provisions regarding Executive Magistrates as provided in the Criminal Procedure Code, the State Government has been conferred powers to appoint in every district and in every metropolitan area, as many as persons as it thinks fit to be Executive Magistrate and shall appoint one of them to be the District Magistrate and the District Magistrate has been empowered to define the local limits of the areas within which the Executive Magistrate exercises all powers which may be invested under the Code of Criminal Procedure and for all purposes those Executive Magistrates shall be subordinate to the District Magistrate but they have been conferred jurisdiction over their respective areas which they exercise and the District Magistrate has also to exercise the same powers within his district which an Executive magistrate exercises within his sub division. In that case, it cannot be said that an Executive Magistrate to whom a particular areas has been assigned to exercise the jurisdiction and powers of an Executive Magistrate independently, is part and parcel of the District Magistrate or is not inferior to the District Magistrate. In the matter of Additional District Judges, the jurisdiction is exercised by them without any limitation of area and he can exercise jurisdiction over the whole area of the district court. Hence, in view of the provisions of sub-section (2) of Section-8 of Bengal, Agra & Assam Civil Court, Acts, an order passed by the Additional District Judge, for all purposes shall be deemed to have been passed by the District Court. The Additional District Judge is part and parcel of the district court and for all purposes, it is district court within the meaning of section 2(1) (e) of the Act.

9. The intention of the legislation to restrict the institution of suit in a district court and not in any court inferior to a district court is that the district court may not hear the appeals over the overs/judgements passed by the inferior court. Hence, the purpose of making such restriction by the legislature would not certainly be defeated if the suit is tried by Additional District Judge appointed by the State Govt. after having consulted the High Court for the aid of District Judge for speedy disposal of the cases pending the District Judge. Further, it is a matter of consideration that the word" any court inferior to a district court used in section 105 of the Act is meant the court inferior to district court in the administrative matters or inferior to a district court in respect of the exercise of judicial powers. To my mind, the restriction imposed under restriction imposed under section 105 of the Act regarding institution of suit in the inferior court restriction imposed in section 105 of the Act regarding institution of suit in inferior Court to district court can notes in respect if judicial exercise and not on administrative side. This section has no concern with the administrative affairs nor with the management of the courts. It has only concern with the judicial exercise of the powers.

10. The case law referred to in the instant case by Sri R..K.Jain, learned counsel for revisionist- applicant are also liable to be considered in the light of the above discussion. The case of Smt. Shakuntala Devi (supra) referred by Sri R.K.Jain lays down that the District Judge under his power under section 24 C.P.C. can transfer any application moved before him to the court of Additional District Judge for disposal and the Additional District Judge rejected the application for transfer of suit by observing that the applicant/plaintiff could move an application

in the court concerned (trial court) for withdrawl of the suit with permission to file the same in the court of competent jurisdiction and the order was not without jurisdiction and the order was not without jurisdiction . This case has no relevance with the matter in question. The other case of K.I. George (supra) in which, it has been held that the Munsif's Court had no jurisdiction to try the suit and view of section 62 of the Copyright Act, 1957, the district Court had only jurisdiction to try the same, has also no in the matter in hand as in that case, the suit was instituted in the Court of Munsif and it was held that the Munsif had no jurisdiction and the district court had only jurisdiction to try the suit, but it was a matter of consideration before that court that the Additional District Judge comes within the 'district court' or not. In the matter of The Daily calendar Supplying Bureau (supra) it has been held that when the High Court exercises its original civil jurisdiction over the City Court, it can be deemed to be a district court, hence, this case law has also no relevance in the matter in hand. In the matter of I.T.I. Ltd. (supra), it has been held that the court of Additional District Judge is shorn of jurisdiction to entertain an application under section 34 of the Arbitration Act and the District Judge cannot invoke the provisions of section 8(2) of the Bengal, Agra & Assam Civil Courts Act,1887, transfer the application for its disposal to the Court of an Additional District Judge, but the provisions of section 42 if the Arbitration Act are not parameteria to section 105 of the Trade & Merchandise Marks Act,1958. The provisions of section 42 of the Arbitration Conciliation Act,1996 are quoted herein below : " 42 Jurisdiction :- Notwithstanding anything contained elsewhere in this part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this part has been made in a Court , that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other court."

11. A perusal of the above provisions show that the word "alone" has been used therein, meaning thereby that no other court expect with respect to Arbitration Agreement, any application under that part has been made, shall have jurisdiction over the arbitral proceedings. The word "Court" has been defined in section 2(e) of the Arbitration and Conciliation Act,1996. According to which, the "court" means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the question forming the subject-matter of a suit but does not include any civil court of a grade inferior to such principal civil Court of any court of small Causes. The word"alone" does not find place in section 105 of the Act.

12. Hence it cannot be said that the provisions of Section 42 of the Arbitration and Consiliation Act, 1996 are paramateria to the provision of Section 105 of the Act. In my view the court which has jurisdiction to try a suit to be tried by principal Civil Court of original jurisdiction. Learned counsel for the respondents Sri R.P. Goel has submitted that the provisions of Civil Procedure Code are applicable in the proceedings held under the Act. He has referred Section 110 of the Act in which power of High Court to make rule consistent with these Act as to the conduct and procedure of all proceedings under the Act, before it has been conferred. In Chapter-35-a of the Allahabad High Court Rules, 1952 the rules under the Trade and Merchendise Marks Act have been framed. In Rule 11 of the application of Code of Civil Procedure and Rules and Forms of the Courts have been provided, which is reproduced below :

"Application of the Code of Civil Procedure and Rules and Forms of the Court-Matters not provided for in the foregoing Rules shall be governed by the provisions of

the Code of Civil Procedure 1908, and the Rules of the Court, shall apply mutatis Mutandis to all proceedings under the Act.Provided that it shall not be necessary for the Court to frame issues."

13. The other provisions in the aforesaid Rules are made for filing of application or appeals under any provisions of the Act. It is necessary to notice that there is no provision given in the Act for filing appeal or revision against the decision made or order passed in a suit filed under Section 105 of the Act. Hence naturally the provisions of Civil Procedure code would apply. This cannot be disputed due to the fact that the present revision has been files by the revisionist under Section 115 C.P.C. and it has been indicated specifically in the revision that the same has been files under Section 115 C.P.C. However, provisions of Section 24 C.P.C. would not be applicable in the instant matter as here the statutory provisions i.e. Section 8 of Bengal, Agra & Assam Civil Court Act would be applicable in which it has been provided that the additional judges are appointed for the aid of District Judge and they shall discharge any of the function of a District Judge which the District Judge may assigned to them. Hence, if the District Judge has assigned any work to them or to any of the Additional District Judge, the same shall be deemed to have been discharged, as if the same has been discharged by the District Judge.

14. This is also a question of worth consideration that if a decree has been passed by the Additional District Judge whether for all purposes it should be deemed to have been passed by the District Judge or Principal Civil Court of Original Jurisdiction. The decree passed by the Additional District Judge can not be termed as the decree passed by the court subordinate to the District Court. Since the appointment of an Additional Judge is made under Section 8(1) of Bengal Agra and Assam Civil Court Act only where the business pending before any District judge requires the aid of additional judge for its speedy disposal, hence the decree passed or orders made in the case assigned to an Additional District Judge by the District Judge due to rush of work for his aid it cannot be said that the same has not been passed by the District Court.

15. The last question for consideration is that in Section 105 of the Act there is restriction to institure a suit in a court inferior to the District Court and in the instant matter certainly the institution has been in the court of District Judge which has been transferred to Additional District Judge by the District Judge in view of the provisions of Section 8 of Bengal, Agra and Assam Civil Court Act. There is no restriction to try the suit by any other Court of equal status as provided in section 8(2) of the Bengal. Agra and Assam Civil Court Act. In view of this it cannot be said that the Additional District Judge has no jurisdiction to try the suit. Besides this to my mind even if the District Judge for the purpose of institution of a suit the same is liable to be instituted there and the same should be deemed to have been instituted in the Principal Civil Court of original jurisdiction as the Additional District Judge is part and parcel of the District Judge.

In view of what has been discussed above, the revision fails and is dismissed.

No order as to costs.

Learned Additional District Judge is directed to proceed further in accordance with law.

Revision dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: :ALLAHABAD 3.11.1999.

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

C.M. Writ Petition No.32850/99:

M/s. Swadeshi Cotton Mills A unit of National Textile Corporation (U.P.) Ltd. Naini, Allahabad. ...Petitioner.
Versus
Assistant Labour Commissioner and others ...Respondents

Counsel for the Petitioner:
Shri V.B. Singh

Counsel for the Respondents:
S.C.
Km. Mahima Maurya

Sick Industrial companies (Special Provision) Act 1985-Section-22-Recovery proceeding-towards the amount of gratuity-can not be stayed-otherwise it amounts to negation of legally accepted right of workmen – if the quarter is not vacated by the workmen-penel charges can be realised but they can not be denied about the amount of gratuity or wages.
Held-
If at all the workmen are holding over possession of the official quarters, there must be some provision in the regulations of the employers to charge a penal rent from the occupiers and mere non-vacation may not be a ground for withholding the payment of gratuity. (Para 17)

Case law discussed-
AIR 1992 SC-1439
AIR 1990 SC-1017

By the Court

1. All the aforesaid matters were heard together as a common point of law stood involved in all these cases. The present order, accordingly, would cover all the aforesaid petitions.

2. The petitioners run an industry as a unit of National Textile Corporation (in short, the NTC) at Naini, Allahabad. It is the case of the petitioner that the NTC is an undertaking of the Government of India under the provisions of the Industrial Development Regulation Act, and the Swadeshi Cotton Mills Co. Ltd.(Acquisition and Transfer of Undertaking) Act, 1986. The unit became sick and had submitted a reference under Section 15(1) of the Sick Industrial Companies (special Provisions) Act, 1985 (in short, the BIFR). It was the further case of the petitioners that the reference was registered by BIFR by its order dated 8.6.1993 and the petitioner company had been declared sick under Section 3(1)(o) of the SICA, 1985. It was urged on behalf of the petitioners that being declared a sick unit, no recovery proceedings were to be initiated against the petitioner mill under section 22 of the SICA, 1985.

3. There was, however, a claim for payment of gratuity to certain retired employees of the petitioner and the Assistant Labour Commissioner (Central), being the controlling authority under the Payment of Gratuity Act, 1972, proceeded against the petitioners for recovery of the unpaid amount of gratuity.

4. So for the first mentioned writ petition is concerned, there had been a finding of the Assistant Labour Commissioner dated 11.6.1999 directing payment of Rs.65,652.30 together with interest as gratuity to respondent no.3, J.P. Saha. The findings of respondent no.1 were challenged in the writ petition not only on the ground of Section 22 of the SICA, 1985 but also on merits of the claim that no gratuity was to be paid to respondent no.3 as he had not vacated the official quarters.

5. In the second mentioned writ petition, the finding was dated 15.6.1999 for an amount of Rs.44,128.80 with interest in respect of one Gula Singh and similar

objections as per the first mentioned case were taken towards this finding as well .

6. In the third mentioned writ petition, again, the finding was dated 15.6.1999 for a sum of Rs.48,106.60 with interest in favour of one Munendra Singh Bisth. Objections in this case were also similar to those as the first mentioned case.

7. In the last mentioned writ petition, the finding was dated 15.6.1999 for a sum of Rs.31,284/-plus interest for one Ali Haidar. Here also similar objections, as stated above, were raised.

8. In all the writ petitions, the petitioners made a prayer for a writ of certiorari for quashing the impugned orders dated 14.6.99 and 15.6.99 and for a writ in the nature of mandamus directing the respondents from implementing the aforesaid orders towards recovery of the alleged dues. It was asserted in all these writ petitions that in similar circumstances a large number of writ petitions had been filed before the Allahabad High Court and in all those cases concerning workmen had not been vacated official quarters the High Court had recorded orders staying the direction for payment of gratuity unless the workers vacated the quarters. The copies of the orders were annexed with the writ petitions. On behalf of the petitioners it was contended that Section 22 of the SICA, 1985, was a clear bar towards recovery of the dues even for payment of gratuity. This point was seriously contested by the learned counsel for the Union of India who had submitted that when it was a question of payment of gratuity. The bar under Section 22 of the SICA , 1985, would not be applicable.

9. There is no denial that the employees are entitled to gratuity under the Payment of Gratuity Act, 1972. There is also no denial that the Assistant Labour Commissioner was the controlling authority for payment to an employee on the termination of his employment after he has rendered continuous service for not less than 5 years, and this termination might be on his superannuating or on his retirement or resignation or even on his disablement due to accident or death. The Act, however, does not define what was a gratuity, but speaks that for every completed year of service or part thereof in excess of 6 months, an employer shall pay gratuity to an employee at the rate of 15 days wages based on the rate of wages last drawn by the employee concerned. In the case of monthly rated employees, the 15 days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by 26 and the quotient shall be multiplied 15. This amount of gratuity is not to exceed Rs.1,00,000/- as per this Act. Although gratuity has not been defined, the scheme discloses that it is related to the period of service and to the rate of wages of an employee.

10. The SICA 1985, was made in public interest with a view to secure the timely detection of sick and potentially sick company owning industrial undertakings, the speedy determination by a Board and experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures was determined and for matters connected therewith or incidental thereto. Section 22(1) of this Act reads as follows:

"22. Suspension of legal proceedings, contracts, etc.-(1). Where in respect of an industrial company, an enquiry under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956(1 of 1956), or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the

winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advanced granted to the industrial company or of any guarantee in respect of any loans or advanced granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.

(2) ……."

11. It appears that this section applies when an enquiry under Section 16 is pending or a scheme referred to under section 16 is under preparation or consideration of a sanctioned scheme is under implementation and also when an appeal under Section 25 relating to an industrial company is pending. If these conditions are fulfilled, then no proceeding for winding up the industrial company or for execution or distress against any of the properties of the industrial company and not even a suit for recovery of money shall lie or be proceeded further except with the consent of the Board for the appellate authority.

12. Only in reference to this provision, the learned counsel for the petitioner submitted that the findings in question had imposed monetary liability on the petitioners and when the petitioners are covered by the SICA 1985, no recovery in terms of the findings could be made by execution or distress without the consent of the Board or the appellate authority.

13. In this connection, learned counsel for the respondents submitted that this bar was not applicable in cases of payment of gratuity. Learned counsel for the Union of India relied on a decision of the Bombay High Court in support of her contention. The judgement was delivered in relation to a case between the NTC (South Maharashtra) and B.N. Jalgaonkar, as reported in 1999 (81) Factories and Labour Reports at 234. It was a case of recovery of wages and a question came up for consideration whether the recovery of the wages due to workmen was also barred by the provisions of Section 22 of the SICA, 1985. The Hon'ble single Judge of the Bombay High Court had before him the decisions of the Apex Court in the case of Sri Chamundi Mopeds, AIR 1992 SC 1439,and Dy. Commercial Tax Officer Vs. Coramandal Pharmaceuticals and others reported in JT 1997 (3) SC 660, and also some other decisions. The question was that if at all Section 22 of the SICA, 1985 was thought applicable to bar recovery of wages of workmen the workmen would have to approach the BIFR and if such a position was allowed to prevail that would defeat the legitimate claim of the workmen for wages and other dues by not payment in the first instance and also forcing them to resort to other remedies. The contention of the NTC was dismissed by the learned single Judge.

14. The petitioner relied on a decision of the Supreme Court as reported in AIR 1990 SC 1017 . In this case the proceedings were taken up for recovery of property tax under Section 129 of the Bombay Village Panchayat Act from M/s. Shri Vallabh Glass Works Ltd. Which was a sic industry under the provisions of the SICA, 1985, and proceedings under Sections 16 and 17 of the Act were pending . It was held that the proceedings for recovery of property tax could not lie in view of Section 22 of the Act except with the consent of the Board established under the law.

15. Reliance was also placed by the respondent on a decision of the Allahabad High Court in the case of Poisha Industries Vs. Collector of Ghaziabad, as reported in 1998 (79) FLR 166. A recovery proceeding was initiated against an industry covered by

the SICA, 1985 and the claim related to wages payable to the workmen. The relationship of master and servant between the industrial company and the workman was continuing, the court held that the employer was bound to pay wages even though no work was not taken from them and proceedings for recovery of such wages were not covered by Section 22 of the SICA, 1985.

16. As observed above, the SICA, 1985, is a legislation made in public interest for securing timely detection of sick companies owning industrial undertakings and it was thus a legislation for the benefit of the industries in public interest. The public interest cannot be looked bereft of the interests of the workmen. The policy behind the labour legislation's is aimed at security justice to the workmen and to avoid exploitation by employers, either by non-payment of wages or by wrongful retrenchment or by withholding payment of wages or the like. Thus, a protection of the interest of an industrial company may not be given an upper hand to the protection of the labourers working therein and, as observed by the Bombay High Court in the case of NTC Vs. B.L. Jalgaonkar (supra), Section 22 of the SICA, 1985, must not be allowed to defeat the legitimate claim of the workmen for wages. In fact, this decision was based on the finding of the Apex Court in the case of Dy. Commercial Tax Officer (supra) wherein it had been held that recovery of commercial tax could not be barred under Section 22 of the SICA, 1985. Gratuity, as observed above, is related not only to the period of employment but also to wages and the payment of gratuity is one of the beneficial measures introduced by labour legislation. To extend the provisions of Section 22 of the SICA, 1985 to prohibit recovery of gratuity, which is related to wages, would be a negation of a legally accepted right of the workmen. Section 22 must be interpreted not to cover a bar of recovery of payment of wages or gratuity to workmen. Seen in this light, the objection of the petitioners against the impugned recoveries is not tenable.

17. If at all the workmen are holding over possession of the official quarters, there must be some provision in the regulations of the employers to charge a penal rent from the occupiers and mere non-vacation may not be a ground for withholding the payment gratuity.

All the writ petitions are, therefore, dismissed.

Petition Dismissed.

ORIGINAL JURIDCTION
CIVIL SIDE
DATED: ALLAHABAD: 11.11.1999

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE LAKSHMI BIHARI, J.

Civil Misc. Writ petition No. 13554 of 1989

Maya and Co. and another ...Petitioners.
Versus
The Commissioner, Agra Division, Agra and others ....Respondents.

Counsel for the Petitioner:
N.S. Chaudhary
Counsel for the Respondents;
Shashi Nandan (SC)

Provincial Municipalities Act 1916 S-298 (2) list J. Misc. (d) readwith Constitution of India Article 19 (1) (g)- Bye laws framed by the Municipal Board Etah enacting provisions to impose licence fee upon the contractors of bodies including repairs, construction of buildings road, drainage etc. whether unconstitutional or ultravires ? Held 'No'
Held-
Accordingly, we hold that the bye laws in question are not ultra vires the powers of the Municipal Board or of Article 19 (1) (g) of the Constitution in regard to its framing.(para 14)

By the Court

By filing this writ petition on 3rd July, 1989, the petitioners, who are organised

contractors taking contracts of various bodies including the Nagar Palika, Etah for performing works entrusted to them in regard to construction of buildings roads drainage, etc. including repairs thereof have come up with following prayers (I) to quash the bye laws of Etah Municipality framed under Section 298 (2) List I J miscellaneous (d) of the Provincial Municipalities Act 1916, hereinafter referred to as the Act, published on 3rd September 1988 (as contained in Annexure 1) and (ii) to command Etah Municipality (Respondent No. 2) to refund the amount taken or deducted from their Bills prepared under Bye law 10 of the impugned Bye laws.

2. On 4th July, 1989, the following interim order was passed by the Division Bench:-

"Till further orders of court opposite parties are directed refuse to entertain tender of petitioner only because they have no got themselves registered in accordance with the bye laws, copy of which has been filed as Annexure-1 to writ petition."

The Facts pleaded:-

3. The petitioners have come with following pleadings_

Tenders were invited by the authority for performance of specified works within scheduled period. After scrutinizing the tenders the authority accepts them in accordance with the quality of work performed by a particular contractor generally accepting the lowest one. On acceptance of the tender the contractor is entrusted the work. Presently the person filing the tenders required to purchase NSC to the extent of 2% of the amount tendered for the purpose of earnest money and after acceptance of his tender submit NSC worth further 3%. Thereby the total money which is taken as earnest money costs 5%. These certificates are however, returned after six months, if the authority is satisfied with the work of the contractor. A list of the approved contractors is maintained by various authorities including the Etah. The petitioners apprised the authorities about Municipality. Black listed Contractors by any department are not permitted to submit their tenders.

The Etah Municipality framed bye laws (which is being impugned) for regulating and controlling the contractors purported to have been framed under section 298 (2) J (a) of the Act. The impugned bye laws provides as follows-

(i) For taking work of the Municipality no person will be eligible to put tenders unless he it is registered as a contractor in the categories provided in Rule 6 (ii) vide Rule 10 the licence fee in the said categories will be as mentioned in the bye laws (iii) under Rule 10 it has been provided that in the first week of April, it will be obligatory for the registered contractor to seek renewal of his registration on payment of requisite amount and for default thereto his registration will be deemed to have been cancelled and in the event of its renewal he shall have to deposit again the said amount as contemplated under Rule 10, which will be deemed to be either licenced money or tax and (iv) Rule 12 provides that the contractor will have to deposit earnest money in shape of NSC apart from the licenced money of tax money. The Act nowhere provides for imposition of such tax or fee. It is not clear under what provision of law such taxes or levy in the nature of licence fee has been imposed. Section 293 (1) of the Act provides levy of licence fee on using immovable property vested in or entrusted to the Management of the Municipality. The contractors are neither occupying any property of the Municipality, nor are they using the property of the Municipality for any purpose. Section 294 empowers the power to charge fee to be fixed by the bye laws for any licence, sanction or permission which it is entitled or required to be granted by or under the Act. The Act nowhere provided for grant

of any licence, sanction or permission to the contractors, who are engaged in their activity of filing tenders whenever invited by a particular authority or by the Municipality for particular work. Since the fee or tax imposed under the impugned bye laws clearly imposes a restriction on the right of a person to carry on any occupation, trade or business thus it is an unreasonable restriction on their rights quarantined under article 19 (1) (g) of the Constitution. This licence fee or tax cannot be justified on the basis of any viled law which the Etah Municipality has powers to frame under the Act and thus ultra-vires. These two bye laws are being challenged specifically on these two grounds:-

(i) If it is a tax, in the event the procedure provided under the Act have not been followed. The Municipal authorities have not been empowered to impose such a tax on the persons who are engaged in the activities of taking contracts under the tenders invited by the Etah Municipality; (ii) if it is a licence fee, then it has no sanction or authority under the Act as the Municipal Boards are not rendering any service to them thereby hit by the doctrine of quit-pro-quo. The impugned bye laws do not mention that they were previously also published and objections were invited from the aggrieved persons about which they learnt in January, 1989. The petitioners apprised the authorities about the aforementioned aspect. The authorities realised that the bye laws, apart from being illegal, have imposed an amount in the shape of licence fee or tax, which is unreasonable, and hence they passed a Resolution in its meeting dated 16th January 1989 resolving that the registration amount mentioned in Rule 10 be reduced to the amount of Rs.500/- Rs.300/- and Rs.200/- in regard to Class Ka-Kha and Ga contractors respectively (copy of which appended as Annexure-2). The Executive Engineer of the Municipality, Etah persuaded the petitioner to deposit the amount with an undertaking that it will be refunded. In the case of the petitioner no. 1 the amount was deducted from its Bill on 7th March, 1989 for a work which was undertaken by it and for which the Bill was to be paid (A copy of the receipt issued to the petitioner No. 1 has been filed as Annexure-3). Similarly, petitioner no. 2 was also called upon to deposit the amount in case it wants to participate in the Tenders. The petitioners were awaiting for refund of their said amount as assired by the appropriate authorities buy instead of refunding they have been called upon to deposit the same amount under Rule 10 as they have failed to seek renewal of their registration in the first week of April, 1989. As they have been refused to fill in tenders and hence this writ petition.

4. In the Counter Affidavit filed on behalf of Respondent nos. 2 and 3 in substance the following facts have been stated while denying the allegations:- The petitioners have ceased to be recognised registered contractors by the Nagar Palika, Etah who has admittedly framed bye laws relating to the registration under the Act the board has been empowered to impose reasonable restrictions and regulate the grant of contract; it is incorrect to allege that the bye laws ultravires the Constitution of India; as per bye laws a licensee is entitled to renewal of licence only if renewal fee is deposited within one week after expiry of his licence period and in case he fails to do so, he has to obtain a fresh licence after depositing fee fixed by the bye laws; the licence fee, which is being realised from the contractors is not in the nature of tax, it is actually in nature of fee realizable from the person who carrys on the contract work for the purpose of regulating contract granted by the Board within the Nagar Palika and the notification issued under section 298 (2) List I J (d) of the Act is perfectly in accordance with its provisions; proper publication, as contemplated by the Act. Was made, objections were invited by publication in the Newspaper Awaz dated 12.11.1986, pursuant thereto certain objections including one as contained in annexuse-1 were also filed, which were disposed of in accordance with

law and thereafter the duly sanctioned by laws were published in the official Gazette, as contemplated under the Act. The claim of the petitioners that they came to know of the bye laws for the first time in January, 1989 in false inasmuch as on 27.10.1988, necessary notices were issued to them by the Executive (copies appended as Annexure II and III to the counter affidavit), which were also duly served on them on that very day, directing them to obtain their registration in accordance with the bye laws; the petitioners had also submitted their applications on 01.12.1988 before the Executive officer (copy appended as Annexure-IV to the counter affidavit) agreeing to obtain necessary registration requesting that an amount of Rs.2000/- towards fee be deducted from their Bills, which was also duly deducted; their request for return of the amount of fee was rejected by the Commissioner vide his order dated 14.06.1989 (copy appended as Annexure-5 to the counter affidavit) and communicated by letter dated 28.06.1989 by the office of the D.M.; the petitioners are not entitled to refund of the amount of Rs. 2000/- as there is no such provision under the bye laws; no illegality has been committed in refusing to grant licence to them, as admittedly application was filed after 7th April, 1989, which was the prescribed period for filing applications for obtaining renewal.

5. In their rejoinder affidavit to the counter affidavit the petitioner stated, inter-alia, that it has not been disclosed under what provisions of law powers have been conferred for framing bye laws; it is being admitted that the amount from the contractors are being realised as fee but it is for the Respondents to satisfy as to what service they are rendering to the contractors and thus the doctrine of quid pro-quo is attracted; the newspaper is merely a registered newspaper and is not published daily and has no circulation in the Etah City; Annexure A filed to the counter affidavit is not a genuine document but has been manufactured only to meet the case set up in paragraph 13 of the writ petition; it has not been disclosed as to which authority has decided the alleged objections and what orders were passed thereon which have also not been annexed; the petitioners have challenged the bye laws immediately after learning of them, which compelled the respondents to pass Resolution, as contained in Annexure-2, amending bye laws, which on face of it shows that the bye laws have no sanctity in the eyes of law and the board having realised that the bye laws were illegally passed resulting in reducing the amount; since the petitioners are not liable to pay fee and thus the question of renewal of their licence or grant of fresh licence do not arise at all, who have been carrying on work and have also not been stopped by the authorities; proper stay order was passed by this court protecting the rights of the petitioners which deserves to confirmed.

The Submissions:-

6. Sri N.S. Chaudhary, learned counsel for the petitioners, contended as follows:-

(i) The notification publishing the bye laws bearing no. 868/23-2 (5) 86-87-Nagar Palika Etah, in the U.P. Gazette dated 3rd September, 1988, shows that impugned bye laws, were prepared under section 298 (2) List I J (d) of the Act, whereas the aforementioned provisions do not confer any authority in the Municipal Board, Etah to frame/enact them.

(ii) As no facility has been provided to the contractors like the petitioners and thus the doctrine quid pro quo has been breached.

His argument stand fully supported by a three judges division bench pronouncement of the Supreme court in Nagar Mahapalika, Varanasi Versus Durga Das Bhattacharya, AIR 1968 Supreme Court 1119.

(iii) It being unreasonable ultra vires Article 19 (1) (g) of the Constitution.

(iv) The defiance taken by Respondent nos. 2 and 3 that the bye laws were made under general power under section 298 (1) of the Act is an after thought, besides inconsistent with the provisions of the Act and has nothing to do for the purpose of framing or maintaining health, safety and convenience of the inhabitants of the Municipality or in furtherance of the Municipal administration under the Act.

Accordingly, the relief's prayed for by the petitioners be granted.

7. Sarv Sri Jai Kishan Tiwari and Shashi Nandan, learned counsel appearing on behalf of Respondent no. 2 and 3, on the other hand contended as follows:-

(i) a bare perusal of section 298 (2) List I.J-Miscellaneous (d) of the Act would show the authority of Municipal Board to frame the bye laws in question in imposing fee, which is not tax, inasmuch as the work "undertaking" mentioned in sub clause)d) as per the pronouncement of the Supreme Court, through its three Judges Division Bench, in secretary, Madras Gymkhana Club Employees Union Versus The Management of the Gumkhana Club AIR 1968 SC 554, must be defined as "any business, or work or project which one engages in or attempts as an enterprise analogous to business or trade". (ii) Even assuming without conceding that the Municipal Board Etah lacked authority to make bye laws under section 298 (2) of the Act its power being traceable to section 298 (1) mentioning of 298 (2) of the Act in the notification will not give a handle to the petitioners to challenge the very authority of the Zmunicipal Board Etah to frame them. A bare perusal of section 298 (1) of the Act would show that in its generality the Municipal Board under its general powers could have framed the bye laws. Through a five Judges Bench the Supreme Court in Afzal Ullah V. State of U.P. AIR 1964 Supreme Court 264 laid down that even if the said clauses do not justify the making of the bye laws, there can be little doubt that the said bey laws would be justified by the general power conferred on the board by section 298 (1) as it is now well settled that specific provisions such as are contained in the several clauses of Sections 298 (2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section (1). The recent Division Bench decision of this Court in Mohd. Usuf Khan v. State of U.P. 1999 Allahabad Civil Jounral 1268, which had followed the judgment of the Supreme Court in Vam Organic Chemisal Ltd. And another V The State of U.P. others 1997 (1) Judgment Today SC 625 and P. Kannadasan Versus state of Tamilnadu 1996 (7) judgment Today SC 16 which wholly supports his contention.

(iii) The word licence fee, has been explained by the Supreme Court through its Five Judges Bench decision in Hari Shankar Versus Dy. Excise and Taxation Commissioner Air 1975 SC 1121 that "the licence fee which the state Govt. charges to the licence through auction or the fixed fee existence of quid pro quo is not necessary to the service rendered tot he licensee; by the licence fee or fixed fee is meant the price or consideration which the Government charges to the licence for parting with its privileges amounting them to the licensee, it is in the nature of the price or privilege which the purchaser has to pay in any trade business and transaction. Accordingly, as held by Supreme Court in the Corporation of Calcutta Versus Liberty Cinema AIR 1965 SC 1107 the provisions of imposition of licence fee does not unnecessarily lead to the conclusion that the fee must be only for the services rendered.

In the instant case through bye laws regulatory fee has been imposed for egulating the contracts for the contractors, who may take part in the auction to the held for allotment of work of construction of houses etc.

(iv) As the petitioners have not prayed for grant of a writ of certiorari quashing the order dated 14.06.1989 rejecting their prayer for reduction of the fee they are not entitled to grant of relief no. 2 prayed for by them.

(v) Since the petitioners have not come with a prayer to quash the order passed by the Commissioner and have made false statements in paragraph 14 of their writ petition, as pointed out in paragraph 13 of the counter affidavit to which they have not filed any reply in their rejoinder affidavit, in view of two pronouncements of the Supreme Court in Dhananajay sharma Versus State of Haryana, AIR 1995 3 SCC 757 (paragraph 38) and Panchu Gopal Barua Versus Umesh Chandra Gosami, Judgment Today 1997 (2) SC 554 (Paragraph 60) and accordingly they are not entitled to any relief and the writ petition be dismissed with costs.

8. Mr. Chaudhar, in reply to the submissions made on behalf of Respondent nos. 2 and 3 contended as follows:-

(1) The word 'undertaking's strenuously urged by Sri Tiwari, the learned Counsel, has to be read alongwith other provisions and not in isolation by invoking the doctrine of 'Ejues generis'.

(ii) The arguments made on behalf of the Respondents are not sound thus be rejected.

OUR FINDINGS:-

9. We first take up the last submission made by Mr. Tiwari.

9.1 According to the averments made in paragraph 13 of the counter affidavit the assertions of the petitioners that they learnt of the bye laws for the first time in January, 1989 is false inasmuch as necessary notices were issued to them by the Executive Officer on 27.10.1988 which they had received on that very day. Respondent nos. 2 and 3 to support their stand have also brought on the Record the notices as Annexure II and III to their counter affidavit. They have also further pointed out that pursuant to the aforementioned notices, the petitioners submitted their applications before the Executive Officer on 01.12.1988 agreeing to obtain their registration stating that the amount of Rs. 2000/- towards fee be deducted from their Bills, which was also realised. The petitioners had also made a prayer for reducing the quantum of fee which, however, was rejected by the Commissioner vide his order dated 14.06.1989 and communicated by the Office of the D.M. vide letter dated 28.06.1989.

9.2The aforementioned statements have been answered by the petitioners in paragraph 13 of their Rejoinder affidavit, which reads thus:

"13-that paragraph 13 of the counter affidavit as stated is denied. The petitioner learnt about the said bye laws and immediately challenged the bye laws. This on the face of it shows that these bye laws have no sanctity in the eyes of law and the Board having realised that the bye laws are illegally passed/resolution reducing the amount. Other illegalities have also been demonstrated in paragraph 14 and 15 of the writ petition and the said illegalities are still continuing."

9.3 There is presumption of correctness of the official acts. The commissioner has already rejected their objections. Their denial appears to be merely an eye wash and not effective one inasmuch as no clear cut answer has been given to the positive statements made in the counter affidavit which stood supported by the production of relevant materials. We do not feel satisfied to place reliance on their self serving statements. Annexure-4 to the Counter Affidavit filed by petitioner no. 1 shows that it was prepared for registration under A category though on the condition that the registration amount be realised through its

first bill no that it is prepared to deposit the amount of Rs. 2000/- just now and thus orders for registration be passed. This writ petition was filed on 3rd July, 1989 after passing of the order dated 14.06.1989 by the Commissioner Agra division which was communicated tot he petitioners vide letter dated 18.06.1989. Thus,. We hold that the petitioners were aware of the bye laws as asserted by the Respondents.

In Panchu Gopal Barau (supra) it was emphasized by the Supreme Court that a party must come to the Court with clean hands.

10. The petitioners have also not come with a prayer to quash the order dated 14.06.1989 passed by the Commissioner by grant of a writ of certiorari.

10.1 However, we also proceed to consider the case on merits.

11. Section 298 of the Act reads thus:-

"298-power of board to make bye laws: (1) A board by special resolution may, and where required by the State Government shall made by laws applicable to the whole or any part of the municipality, consistent with Act and with any rule, for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality and for the furtherance of municipal administration under this Act.

(2) In particular, and without prejudice to the generality of the power conferred by Sub Section (1) the board of a Municipality, wherever situated, may in the exercise of the said power, make any bye law described in List I below and the board of Municipality, wholly, or in part, situated in hilly tract may further make, in the exercise of the said power, and bye law described in List II below.

11.1 List I attached with sub Section 2 (relevant part only) reads thus:-

"BYE LAWS FOR ANY MUNICIPALITY"

J-Miscellaneous

(d) Fixing any charges or fees, or any scale of charges or fees to be paid for house scavenging or the leasing of latrines and privies under section 196 © or for any other municipal service or undertaking or to be paid under section 293 (1) or section 294 of the Act, and prescribing the times at which such charges or fees shall be payable, and designating the persons authorized to receive payment thereof."

11.2 a bare perusal of the aforementioned sub clause shows that the Municipal Board can fix any charge, or fee for any other Municipal Service undertaking, Various topics mentioned therein are merely illustrative as laid down by the Supreme Court in Afzal Ullah's case (supra) arising out of the Act itself. In this very case the validity of certain bye laws was raised the preamble of which also referred to clauses (a) (b) (c) and J (d) of section 298 A of the Act. A contention made on similar lines, as made by Sri Chaudhary, was rejected holding as follows:-

"13 Even if the said clauses did not justify the impugned by law, there can be little doubt that the said bye laws would be justified by the general power conferred on the Board by S. 298 (1) it is now well settled that the specific provisions such as are contained in the several clauses of S. 298 (2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by S. 298 (1) vide Emperor V. Sibnath Banerji, AIR 1945 PC 156. If the powers specified by S. 298 (1) are very wide and they take in within their scope bye laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under S. 298 (2) control the general words used by S. 298 (1). These latter clause merely illustrate and do not exhaust all the powers conferred

on the Board, so that any cases not falling within the powers specified by section 298 (1) provided, of closures, the impugned bye laws can be justified by reference to the requirements of S. 298 (1). There can be no doubt that the impugned bye laws in regard to the markets framed by respondent no. 2. Are for the furtherance of municipal administration under the Act and so, would attract the provisions of S. 298 (1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye laws are valid."

"(14) It is true that the preamble to the bye laws refers to clauses (a), (b) and (c) and J (d) of Section 298 and these clauses undoubtedly are inapplicable; but once it is shows that the impugned bye laws are within the competence of respondent no. 2 the fact that the preamble to the bye laws mentions clauses which are not relevant, would not affect the validity of the bye laws. The validity of the bye laws must be tested by reference to the question as to whether the Board had the power to make those bye laws. If the power is otherwise established the fact that the source of the power has been incorrectly indicated in the preamble to the bye laws would not make the bye laws invalid."

11.3 The word 'Undertaking' as mentioned in sub clause (d) has to be given the same meaning as given in the secretary Madras Gymkhana Club Union (Supra) wherein it was held as follows

"The word undertaking must be defined as any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade."

11.4 Apparently the Municipal Board wanted to proceed with the contractions of the Building etc. and for which the tenders were required to be invited. Thus in order to regulate the same their action was regulatory in nature as laid down by the Apex Court in Vam Organic Chemicals Ltd. (Supra). As laid down by the Apex Court in the Case of corporation of Calcutta (Supra) "the fee for licence for the service rendered as contemplated it amounts to levy fee for the service to be rendered as suitable of Article 102 and Article 119 (2) of the Constitution. We both express our view indicating thereby that they are not the same; it would therefore, appear that the provisions of imposition of licence fee does not necessarily lead to the conclusion that the fee must be for the service rendered." In P. Kanna Dasan (supra) it was held by the Apex Court that "Even in the matter of fees it is not necessary that element of quid pro quo case, for it is well settled that fee can be both regulatory and compensatory and in the case of regulatory fee the element of quid pro quo is totally irrelevant." These judgments of the Apex Court have been relied upon in the Division Bench of this Court in Mohd. Yusuf Khan (supra) while upholding the validity of the bye laws framed in regard to parking fee made by the Town Area committee Kamalganj, Farrukhabad, we do not find sufficient reasons to differ from the view taken by the Division Bench.

11.6 True it is that in Nagar Mahapalika, Varanasi case, strongly relied upon by Sri Chaudhary, the three Judges Division Bench of the Supreme Court had nullified the bye laws famed by the Municipal Board, Varanasi under section 298 List _I – HC and D of the Act, when it imposed fee for every licence granted to the proprietor of cycle, rickshaw itself and for hand driven rickshaw for the reasons mentioned therein, namely that it was not permissible for the Municipal Board to impose tax under the guise of license fee without following the mandatory procedure for imposition of tax prescribed by Sections 131 to 135 of the Act and that the theory of quid pro quo was not sufficiently established and thereby ultra-vires and illegal, but having regard to the submissions made on behalf of Respondent no. 2 and 3 which are supported by various

pronouncements of the Supreme ?Court, including one in Afzal Ullah, which is earlier and of five Judges bench which was also not noticed in Nagar Mahapalika Varanasi which is by only three Judges.

11.7 The reduction of the fee amount by the board itself as stated by the petitioner will give no handle to them to establish that it was in excess of jurisdiction rather strengthens the stand of the respondents.

12. The submissions made by Mr. Chaudhary that the bye laws are unreasonable and violate of article 19 (1) (g) of the Constitution of India is also not accepted.

13. The submissions made on behalf of the Respondent nos. 2 and 3 being correct are thus accepted.

14. Accordingly, we hold that the bye laws in question are not ultra vires the powers of the municipal board or of Article 19 (1) (g) of the Constitution in regard to its framing.

The Result:-

15. For the reasons aforementioned we dismiss this writ petition, but having regard to the peculiar facts and circumstance make no order as to cost.

Petition Dismissed.

ORIGINAL JURISOICTION
CIVIL SIDE
DATE :ALLAHABAD 5TH NOV.,99

BEFOUR
THE HON'BLE A.A.DESAI,J.
THE HON'BLE ONKARESHWER BHATT,J.

Civil Misc. writ petition no 38367 of 1999

Subharti K.K.B. charitable Trust through its president Dr. Atul Krishna, R/o Subhari Bhawan, Garh Road, Meerut, Uttar Pradesh ...Petitioner

Versus

Union of India & others ...Respondents

Counsel for the Petitioner :
Shri Yasharth
Shri Sudhir Chanora Agrawal

Counsel for the Respondents :
Shri Kirit Rawal,
Additional Solicitor General of India
Shri S.N. Srivastava
Senior Standing counsel
Shri Maninder Singh
Shri Pradeep Kumar
Shri Vikram Nath

Indian Medical council (Ammendment) Act 1993 section 10-A (4) readwith Regulation 5- Approval of scheme – petitioner being Cheritable Trust –submitted a scheme for approval to run the Medical College alongwith relevant detail about ownership of 25 area Iand and other necessary particulars Inspection made – infrastructural facilities of the hospital to develop the teaching talk – the authorities can either approve the scheme with certain condiction or to disapprove the same but can not delayed the matter in the garb of inspection.

Held

The facts and circumstances of the case show that issuance of the letter of intant and grant of permission to the petitioner trust have been unnecessarily delayed by insisting upon another inspection. (Para24)

1996(8) SCC-P.330

By the Court

My means of this writ petition under Article 226 of the Constitution of India, petitioner has prayed for issuance of a writ of certiorari for quashing for quashing the impugned other 19.07.1999, Annexure no26 to the writ petition, passed by respondent no.1.The petitioner has also prayed for issuance of a writ, order or direction in the nature of mandamus directing the respondent no.1 to issue an order granting permission to the petitioner to commence medical college as per the Scheme submitted without any further inspection or enquiry within the period so fixed by the Court .

2. Sri Sudhir Chand Agrawal, learned senior Advocate, appearing for the petitioner,

Mr. Kirit Rawai, learned Additional Solicitor General of India, and Sri S.N. Srivastava , learned senior standing Counsel, appearing for respondent no.1 and Sri Maninder Singh, learned counsel appearing for the respondent no.2, were heard at length and in detail.

3. The petitioner is a registered charitable trust the petitioner submitted a Scheme on 6.8.1996 for setting up of a medical college in Meerut to the respondent no1, which was referred to the respondent no. 2.

4. The petitioner 's case is that it applied and was granted no objection certificate from the State also applied for and was granted consent to affiliation by Chaudhary Charan Singh University, Meerut .The petitioner trust has also been accorded consent for affiliation by Purvanchal University, Jaunpur and by Dr. Bhim Rao Ambedkar University, Agra . The petitioner submitted the Scheme giving relevant, details regarding owner ship of 25 acres of land, a copy of the government order issued by the Government of Utter Pradesh notifying that the District Hospitals ware available for teaching purposes of new medical colleges and a memorandum of understanding with Lokpriya Nursing Home Ltd. For the use of 300 bed hospital for teaching purposes. Subsequently , this memorandum of understanding was converted in to an agreement of perpetual Keisei whereby the Lokpriya hospitals was irrevocably handed over to the petitioner. Subsequently , without conducting any inspection the respondent no.2 recommended rejection of the petitioner's Scheme Thereafter the respondent no.1issud notice to the petitioner to appear for personal hearing which took place firstly on 27.02.1997 and secondly on 30.07.1997 .On 13.08.1997 three Doctors, claiming to represent the respondents no visited the college premises and carried inspection. The inspection – report alongwith notice of hearing no. 05.11.1997 was sent to the petitioner. The petitioner submitted a written representation alleging that the defects/ deficiencies pointed out in the inspection report were misconceived. On 31.01.1998 another teem of three doctors visited the petitioner's hospital. No further action was taken after the inspection dated 31.01.98. The petitioner sent a representation on 09.03.1998 to the respondent no .1, which received no response.

5. The petitioner then filed writ petition no.12531 of 1998 claming that it was entitled to a declaration to the affect that medical college was deemed to have been approved under section 10-A(5) of the Indian Medical Council(Amendment) Act, 1993.

6. The respondents filed counter affidavits. This Court on 06.05.1998 directed that another inspection we made and in this inspection the medical Council of India should point out the deficiencies and also suggest how to remove it and provide help, so that the medical college can be set up soon. On 06.07.1998 the respondent no.2 filed an affidavit alongwith a copy of the inspection report. It was averred that in view of eight defects pointed out by them in the report, they had recommended to the central government not issue latter of intent to the petitioner college. The petitioner filed a detailed affidavit on 10.07.1998 demonstrating that eight defects pointed out ware totally unfounded . Thereafter this Court passed an order on 24.07.1998 directing the respondent. No.1 to examine the entire matter and pass appropriate orders within two months. The respondent no.1 struck down six out of eight defects pointed out by respondent no.2 by order dated 12.11.1998 However, two defects were pointed out. The petitioner in view of the order 12.11.1998. passed by the respondent no.1 amended it s writ petition and added to the existing prayers. Amended Counter affidavits were also filed by the respondents. This Court disposed of the writ petition by order dated 19.03.1999 with liberty to the petitioner to make representation before the

respondents no.1 with all materials to satisfy that the two defects pointed out in the impugned order have been removed. It was made clear that consideration will be of the same application which was filed earlier and shall not be treated as fresh application. The Court also ordered that the representation, if so filed, shall be considered and decided within one month from the date it is filed.

7. The petitioner submitted a representation to the respondent no.1 on 25.03.1999. Thereafter the respondents no .2 appointed two Inspectors. While conducting the inspection on 4.1.1999 the inspection team of the respondent's no.2 wanted to conduct full scale inspection. The president of the petitioner trust requested the inspection team to confine the inspection on the aspects specified by the Court's order dated 19.03.99. The respondent no.1 after taking into consideration the above report passed the impugned order on 19.07.1999 .The petitioner made representation on 26.07.1999 to the respondents no.1 to review the orders dated 19.07.1999 and 04.08.1999, which has not met with any response.

8. During pendency of the writ petition the respondents no.1 has disposed of the representation of the petitioner by an order dated 15.09.1999, which is Annexure –1 to the additional affidavit filed by the petitioner. The petitioner has alleged that even this order has been passed in haste in an attempt to avoid action for contempt of this Court order dated 19.03.1999 and it is mala– fide.

9. The respondent's no.1 filed counter affidavit. It has been stated in it that in pursuance of the order of the Court dated 19.03.1999 the representation was received from the petitioner on 26.03.1999 thereafter the Central Government decided to ask the respondents no.2 to carry inspection. The inspection was carried out on 04.05.1999 However, by communication dated 20.05.1999 the respondent no. 2 informed that the inspection was not permitted by the college and the respondent no.2 decided not recommend for issuance of the letter of intent to the petitioner .The petitioner by its letter dated 04.06.1999 refuted and controverted the facts in relation to the inspection made on 04.05.1999. To resolve the controversy a joint meeting was held on 18.06.1999, where after the impugned order was passed on 19.07.1999 It is stated that the order dated 15.09.1999 has been passed in bona-fide discharge of the official duties .

10. The respondent no.2 has also filed counter affidavit. It has been stated that the application of the petitioner besides various other deficiencies were found to be lacking in relation to the precondition of the college owning a hospital of not less then 300 beds which can be developed as teaching hospital. It is also stated that on 04.05.1999 the petitioner did not permit the inspection-team to carry out the necessary facts.

11. In the additional affidavit it has been stated that the petitioner owns and manages a hospital of not less then 300 beds with infrastructural facilities, which are capable of being developed. It is further stated that 75%of the work is complete. It is also stated that in each category the staff exceeded the requirements and clinical staff has been converted into time.

12. The respondent no.2 in exercise of the power conferred by section 10-A read with section 33 of the Indian Medical Council Act1956(102 of1956), with the previous approval of the Central Government , has made Regulations relating to the establishment of new medical colleges. These Regulations may be called as 'The Establishment of New Medical Colleges, Opining of Higher Courses of Study And Increase of Admission Capacity in Medical Colleges Regulations, 1993; here –in-after called 'the Regulations'. In section 2 of the Regulation eligibility criteria as well as

qualifying criteria has been provided for application for permission of the Central Government to establish a new medical college. Clause 5 of the qualifying criteria reads as follows :

"5. that the applicant owns and manages a hospital of not less then 300 beds with necessary infrastructual facilities and capable of being developed in to a teaching institution as prescribed by the medical Council of India in the vicinity of proposed medical college; (emphasis supplied by us)

13. By the impugned order dated 19.07.99, the respondents no.1 has directed the petitioners to subject itself to fresh inspection by the respondents no.2 According to the petitioner the impugned order is wholly illegal, unwarranted and mala-fide. While disposing of the writ petitioner no. 12531 of 1998 this Court on 19.03.1999 gave certain directions noted above.

14. The order dated 19.03.1999 passed by the Court took notice of the averments made in paragraph no.3 of the counter affidavit filed by Sri C.L. Bhatia, under Secretary, Ministry of Health and Family Welfare, which indicated about the requirement of managing 300 bedded hospital. It was stated that the lease granted in perpetuity seeks to transfer virtually all the right of ownership to the lessee. The Ministry of Law have, therefore, concluded that the requirement of the applicant owning and managing a 300 bedded hospital may be viewed as having been sufficiently complied with. This Court also observed that perpetual lease, which has been granted by registered document, shall be as good as any property owned by that tryst. The Court also observed that 'in our opinion, the perpetual lease though in strict sense cannot be termed as ownership, but in affect it is as good as ownership property and may satisfy the prescribed requirement!

15. The two defects which are mentioned in the Court's order dated 19.03.1999 are to be found in the order dated 12.11.1998 passed by the respondent no.1.The said order states that the application submitted by the trust in 1996 is still deficient in two respects:

(i) the trust does not own and manage a 300 bedded hospital. The inspection team has further pointed out that the hospital has single room OPOS and most of the rooms in the wards are two bedded which are not suitable nor convenient for teaching and training of medical students.

(ii) The second major deficiency noted in the order so non-availability of adequate teaching staff.

16. On 04.05.1999 the inspecting team of the respondent no.2visited the petitioner – trust and submitted inspection report , which is Annexure P-25. The report mentions that the staff of training department is paid full time salary and it has been converted in to fully time salary basis. Photo copies of salary register for the month of April, 1999 were shown. The inspection report gives chart of the staff which was available in the clinical department. The report mentions that the photo copy of the salary register which has been given to the Inspectors does not show the designation of the various staff member completely disabling the inspection team to verify the aspects relating to the deficiency of the staff required by the college at its inception. The report also under the heading 'hospital is capable of being developed into a teaching hospital' mentions that the institution has started modifications to convert single room , OPDs and single indoor wards having one or two beds. So far at three places in the indoor changes have been done and at three places the work is in progress. Rest all the indoor rooms are yet to be converted . In the OPD conversion of single rooms by breaking the walls of the adjacent rooms started on the day of inspection and so far only in one room this work was going on .The team was also given a map of the whole building prepared by the architect to convert the single room in to bigger spaces for 5 to 7 patient's ward.

17. In the impugned order passed on 19.07.99 the above facts, as mentioned in the inspection report dated 04.07.1999, have been taken note of. However, in para 16 of the impugned order it is stated that :

"Reverting to the limited points of the two deficiencies pointed out in the order of Secy.(Health) dated 12.11.98 the major deficiencies still appear to be in the process of rectification. The hospital structure is still being remodelled and physical verification of staff could not be done as some were reportedly on vacation. Ample opportunities have been given to the petitioner to rectify these deficiencies. He claims that he has recited these deficiencies. However, he is not willing to have these scrutinised by Medical Council of India."

The impugned order in the end mentions that the Medical Council of India will conduct another inspection.

18. Sub section (4) of section 10-Aof The Indian medical Council (amendment) Act ,1993 provides as follows :

"(4) The Central Government may, after considering of the scheme and the recommendations of the Council under sub – section (3) and after obtaining, where necessary, such other particulars as may be considered necessary by it from the person or college concerned, and having regard to the factors referred to in sub- section(7) either approve (with such condition , if any, as it may consider necessary) or disapprove the scheme and such approval shall be a permission under sub- section (1) :

Provided that on scheme shall be disapproved by the Central government except after giving the person or college concerned a reasonable opportunity of being heard …"

19. Sub – section (4), mentioned above provides that the central government may approve the scheme with such condition, if any, as it may consider necessary, meaning thereby that approval of the scheme can be with conditions .

20. Regulation 5 also speaks of the hospital with necessary infrastructural facilities and capable of being developed into a teaching institution. The above provision will shot that at the time of giving permission the hospital should not necessarily be a teaching hospital, but should be capable of being developed in to teaching institution. Moreover, according to the Regulations , the permission to establish new medical college and admit the student will be granted initially for a period of one year and will be renewed on yearly basis subject to verification of the achievements of annual targets and revalidation of the performance bank guarantees . This process of renewal of the permission will continue till such time the establishment of the medical college and expansion of the hospital facilities is completed and formal recognition of the medical college by the Council of India is granted.

21. The petitioner in its representation has stated that the chart of the available staff given alongwith the order dated 12.11.1998 shows on its own that mare then the required teaching staff is available with the college. The chart is to be found in the order dated 12.11.1998. The order dated 12.11.1998 does not mention that the teaching staff was inadequate. The chart show that number of teaching staff was either the same which was required at the inception or more then that. According to the petitioner the Inspectors of the respondent's no.2 met with 19 out of 21 staff members of the clinical department, who were made to fill forms. The objection, was their becoming full time or not. The report of the Inspectors of the respondents no.2 dated 04.05.1999 shows that clinical staff was converted to full time salary basis.

22. In para 5 of the impugned order it is stated that :

(a)The trust has taken the control and management of Lokpriya Hospital through registered perpetual lease deed.

(b)The staff in pre-clinical departments is available. The staff in on clinical department which was earlier on contract basis has also been appointed on regular basis.

(c) The modification of wards for on accommodating 5 to 6 patient in a room is underway . After having noticed the above facts two deficiencies mentioned in the order dated 12.11.1998 of the respondents no.1 appear to have been made good. Therefore, the insistence of respondents no 1 to subject the petitioner trust for .the impugned order is arbitrary exercise of power and cannot be sustained . The order of the respondent no.1 dated 15.09.1999 , which has been passed during pendency of the writ petition also cannot be sustained , because it has been made without giving the petitioner trust a reasonable opportunity of being heard in contravention of the first proviso to sub-section (4) of section 10-A of The Indian medical Council (Amendment) Act, 1993.

23. In the case of "Al-karim Educational Trust and another Vs. State of Bihar and others " reported in 1996(8) supreme Court Cases page 330, the question was of withholding or prolongation of grant of affiliation to universities, and the Hon'ble Supreme Court observed that it is impratical to insist, for a foolproof or absolute adherence to all requirements without regard to their importance or relevance. In the final analysis the question to be posed is whether there exists the minimal and satisfactory requirements to keep the matter going, and not whether better arrangements that will render the set-up more efficient and more satisfactory , should be insisted as "a wooden " rule . it may be that there are some minor deficiencies herd and there which call for rectification . The time can certainly set right such matters.

24. The facts and circumstances of the case show that issuance of the letter of intent and grant of permission to the petitioner trust have been unnecessarily delayed by insisting upon another inspection.

25. In view of the aforesaid discussion, the writ petition succeeds.

26. The writ petition is allowed and the impugned order dated 19.07.99 as will as the order dated 15.09.1999 (Annexure 26 to the writ petition, and Annexure 1 to the additional affidavit of the petitioner respectively) are quashed. The respondent no.1 is directed to pass appropriate orders of permission on the application of the petitioner trust for commencing medical college as per the Scheme submitted, within four weeks.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 11.11.99

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

Civil Misc. Writ Petition No. 17663 of 1996

Babu Ram & another ...Petitioners
Versus
Deputy Cane Commissioner Moradabad Division Moradabad & others...Respondents

Counsel for the Petitioner :
Shri Veer Singh
Shri R.K. Misra

Counsel for the Respondents :
S.C.
Shri Shashi Nandan

Constitution of India, Article 226, - Applicants appointed as Parchi Vitrak in cane society office- Inititally promoted as seasonal clerks treating them to be eligible for promotion in the belief that 'Prathma' is equivalent to High School- Subsequently on detection of mistake petitioners were

reverted to original posts, they did not possess requisite minimum qualification of High School-
Held
Petitioners have not filed syllabus or the certificate of 'Prathama' to show that Hindi Sahitya Sammelan claims its said examination as equivalent to 'High School' This Court takes judicial notice of the Educational Code of U.P. 1958 Edn. (Corrected up to 31.12.1962) published by Secretary to Government, Education Department, U.P. which does not recognise 'Prathama' or any other examination conducted by Hindi Sahitya Sammelan' Allahabad. Again Manual of Government Orders (Revised Edition) , 1981 Chapter 136 at particular pate 482- reproduces OM No. 8825/II-297-39 dated June 3, 1940- Vol. II does not support the Petitioner's case No. statute/ordinance or Regulation or any other Government order was either filed in the case of Vishambhar Singh (Supra) or any of it is filed in the present case. There is no material to show that Hindi Sahitya Sammelan claims its 'Prathama' examination equivalent to High School. (Para 13)
Case law referred-
C.M.W. No. 135 of 1995, decided on 20.3.1997.

By the Court

1. Babu Ram and Harbir Singh, the two Petitioners have flied this petition under Article 226, Constitution of India claiming a writ of certiorari to quash the order dated 19th November 1994 (Annexure-1 to the Writ Petition) in compliance to the Resolution dated 28th February 1994 (Annexure-1A to the Writ Petition) as well as writ of mandamus directing the Respondents not to interfere with working of the Petitioners as Seasonal Clerks and pay salary to them accordingly.

2. Briefly stated facts are that Petitioners were appointed as Parchi Vitrak in the Office of Cane Society, Bijnor in the year 1977- 78 respectively. Question arose for making promotion to the post of seasonal Clerks, which required High School as minimum qualification.

3. In Paragraph 4 of the petition is alleged that Petitioners had passed "Prathma" examination from Hindi Sahitya Sammelan, Allahabad. According to the Petitioners, the said examination is equivalent to High School . Reliance has been placed on a Notification on the subject purported to been issued by the Central Government (Annexure-2 to the Writ Petition).

4. It appears that petitioners were initially promoted treating them to be eligible for promotion on the belief that they were as good as 'High School' on having passed "Prathama", and that they were at par with a person who had passed High School from U.P. Board. It appears, subsequently this mistake was detected by the employer and resolution was passed to revert such persons to their original post on the ground that they did not possess requisite academic qualification of High School. Accordingly, impugned order dated 19th November 1994 was passed.

5. Feeling aggrieved, Petitioners have come this Court and seek to challenge the aforesaid impugned orders (Annexures-1 and 1-A to the Writ Petition)

6. A Counter Affidavit has been filed on behalf of Respondents nos. 1,2 and 3. In Paragraphs 6 and 9 of the Counter Affidavit it is stated the Petitioners did not fulfil educational qualification prescribed by the relevant service regulations. According to the contesting respondents minimum qualification prescribed is High School and Petitioners did not possess the same as they, admittedly, passed "Prathama" examination conducted by Hindi Sahitya Sammelan. According to the contesting Respondents "Prathama examination of Hindi Sahitya Sammelan is not equivalent to High School of U.P. Board . Copy of the resolution deciding to revert has been filed as (Annexure CA-1 to the Counter affidavit).

7. A Rejoinder Affidavit has been filed denying aforesaid stand taken by the contesting Respondents and it is stated that this Court vide judgment and order dated March 20, 1997 in Civil Misc. Writ Petition No. 135 of 1995 (Vishambhar Singh and others versus Cooperative Cane Development Union Limited, Nagina and others) and other connected petitions has held that 'High School' qualification mentioned in the regulation did not suggest that candidate should have passed "High School" examination conducted by U.P. Board only. According to the learned Single Judge use of word "High School" prescribing educational qualification in relevant regulation, meant and included in it other recognised equivalent examinations, e.g. SSC, CBSC, etc.. Copy of said judgment has been filed as Annexure-1 to the Rejoinder Affidavit.

8. Learned counsel for the Respondent with reference to the averments contained in Paragraph 6 of the Counter Affidavit, drew notice of this Court to (Annexure-2 to the Writ Petition) and submitted that a bare perusal of the said Annexure-2 to the Writ Petition would show that by no stretch of imagination 'Prathama' examination of Hindi Sahitya Sammelan can be treated as equivalent to 'High School' of U.P. Board/or for that matter any other examination recognised as equivalent to High School.

9. Annexure-2 to the Writ Petition clearly indicates that "Prathama" examination of Hindi Sahitya Sammelan is recognised for limited purposes, namely, it is relevant for treating a person holding 'Prathama Certificate' as having knowledge of Hindi only up to High School level. The Central Government Notification, filed as annexure 2 to the Writ Petition, in so many words lays down that "Prathama" examination of Hindi Sahitya Sammelan cannot be treated at par or equivalent to High School.

10. Again, before this Court, in the case of Vishambhar Singh (supra), the question whether " Prathama" should be treated equivalent to High School was neither arising out of pleadings nor raised and it was decided incidentally. The main question for decision in the said case was regarding interpretation of the expression "High School", the expression used in the concerned regulation.

11. The observation of the learned single Judge regarding "Prathama" to be treated as equivalent to High School is only 'per ineuriam' and observation in this respect are 'sub silentio'. It is not a precedent and cannot be treated as having binding force.

12. I called for the record of the case of Vishambhar Singh (supra) and gone through it. Perusal of the petition supports the above observation; namely the main question arising in the said case was whether an equivalent examination conducted by other recognized educational body was included in the expression High School or not. The observation of the learned single Judge regarding "Prathama"examination being equivalent to High School appears to have been made on the basis of certain correspondence of the University (filed as Annexure RA-2 to the Rejoinder Affidavit in that case) which was not the whole of the story. There is no reference to syllabus or statutes or ordinance of the Allahabad University.

13. Petitioners have not filed syllabus or the certificate of "Prathama" to show that Hindi Sahitya Sammelan claims if said examination as equivalent to 'High School'. This Court takes judicial notice of the Educational Code of U.P., 1958 Edn. (Corrected up to 31-12-1962) published by Secretary to Government, Education Department, U.P. which does not recognise 'Prathama' or any other examination conducted by Hindi Sahitya Sammelan, Allahabad. Again Manual of Government

Orders (Revised Edition), 1981 Chapter 136 at particular page 482- reproduced- OM No. 8825/II-297-39 dated June 03, 1940- Vol. II- does not support the petitioner's case. No Statute/Ordinance or Regulation or any other Government Order was either filed in the case of Vishambhar Singh (supra) or any of it is filed in the present case. There is no material to show that Hindi Sahitya Sammelan claims its "Prathama" examination equivalent to High School.

14. In view of the above I find no manifest error apparent on the face of record calling for interference with the decision taken by the Respondents vide impugned resolution dated 28th October 1994 and consequently order dated 19th November 1994. Writ Petition fails and is, accordingly, dismissed.

15. In the facts of the case particularly when Petitioners who claim to be promoted, though under mistake of fact, are denied relief and they are persons getting meagre salaries as Parchi Vitrak in Sugar Cane Societies, I direct that parties shall bear their own costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED :ALLAHABAD 17.11.1999

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

Civil misc . writ petitioner no.9000 of 1996

Smt Nirmal Rani ...Petitioner
Versus
State of U.P. & others ...Respondent

Counsel for the Petitioner :
Shri H.N. Tripathi

Counsel for the Respondents :
S.C.

U.P. High School and Intermediate Education Act readwith U.P. High school and Intermediate Colleges (payment of Salaries of Teachers and other Employees) Act , 1971 – Removal of Teachers on ground of absence of requisite training qualification- Termination order passed in violation of principles of natural justice and non – application mind –Hence set aside.
Held-
In view of the unrebutted statements contained in the writ petition that termination order has been passed in violation of the principles of natural justice, that she was given no chargesheet, that no disciplinary enquiry was held as contemplated under Regulations framed under the U.P. high School and Intermediate Education Act and that the employer (Committee of Management of the Institution) had taken no decision on its own and that she was directed to be relived under the dictates of the District Inspector of Schools without giving opportunity as contemplated under law, the impugned orders are vitiated in law and cannot be sustained. (para 18)

By the Court

1. Petitioner was appointed as Assistant Teacher in a recognized Junior High School, which was upgraded to High School and Intermediate level. Detailed facts have been mentioned in the Writ Petition. Institution (Kunwar Ranjit Singh Inter College, Nagariya Parikshit, Air Force, Bareilly) was getting grant-in-aid and the provisions of U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 are applicable to it.

2. Petitioner received her salary when the College came on grant-in aid list in 1994 and she was paid until impugned order dated 9th August 1995 (Annexure-IV to the Writ Petition) and consequential order dated 31st August 1995 (Annexure-XI to the Writ Petition) were passed.

3. Petitioner has passed High School and Intermediate Examinations of U.P. Board,

Allahabad'. She also passed 'Madhyama' (Intermediate level), Sahaitya Ratna (B.A. Level) as well as Shiksha Visharad Examinations, (said to be equivalent to B.Ed.) Teaching Training Course from Hindi Sahitya Sammelan, Allahabad. Petitioner has filed certain documents (as Annexure-I, II and III to the Writ Petition) to show that 'Shiksha Visharad' of Hindi Sahitya Sammelan is recognized as equivalent to B.Ed/Trained Teacher.

4. It appear that some complaints were made and a preliminary enquiry was held by the District Inspector of Schools, who passed impugned order dated 09th August 1995 (Annexure-IV to the Writ Petition). District Inspector of Schools, Bareilly, under the impugned order informed the Institution that salary of the Petitioner, apart from other three persons, shall not be sanctioned under the Payment of Salaries Act,1971 on the ground that these persons did not possess requisite training qualification.

5. Petitioner made representation dated 30th May1995 (Annexure –VI to the Writ Petition) and 29th August 1995 (Annexure VI to the Writ Petition), to the manager of the Institution. She sent copies to the concerned authorities also Petitioner thereafter made representation dated 02nd November 1995 to the District Inspector of School and representation dated 15th November 1995 (Annexure-X to the writ Petition) to the Director of Education (Secondary).

6. Petitioner has filed copies of interim order dated 31stAugust 1995 passed in the Writ Petition nos. 1902 of 1995 and 1997of 1995 filed by other two teachers, who were also covered under the same impugned orders .

7. Respondent nos. 2 and 5 are represented through learned Standing Counsel and Respondent Nos. 3 and 4 are represented by Shri Rajesh Tripathi, Advocate, who has filed today a Counter Affidavit (after serving a copy on the learned counsel for the petitioner on 21st September 1998).

8. The said Counter Affidavit supports the case of the Petitioner, which shows that management has no grievance if Petitioner is allowed to continue in service in the Institution.

9. On the other hand no Counter Affidavit has been filed by Respondent Nos. 1,2 and 3 to controvert the facts stated in the Writ Petition.

10. Learned counsel for the petitioner submitted that Petitioner was taken by surprise inasmuch as she was never apprised of the complaint against her; she was never given notice regarding filing of alleged forged certificates, she was given no notice nor afforded opportunity and lastly no enquiry was held by the competent authority, namely-the Committee of Management of the Institution before the impugned order terminating her services has been issued.

11. In Paragraph 24(a) of the petition it is stated, "…. In the year 1994 Respondent no. 2 without following the principles of natural justice without giving opportunity of hearing or to show cause suddenly sent a letter to the Manager of the institution who is highly annoyed with the petitioner best cause known to him and withdrew the financial sanction granted in respect of substantive appointment of the petitioner on the post of Assistant Teacher in the institution."

12. Again in Paragraph 24(d) it is stated that, "That the Manager of the institution without any resolution of the Committee of Management without any authority in law passed the impugned order dated 9.8.1995 and relieved the petitioner from the service of the institution and without passing any clear of termination against the petitioner relieved her. Neither the petitioner has been removed from

service by the appointing authority nor the appointing authority authorised the Manager of the institution to relieve the petitioner from the post of Assistant Teacher, so the order dated 21.08.1995 passed by the manager of the institution is void being without jurisdiction."

13. Petitioner has categorically stated in Paragraph 24(e) that she did not conceal 'fact' regarding her qualification or caused 'misrepresentation'.

14. In the representations filed by the Petitioner it was also contended that she is entitled for exemption in view of length of service (more than 10 years) and even if training degree is ignored, Petitioner is eligible and should be treated at par with any other Assistant Teacher possessing training degree/certificate.

15. The Respondents have not filed relevant document to indicate whether Petitioner was apprised of the charges in respect of which enquiry was being held. In absence of due notice of the allegations against her, services of petitioner could not have been terminated without holding enquiry and affording opportunity to the petitioner as contemplated under law.

16. The enquiry held by District Inspector of Schools under Payment of Salaries Act, 1971 can, at best, be said to be a preliminary enquiry. If Petitioner is not guilty of committing fraud or misrepresentation, and she has not been given opportunity to defend, the action of terminating services on the part of the concerned Respondent cannot be justified. The authorities ought to have considered the relevant issue on merit in the light of the contention of the Petitioner (whether she had acquired enough teaching experience which would have entitled her to seek exemption of required training degree.) As the record stands today, there is complete non-application of mind to the said issue raised by the Petitioner.

17. Averments made by the Petitioner in the Writ Petition show that she was given no notice and that she has not been removed by the competent authority, namely, the Committee of Management after holding enquiry as contemplated under law. It is also not disputed by any of the Respondents.

18. In view of the unrebutted statements contained in the Writ Petition that termination order has been passed in violation of the principles of natural justice, that she was given no charge-sheet, that no disciplinary enquiry was held as contemplated under Regulations framed under the U.P. High School and Intermediate Education Act and that the employer (Committee of Management of the Institution) had taken no decision on its own and that she was directed to be relieved under the dictates of the District Inspector of Schools without giving opportunity as contemplated under law, 'the impugned orders are vitiated in law and cannot be sustained.

19. Accordingly, I issue a writ of certiorari quashing the impugned orders dated 09th August 1995 (Annexure-IV to the Writ Petition) and 21st August 1995 (Annexure-X to the Writ Petition). A writ of mandamus is also issued directing Respondents to reinstate the Petitioner treating her in services continuously with effect from 08th August 1995 all purposes including seniority, pension, etc.. Petitioner will be paid salary in future by giving benefit of and accounting for the annual increments, all allowances perks etc., and she will be paid future salary month by month along with other staff of the college. It is further directed that concerned authorities shall decide the question of payment of arrears of salary for the period from August 1995 till the date of joining after taking in to account whether Petitioner has been willing to work and that she was not gainfully employed

elsewhere including such other mitigating Circumstances as may be relevant under law. In case Petitioner was not gainfully employed and willing to work, she shall be paid full back wages with 12% per annum simple interest from the date of salary being due till the date of actual payment of the dues.

20. Writ Petition stands allowed.

No order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD : 29 .11.1999

BEFORE
THE HON'BLE PALOK BASU, J.
THE HON'BLE S.K.JAIN, J.

Civil Misc. Writ Petition NO. 28262 of 1999

Abhai Kumar Rai ...Petitioner.
Versus
State of U.P. through Principal Secretary Irrigation U.P. Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Chaubey

Counsel for the Respondents :
S.C.

Land acquisition Act, Ss 4 and 6- Notification u/s 4 used in 1996 acquiring petitioner's agricultural land-compensation not paid inspite of Court's directions in earlier petition on technical ground that S.6 declaration is not made- Court redirected respondents to pay compensation to petitioner together with special costs of 10,000/- with two months.
Held-

This Court shall not entertain such a defence because it amounts to flouting of law only on a technical plea. Contribution from the department concerned having not been made to the Government cannot be accepted as a valid reason for non-payment of the compensation when the poor cultivator in fact stands divested of his land. The purpose of acquisition may be one or the other, so long as the land owner is not thrown out of possession, all technicalities may be examined. But when he actually stands dispossessed from the land, the State Government is bound to compensate such ousted persons.

This writ petition consequently succeeds and is allowed with special cost, which is assessed at Rs. 10,000/- (Para 6 and 7)

By the Court

1. It is strange case where an innocent citizen living in interior of an under developed village is being deprived of his agricultural land on the ground of establishing an irrigation canal but compensation has not been paid to him since the year 1981. Petitioner has to rush up to this court for second time even though the first order dated 29.11.199 directed the payment of the compensation to be made expeditiously vide orders in writ petition no.37926 of 1996 quoted in paragraph 3 of the instant writ petition. When this writ petition was filed before this court a counter affidavit was called because the pleadings were on the part of an helpless innocent citizen. While calling the counter affidavit therefore interim mandamus was also issued which was to the following effect :

2. "An interim mandamus is hereby issued to the respondents to grant the compensation to the petitioner within one month from today and release the compensation amount to the petitioner within 2 weeks or show cause by filing a counter affidavit why the petitioner be not paid the compensation and the aforesaid relief be not finally granted."

3. In response two counter affidavits have been filed. One has been sworn by Sri Sandeep Kumar Sharma who is presently posted as Additional District Magistrate, Sant Ravi Das Nagar. Sri Indra Deo Prasad

presently posted as Assistant Engineer Tubewell Maintenance Division Bhadohi, District Sant Ravi Das Nagar has sworn the second counter affidavit. The contents of both these counter affidavits are identical in terms. The difference existed only in some of the averments which are not relevant for the purpose of the deciding the question of payment of compensation to the petitioner. The relevant paragraph in the writ petition which required answer from the respondent is paragraph 7 which reads as under.

"That the land plot belongs to the petitioner was possessed by the respondent authorities in the year 1991-92 and the construction over the land plot in dispute, tubewell for irrigation purposes has already been made and the notification pertaining to acquisition was made on 16th April, 1996 under section 4(1) of the Act. True copy of U.P. Gazette dated 16th April 1996 which is pertaining to publication of notification is being filed herewith and is marked as Annexure-5 to the writ petition."

4. Paragraph 8 of the counter affidavit filed by Sri Sandeep Kumar Sharma as also paragraph 8 of the counter affidavit filed by Indra Deo Prasad read as under :

"That the contents of para 7 of the writ petition are admitted to the EXTENT THAT THE LAND IN QUESTION WAS TAKEN BY TUBEWELL DEPARTMENT. IT IS ALSO ADMITTED THAT SECTION 4 NOTIFICATION WAS ALSO PUBLISHED (Emphasis by Court)

5. It is amazing that the defence pleaded in the two counter affidavits is that the tubewell division or department did not contribute to the state exchequer, the compensation amount could not be paid to the tenure holders. It has been pleaded that unless the department for which the land is sought to be acquired, does not deposit or contribute the amount of compensation into the state exchequer, it is not possible to issue notification under section 6 declaration was not issued the petitioners are not entitled to get compensation as no award proceedings could start.

6. How sweet it is to day on the one hand that the compensation will be awardable only if section 6 declaration is issued and on the other admit that though actual physical possession of the land has been taken by a department of the State after notification only under section 4 State should be exonerated from its responsibility in making payment of the compensation. This court shall not entertain such a defence because it amounts to flouting of law only on a technical plea. Contribution from the department concerned having not been made to the Government cannot be accepted as a valid reason for non-payment of the compensation when the poor cultivator in fact stands divested of his land. The purpose of acquisition may be one or the other, so long as the land owner is not thrown out of possession, all technicalities may be examined. But when he actually stands dispossessed from the land, the State Government is bound to compensate such ousted persons. A departmental or inter-departmental matter can not be interpreted to thwart the legal right of the citizen to get compensation for the land acquired.

7. This writ petition consequently succeeds and is allowed with special cost which is assessed at Rs. 10,000/- . The said special cost shall be payable on the date on which the compensation amount is arranged to be paid. The respondents are directed to pay the compensation and the special cost to the petitioner within two months from today.

8. Registrar is hereby required to send a certified copy of this order to the Chief Secretary, State of U.P. for ensuring that such instances are not repeated in the State at least. The Chief Secretary will do well to get initiated suitable proceedings so as to recover

the amount of special cost from such officials who may be found negligent and guilty therein apart from other punishment which they may deserve.

Copy of this order may be furnished to the learned counsel for the petitioner and to the Standing Counsel Sri Vishnu Pratap on the payment of usual charges within 15 days.

Petition Allowed.
