ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 7.12.2000

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

Civil Misc. Writ Petition No. 52014 of 2000.

Ashok Kumar Tiwari ...Petitioner
Versus
State of U.P. through Secretary (Secondary) Education, U.P. Shasan, Lucknow and others ...Respondents

Counsel for Petitioner:
Sri Arun Tandon

Counsel for Respondent:
Sri Arun Kumar Tiwari

U.P. Intermediate Education Act, 1921 Chapter III Regulation II (2) – Promotion Quota – one post of Head Clerk and 3 post of Assistant Clerk if clubbed together 50% would come to two post and if the post of Head Clerk is treated different one in that event 50% of three could fall 2 post under Promotion Quota – Since one post of Class III was filled by compassionate appointment – the other vacancy of class III post is to be filling by promotion.

Held – Para 4

In the institution one post of head clerk and three posts of assistant clerks were sanctioned. Regulation 2 (2) provides that 50% vacancies of assistant clerks has to be filled by promotion from class IV. If the post of head clerk and assistant clerks are treated to be in same cadre and are clubbed together then there would be four posts in class III cadre of non teaching staff. And two had to be filled by promotion. Since one of the Vacancies was filled by appointment under the dying in harness rules the other vacancy was to be filled in accordance with Regulation 2 (2) by promotion of eligible senior most class IV employee in accordance with law. Therefore, the management could not fill the post by direct recruitment as it could be filled by promotion only. Even, if one post of head clerk and three posts of assistant clerks are treated to be different cadres and promotional quota is worked out as per Regulation 2 (2) then out of the three posts of assistant clerks one post could be filled by direct recruitment and the other two posts would fall in 50% promotional quota because of the note appended to Regulation 2 (2).

By the Court

In Jawahar Inter College, Gohan, District Jalaun (in brief institution) one post of head clerk and three posts of assistant clerks are sanctioned. Atar Singh Yadav was working as head clerk. Om Prakash Tiwari, Om Prakash Tripathi and Kailash Narayan were working as assistant clerks. Kailash Narayan died in harness on 6.1.1998. His son Narayan Swarup was appointed on 1.9.1998 under the dying in harness rules. This appointment is not under challenge. Atar Singh Yadav head clerk retired on 31.12.1998. Om Prakash Tiwari was promoted as head clerk on 8.2.1999. One post of assistant clerk fell vacant. The management decided to fill the post by direct recruitment. It issued an advertisement on 16.10.1999. The petitioner was selected. He was appointed as assistant clerk on 25.11.2000 His appointment was approved on 13.1.2000 by District Inspector of Schools, Jalaun at Orai (in brief DIOS). Bhagwat Sharan Tewari the respondent no. 4 filed civil misc. writ petition no. 53571 of 1999 claming that the vacancy caused due to promotion of Om Prakash Tiwari as head clerk, was liable to be filled by promotion

from class-IV employees working in the institution as the vacancy fell in 50% promotional quota. In this petition on 22.12.1999 DIOS was directed to decide the representation of respondent no.4. On the complaint of respondent on 6.3.2000 the DIOS stopped payment of petitioner's salary. The DIOS rejected the representation of respondent no.4 on 31.3.2000. Therefore, the petitioner filled civil misc. writ. Petition no. 20382 of 2000 claiming salary and the order of DIOS passed on 6.3.2000 was stayed on 5.5.2000. The respondent challenged the order passed by DIOS on 31.3.2000 by means of civil misc. writ petition no. 24868 of 2000. This court quashed the order of DIOS on 25.7.2000 and directed him to decide the claim of respondent after considering provisions of Regulation 2 (2) of Chapter III of the Regulations framed under the U.P. Intermediate Education Act 1921. The Petitioner's writ petition no. 20382 of 2000 was disposed of on the same day, on 25.7.2000, with a direction that petitioner's salary be paid by the DIOS till representation of respondent is decided. The DIOS on 15.9.2000 accepted the representation of respondent and held that the vacancy created due to promotion of Om Prakash Tiwari as head clerk fell with 50% promotional quota. He further held that the vacancy was to be filled from eligible class-IV employee and directed the management to promote the respondent as assistant clerk. The petitioner challenged this order by means of civil misc. writ petition no. 44354 of 2000 on the ground the order was passed by DIOS on 15.9.2000 without affording any opportunity of hearing to him. This petition was disposed of on 17.10.2000 and the DIOS was directed to consider the application of the petitioner and decide it by speaking order. The DIOS gave opportunity of hearing to the petitioner and rejected his representation on 17.11.2000. He held that the vacancy fell in the promotional quota and could not be filled by direct recruitment; therefore, the appointment of petitioner was illegal. It was held that the management obtained approval of petitioner by concealment of facts. It is this order passed by DIOS on 17.11.2000, which has been challenged in this petition.

2. Shri Arun Tandon the learned counsel for the petitioner has urged that the vacancy caused due to promotion of Om Prakash Tiwari as head clerk was liable to be filled by direct recruitment. The petitioner was validly appointed by direct recruitment and his appointment was approved by the DIOS. It has wrongly been held by the DIOS that the Vacancy fell in 50% promotional quota as provided by Regulation 2 (2). The learned counsel further urged that one vacancy of assistant clerk fell vacant due to death of Kailash Narayan that was filled by appointment of his son under the dying in harness rules. This vacancy could have been filled by promotion. Since the respondent did not claim this vacancy it would be deemed that he has waived his right to claim promotion.

3. On the other hand Shri R.K. Ojha the learned counsel for the respondent no.4 urged that the vacancy of assistant clerk was liable to be filled by promotion of class-IV employee. The order of the DIOS does not call for any interference by this court. The learned standing counsel appearing for respondents no.1 and 2 has supported the order of the DIOS.

4. The question that arises for consideration is whether vacancy which occurred due to promotion of Om Prakash Tiwari was to be filled by promotion or by direct recruitment. In the institution one post of head clerk and three posts of assistant clerk were sanctioned. Regulation 2 (2) provides that 50% vacancies of assistant clerks has to be filled by promotion from class-IV. If the post of head clerk and assistant clerks are treated to be in same cadre and are clubbed together then there would be four posts in class-III cadre of non-teaching staff. And two had to be filled by promotion. Since one of the vacancies was filled by appointment under the dying in harness rules the other vacancy was to filled accordance with Regulation 2 (2) by promotion of eligible senior most class-IV employee in accordance with law. Therefore, the management could not fill the post by direct recruitment as it could be filled by promotion only. Even, if one post of head clerk and three posts of assistant clerks are treated to be different cadres and promotional quota is worked out as per Regulation 2 (2) then out of the three posts of assistant clerks one post could be filled by direct recruitment and the other two posts would fall in 50% promotional quota because of the note appended to Regulation 2 (2). The relevant portion of the Regulation is extracted below:-

"2(2) प्रधान लिपिक श्रेणी के स्वीकृत पदों की कुल संख्या का पचास प्रतिशत संस्था में कार्यरत लिपिकों एवं चतुर्थ श्रेणी कर्मचारियों में से पदोन्नति द्वारा भरा जाएगा। यदि कर्मचारी पद हेतु निर्धारित अर्हता रखता हो तथा वह आगे पद पर 5 वर्ष को अविरल मौलिक सेवा कर चुके हों तथा उनका सेवा अभिलेख अच्छा हो पदोन्नित अनुपयुक्त को छोड.कर ज्येष्ठता के आधार पर की जायेगी।

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टिप्पणी - पचास प्रतिशत पदों की संगणना करने में आधे से कम भाग को छोड. दिया जायेगा और आधे या आधे से अधिक भाग को एक समझा जायेगा। "

5. In the either view both the posts which fell vacant one by retirement and the other by death could be filled by promotion only. Therefore, no post was available which could be filled by direct recruitment. The post on which petitioner was appointed by the management fell in the promotional quota and the management illegally appointed the petitioner by direct recruitment. This fact was not disclosed by the management to the DIOS. Therefore, the appointment of petitioner was contrary to Regulation 2 (2) and since the management concealed the fact from the DIOS that the vacancy due to retirement of Atar Singh Yadav was to be filled by promotion and obtained approval to the appointment of petitioner, by concealment of facts, therefore, the DIOS was justified in cancelling the appointment of petitioner. The DIOS has rightly directed the management to promote the respondent no.4 on the post of assistant clerk.

6. The argument that respondent no.4 should have claimed promotion on the class-III post after the death of Kailash Narayan otherwise he would be deemed to have waived his right is devoid of any merit. Since both the posts that fell vacant were to be filled by promotion it is not open to the petitioner to claim that respondent waived his right. Further, appointments under the dying in harness rules are provided to the family of the

deceased to tide over the sudden financial crisis, which the family is facing due to the death of sole bread earner of the family. Compassionate appointments are made as an exception to the general rule of recruitment.

For the aforesaid reasons, this writ petition is devoid of any merit. The writ petition fails and is accordingly dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 6.12.2000

BEFORE
THE HON'BLE SHYAMAL KUMAR SEN, C.J.
THE HON'BLE S. RAFAT ALAM, J.

Special Appeal No. 734 of 2000

Chandra Bhushan Tiwari ...Appellant
Versus
State of U.P. through Secretary, Department of Sugar Cane Industry, U.P., Lucknow and others...Respondents

Counsel for Petitioner:
Sri Ashwani K. Mishra

Counsel for Respondent:
S.C.

Allahabad High Court Rules 1952 – Chapter 8 R.5 – Special Appeal Hon'ble Single Judge entertained and dismissed the writ petition relating to a Driver working in the office of Sugar Commissioner – while entrusted with jurisdiction of fresh writ relating to employees of co-operative societies, admission and order – only the Chief Justice has power to decide as to how the Benches are to be constituted – No Judge or Bench of Judges can assume jurisdiction.

Held - Para 11
Case Law discussed:
AIR 1998 S.C. 1344
AIR 1959 Alld. 421
1996 Alld. W.C. 644
AIR 1990 Cal. 168

By the Court

1. We have heard Sir Ashwani Kumar for the appellant and Sir B.N. Misra, learned standing counsel for the State.

2. In the instant special appeal the appellant has challenged the jurisdiction of the learned single Judge to take up the matter and pass order dismissing his writ petition. It has been submitted by Sri Ashwani Kumar, learned Advocate of the appellant that the order was passed on 11th October, 2000, when the learned single Judge was taking up service writs relating to co-operative societies and matter for orders, admission and hearing.

3. The appellant was working as a driver in the office of Assistant Sugar Commissioner, respondent no.4 who admittedly was not working with the co-operative societies. It is well settled that the Chief Justice alone has power to confer jurisdiction on the Judges as to what matter a Judge shall take up. In this connection Mr. Ashwani Kumar has relied upon a decision of the Supreme Court in ***State of Rajasthan vs. Prakash Chand and others*** (AIR 1998 SC 1344). The relevant portion of the said judgement is set out herein below:

"15. A careful reading of the aforesaid provisions of the Ordinance and Rule 54 (supra) shows that the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative

to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear a also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice. That necessarily means that it is not within the competence or domain of any Single or Division Bench of the Court to give any direction to the Registry in that behalf which will run contrary to the directions of the Chief Justice. Therefore in the scheme of things judicial discipline demands that in the event a single Judge or a Division Bench considers that a particular case requires to be listed before it for valid reasons, it should direct the Registry to obtain appropriate orders from the Chief Justice. The punish Judge are not expected to entertain any request from the Advocates of the parties for listing of case, which does not strictly fall within the determined roster. In such cases, it is appropriate to direct the counsel to make a mention before the Chief Justice and obtain appropriate order. This is essential for smooth functioning of the court. Though, on the judicial side the Chief Justice is only the 'first amongst the equals', on the administrative side in the matter of constitution of Benches and making of roster he alone is vested with the necessary powers. That the power to make roster exclusively vests in the Chief Justice and that a daily case list is to be prepared under the directions of the Chief Justice as is borne out from Rule 73, which reads thus:-

"Rule 73. Daily Cause List – The Registrar shall subject to such directions as the Chief Justice may give from time to time cause to be prepared for each day on which the Court sits, a list of cases which may be heard by the different Benches of the Court. The list shall also state the hour at which and the room in which each Bench shall sit. Such list shall be known as Day's List."

16. This is the consistent view taken by some of the High Courts and this Court, which appears to have escaped the attention of Shethna, J. in the present case, when he directed the listing of certain part-heard cases before him as a single Judge by providing a separate board for the purpose, while sitting in a Division Bench.

4. A Division Bench of this Court in ***State v. Devi Dayal*** (AIR 1959 All. 421) considered the scope and powers of the Chief Justice under the Constitution with particular reference to Rule, Chapter V of the Rules of the Court, which is set out herein below:

"…. It is clear to me, on a careful consideration of the constitutional position, that it is only the Chief Justice who has to right and the power to decide, which Judge is to sit alone and which cases such Judge can decide; further it is again for the Chief Justice to determine, which Judges shall do. Under the rules of this court, the rule that I have quoted above, it is for the Chief Justice to allot work to Judges and Judges can do only such work as is allotted to them."

5. It is not, in my view, open to a Judge to make an order, which could be called an appropriate order, unless and until the case in which he makes the order has been placed before him for orders either by the Chief Justice or in accordance with his directions. Any order, which a Bench or a single Judge may choose to make in a case that is not placed before them or him by the Chief Justice or in accordance with his directions is an order, which, in my opinion, if made, is without jurisdiction.

(Emphasis ours)

18. In his separate but concurring opinion H.P. Asthana, J. Observed (Paras 19 and 20 of AIR):

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

6. It will appear from a perusal of the above provisions that the High Court as a whole consisting of the Chief Justice and his companion Judges has got the jurisdiction to entertain any case either on the original side or on the appellate or on the revisional side for decision and that the other Judge can hear only those matters which have been allotted to them by the Chief Justice or under his directions. It, therefore, follows that the Judges do not have any general jurisdiction over all the cases which the High Court as a whole is competent to hear and that theirs jurisdictions limited only to such cases as are allotted to them by the Chief Justice or under his directions."

(Emphasis supplied)

7. A full Bench of this Court has also considered this question ***in Sanjay Kumar Srivastava vs. Acting Chief Justice*** [(1996) Allahabad Weekly Cases 644] and held as follows:

"27 The full Bench precisely dealt with an objection raised in that case to the effect that since the writ petition was a part-heard matter of the Division Bench, it was not open to the Chief Justice of the High Court to refer that part-heard case to a Full Bench for hearing and decision. It was argued before the Full Bench, that once the hearing of the case had started before the Division Bench, the jurisdiction to refer the case or the question involved therein to a larger bench vests only in the Judges hearing the case and not in the Chief Justice. It was also argued that the Chief Justice could not, even on an application made by the Chief Standing Counsel, refer the case, which had been heard in part by a Division Bench for decision by a Bench of that Court."

28. After referring to the provisions of the Rules of the Allahabad High Court and in particular Rule 1 of Chapter V, which provides that Judges shall sit alone or in such Division Courts as may be constituted by the Chief Justice from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions and Rule 6 of Chapter V which inter alia provides:

8. "The Chief Justice may constitute a Bench of two or more Judges to decided a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the

question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein."

and a catena of authorities, rejected the arguments of the learned counsel and opined that the order of the Chief Justice, on an application filed by the Chief Standing Counsel, to refer a case, which was being heard by the Division Bench, for hearing by a larger Bench of three Judges because of the peculiar facts and circumstances as disclosed in the application of the Chief Standing Counsel, was a perfectly valid and a legally sound order. The Bench speaking through S. Saghir Ahmad, J. (As his Lordship then was) said:

"Under Rule 6 of Chapter V of the Rules of Court, it can well be brought to the notice of the Chief Justice through an application or even otherwise that there was a case which is required to be heard by a larger Bench on account of an important question of law being involved in the case or because of the conflicting decisions on the point in issue in that case. If the Chief Justice takes cognisance of an application laid before him under Rule 6 of Chapter V of the Rules of Court and constitutes a Bench of two or more Judges to decide the case, he cannot be said to have acted in violation of any statutory provisions."

9. 29. The learned Judge then went on the observe:

"In view of the above, it is clear that the Chief Justice enjoys a special status not only under Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or to Judges sitting in Full Bench. He alone has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges.

The conferment of this power exclusively on the Chief Justice is necessary so that various Courts comprising of the Judges sitting alone or in Division Bench etc., work in a co-ordinated manner and the jurisdiction of one Court is not overlapped by other Court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife of account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the "self" and "judicial" discipline of Judges, which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings."

(Emphasis ours)

10 In this connection it may not be out of place to take note of the decision of Calcutta High Court in ***Sohal Lal Baid vs. State of West Bengal*** (AIR 1990 Calcutta 168), which had dealt with the same point. In the aforesaid decision after referring to the provisions of the Government of India Act 1935, the

Calcutta High Court Rules and a number of decided cases, the Bench observed:

"The foregoing review of the constitutional and statutory provisions and the case law on the subject leaves no room for doubt or debate that once the Chief Justice had determined what Judges of the Court are to sit alone or to constitute the several Division Courts and has allocated the judicial business of the Court amongst them, the power and jurisdiction to take cognisance of the respective classes or categories of cases presented in a formal way for their decision, according to such determination, is acquired. To put it negatively, the power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source and no cases, which is not covered by such determination can be entertained, dealt with or decided by the Judges sitting singly or in Division Courts till such determination remains operative. Till any determination made by the Chief Justice lasts, no Judge who sits singly can sit in a Division Bench nor can a Division Bench be split up and one or both of the Judges constituting such Bench sit singly or constitute a Division Bench with another Judge and take up any other kind of judicial business. Even cases which are required to be heard only by a particular single Judge or Division Bench, such as part-heard matters, review cases etc. …. Cannot be heard, unless the Judge concerned is sitting singly or the same Division Bench has assembled and has been taking up judicial business under the extent determination. Such reconstitution of Benches can take place only if the Chief Justice specially determines accordingly."

(Emphasis ours)

The Supreme Court in paragraph 30 of the said judgement held and observed as follows:

"30. The above opinion appeals to us and we agree with it. Therefore from a review of the statuary provisions and the cases on the subject as rightly decided by various High Courts, to which reference has been made by us, it follows that no judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the court. No departure from it can be permitted. If every Judge of a High Court starts picking and choosing cases for disposal by him, the discipline in the High Court would be the casualty and the Administration of Justice would suffer. No legal system can permit machinery of the Court to collapse. The Chief Justice has the authority and the jurisdiction to refer even a part-heard case to a Division Bench for its disposal in accordance with law where the Rules so demand. It is a complete fallacy to assume that a part heard case can under no circumstances be withdrawn from the Bench and referred to a larger bench, even where the Rules make it essential for such a case to be heard by a larger Bench."

11. After considering all aspects of the matter and the law as settled by the aforementioned decisions, particularly of the Supreme Court, we are of the view that the learned single Judge has no

jurisdiction to decide the said matter on that date.

12. Accordingly, we allow the special appeal only on the question of jurisdiction and set aside the order passed by the learned single Judge. The matter is required to be considered on merit and shall be listed before the appropriate Bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 13.12.2000

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE DEV KANT TRIVEDI, J.

Civil Misc. Writ Petition No. 14446 of 1996.

Sri Shamsher Singh ...Petitioner
Versus
General Manager (Personnel), Punjab & Sind Bank, Review Authority, 21, Rajendra Palace, New Delhi and others ...Respondents

Counsel for Petitioner:
Shri S.K. Gaur
Shri K.K. Arora,

Counsel for Respondent:
S.C.
Sri Kushal Kant

Punjab and Sind Bank Officer Employees (Discipline and Appeal) Regulations, 1981, Regulation 4 Schedule, 4 (f) and 4 (h) read with Banking companies (Acquisition and Transfer of Undertakings) Act, 1980, S. 19- Petitioner working as Branch Manager- Penalty of dismissal impassed by an authority other than prescribed competent disciplinary authority – Appeal and review also decided by incompetent authorities – Dismissal orders, held, illegal.

Held – Para 11

In view of what has been stated above, the penalty of dismissal of the petitioner from service was not passed by the appropriate disciplinary authority prescribed in the Schedule appended to the Regulations. It is also evident that the petitioner's appeal was not decided by the competent appellate authority s prescribed in the Schedule appended to the Regulations. Similarly, the review petition was not decided by the General Manager, the Reviewing Authority prescribed in the Schedule appended to the Regulations. Thus the punishment awarded to the petitioner was awarded by the authority other than those prescribed in the Punjab and Sind Bank Officer Employees (Discipline and Appeal) Regulation 1981. The penalty upon the petitioner was imposed by the prescribed authority and therefore, cannot be up held.

By the Court

1. These two petitions have been preferred by Sri Shamsher Singh erstwhile Branch Manager, Punjab & Sind Bank, against his employer. By means of the first writ petition, the petitioner challenged his compulsory retirement from service of Punjab & Sind Bank, and the second writ petition was preferred by the petitioner assailing the denial of pensionary benefits consequent on his compulsory retirement from service. Since both the writ petitions are inter-connected, the same are being disposed of by this common judgement.

2. The petitioner was put under suspension by the order of Regional Manager on 24.11.92. He was served with the statement of the allegations. A copy of

the charge sheet, however, was not supplied to the petitioner inspite of the request having been made. Mr. S.K. Bahal, Manager, was appointed as enquiring Authority who submitted his enquiry report on 28.8.93. Zonal Manager, acting in the capacity of disciplinary authority, accepted the enquiry report and ordered dismissal of the petitioner from the service of the Bank. Against this order of dismissal passed on 20.3.94 an appeal was preferred by the petitioner to the Joint General Manager. This appeal was, however, decided by the Deputy General Manager (Personnel) by means of his order dated 3.5.95 substituting the penalty of dismissal from service with the penalty of compulsory retirement. A review petition was made by the petitioner to the General Manager. The review petition was dismissed by the General Manager (Personnel) by means of his order dated 30.6.96. The petitioner then approached this court by filing writ petition no. 14446 of 1996 wherein no counter affidavit was filed on behalf of the respondents and, therefore, the averments of the petitioner remain uncontroverted.

3. The petitioner then filed the second writ petition no. 37230 of 1998 claiming that he was entitled to pensionary benefits consequent upon his compulsory retirement from the service of the Bank if the same were denied to him inspite of the repeated representations made to the bank and the respondents failed to pay the retirement benefits. The respondents denied the retirement benefits on the ground that the bank was not in a position to consider the petitioner's case for pension as the petitioner had not opted for pension by 22.7.96, which was the last date for giving option for pension. The petitioner has prayed for quashing the order of the bank dated 28.1.97 declining to grant pension to him The bank also declined to pay the gratuity and leave encashment of the petitioner by means of the order dated 20.1.98 alleging that the Rules did not permit payment of gratuity and leave encashment to the employees who are compulsory retired by way of punishment. The petitioner, therefore, also prayed for the quashing of the order dated 28.1.97 and 20.1.98 declining to grant pension gratuity and leave encashment.

5. In their counter-affidavit filed in the second writ petition the respondents admitted that the order of the dismissal of the petitioner from service was substituted by the order of compulsory retirement and averred that according to the Punjab & Sind Bank (Employees) Pension Regulation, which were notified on 29.9.95 the options were invited up to 27.1.96 and the Zonal Offices were instructed to intimate the pension Scheme to all the retired employees. The petitioner was supposed to send option to the Bank up to 27.1.96 but the option was given only on 16.8.96. According to the Bank, since the option for pension on retirement was not submitted prior to 27.1.96, the Bank rightly withheld the pension and, therefore, the Bank was under no obligation to pay any pension to the petitioner.

6. We have heard the learned counsel for the parties in both the writ petitions.

7. The main grievance of the petitioner before the Court is that he was awarded punishment of dismissal by the Zonal Manager and not by the Deputy

General Manager (Personnel) who is the disciplinary authority of the Junior Management Grade Scale-I Officer to which category the petitioner belonged.

8. Punjab & Sind Bank Officers Employees (Discipline and Appeal) Regulations 1981, framed in exercise of the powers conferred by Section 19 of the Banking Companies (Acquisition and Transfer of undertakings) Act 1980 by the Board of Directors of Punjab & Sind Bank in consultation with the Reserve Bank and with the previous sanction of the Central Government, are admittedly applicable to the case before us. In the regulation 'disciplinary authority' has been defined as the authority specified in the Schedule, which is competent to impose on an officer-employee any of the penalty specified in the regulation 4. The schedule attached to the aforesaid Regulations shows that the 'disciplinary authority' of the petitioner who was in the Junior Management Grade. Scale-I, was Deputy General Manager (Personnel). It is worth noting that the Regulation 4(f) provides that compulsory retirement is one of the major punishments and Regulation 4-h provides that the dismissal, which shall ordinarily be a disqualification for future employment is major penalty. The major penalties could have been awarded only by the Deputy General Manager (Personnel). However, in the present case, it is evident that the penalty of dismissal from service was awarded by Sir P.S. Brinda, Zonal Manager, purporting to act as disciplinary authority. The Zonal Manager was not the disciplinary authority of the petitioner as has been stated above. It is specifically provided that the 'disciplinary authority' of a Junior Management Grade Scale-I Officer to which category the petitioner belonged was the Deputy General Manager (Personnel). Thus, the penalty of dismissal from service was imposed by an officer who was not the 'disciplinary authority' of the petitioner and was not empowered to award the said penalty.

9. Similarly, the appellate authority of the petitioner was Joint General Manager/Deputy General Manager as per the provisions of the Schedule attached to the Regulations. The appeal was, therefore, addressed by the petitioner to the Joint General Manager but the same was decided by Deputy General Manager (Personnel) purporting to act as appellate authority. The penalty of compulsory retirement was awarded by the Deputy General Manager (Personnel) in appeal and was not awarded by the Joint General Manager/Deputy General Manager who was the appellate authority in the case of the petitioner and was, therefore, passed by an authority who was not competent to do so.

10. The reviewing Authority in the case of the petitioner as prescribed in the schedule to the aforesaid Regulations was the General Manager of the Bank. The petitioner, therefore, addressed his review petition to the General Manager of the Bank. The said review petition was, however, decided by General Manager (Personnel) who was not the Reviewing Authority of the petitioner. Thus, the Review Petition was also not decided by the competent authority.

11. In view of what has been stated above, the penalty of dismissal of the petitioner from service was not passed by the appropriate disciplinary authority prescribed in the Schedule appended to the Regulations. It is also evident that the

petitioner's appeal as not decided by the competent appellate authority as prescribed in the Schedule appended to the Regulations. Similarly, the review petition was not decided by the General Manager, the Reviewing Authority prescribed in the schedule appended to the Regulations. Thus, the punishment awarded to the petitioner was awarded by the authority other than those prescribed in the Punjab & Sind Bank Officer Employees (Discipline and Appeal) Regulation, 1981. The penalty imposed upon the petitioner was not imposed by the prescribed authority and therefore, cannot be up held.

12. It has been urged on behalf of the petitioner that he had specifically taken the plea in his appeal hat the Zonal Manager was not his Disciplinary Authority nor was the appointing authority of the petitioner and was lower in rank to the appointing authority. The alleged appellate authority did not address itself to this averment in the appeal. The said question was not considered by the Reviewing Authority as well.

13. Thus, we are of the opinion that the impugned order of compulsory retirement is violative of the specific provisions made in the Punjab & Sind Bank Officer Employee (Discipline and Appeal) Regulation 1981 and the same is bound to be quashed.

14. Since penalty initially imposed by the authority purporting to be the disciplinary authority was not passed by the rightful authority and the petition succeeds on the sole ground of competency of disciplinary authority, appellate authority and reviewing authority, we refrain from entering into the question whether an enquiry was instituted by the rightful authority and the question as to whether the disciplinary enquiry was held by a competent person. WE also refrain from entering-into the merits of the statement of the accusation and so also the question whether the penalty was commensurate with the guilt.

15. The writ Petition No.14, 46 of 1996 is, therefore, allowed. The order dated 29.3.94, a copy of which is contained in Annexure-1 to the writ petition and communicated to the petitioner by means of a letter, a copy of which is contained in Annexure-2, the order dated 3.5.95 passed in appeal, a copy of which is contained as Annexure-4 and so also the order dated 30.3.96 passed in Review, a copy of which is contained as Annexure-7, are hereby quashed. In the result the petitioner shall be deemed to be in continuous service with all consequential benefits. It will, however, be open to the Bank to proceed against the petitioner by serving a fresh charge sheet and after holding enquiry in accordance with the Punjab & Sind Bank Officer Employees (Discipline and Appeal) Rules, 1981.

16. Since the impugned order of compulsory retirement has been set-aside on merits, the subsequent writ petition no. 37230 of 1998 has become redundant. We, however, think it appropriate to indicate that ground taken by the Bank for denial of pension is highly unjustified as it was not open to a dismissed officer to have known about the date by which the option was to be exercised nor could be have known of the pension scheme which, admittedly, came to be introduced after dismissal of the petitioner.

17. Since the petition has become redundant, it requires no orders.

The writ petition no. 37230 of 1998 is, therefore dismissed as redundant.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2000

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

Civil Misc. Writ Petition No. 20230 of 1999

Km. Madhuri Mathur ...Petitioner
Versus
State of Uttar Pradesh through Secretary, Department of Secondary Education, Government of U.P., Lucknow and others ...Respondents

Counsel for the petitioner:
Sri Ashok Khare
Sri Yogesh Kumar Saxena

Counsel for the Respondent:
Sri K.K.Chand S.C.

U.P. Intermediate Education Act 1921, Section 21-Chapter II- change of option by a Lecturer regarding her age of superannuation – pursuant to G.O. dated 6.10.90 the petitioner to retire at the age of 58 years duly counter singed by the RIGS – but by no point of time it placed before the RIGS – on 26-2-97 earlier option withdrawn – held-proper-entitled to work upto 60 years.
(2000) 2 UPLBEC-178

By the Court

This petition relates to change of option by a teacher. The petitioner was Lecturer in Hindi since 1975 in Gyan Bharati Balika Inter College, Birhana, Kanpur Nagar is a recognised and aided institution. Her date of birth is 25.3.199. She gave an option to retire at the age of 58 years on 1.12.90 in pursuance of government order dated 6.10.1990 circulated by Director on 31.10.1990. She withdrew her option on 26.2.1997. The management recommended on 15.3.1997 to the District Inspector of Schools-II, Kanpur Nagar for permitting the petitioner to change her option. The District Inspector of Schools on 19.4.1997 returned the papers that it should again be sent alongwith the government orders. The petitioner filed civil misc. writ petition no. 16401 of 1997. She claimed that since her option has not been accepted, she could change it. A counter affidavit was called and interim order was passed on 16.5.1997 and the petitioner was allowed to continue to work till 60 years. The petitioner was disposed of on 22.7.1998 with the direction to the concerned authorities to decide the petitioner's representation. The District Inspector of Schools on 1.4.1999 rejected the representation of the petitioner and held that the petitioner that she having exercised option once could not change it. The petitioner has challenged this order dated 1.4.1999 passed by the District Inspector of Schools in this petition.

I have heard Shri Yogesh Kumar Saxena the learned counsel for the petitioner and Shri K.K. Chand the learned standing counsel appearing for respondents no. 1 to 5. Notice was issued to respondent no. 6 by registered post. Service on respondent no. 6 is deemed to be sufficient.

The learned counsel for the petitioner has urged that the option given by the petitioner was not accepted by the respondents, therefore, she could change the option exercised by her earlier to

retire at the age of 58 years and give fresh option to retire at the age of 60 years. On the other hand, the learned standing counsel urged that the option exercised by the petitioner and counter signed by the District Inspector of Schools became final and could not be changed by the petitioner. Therefore, the age of the retirement of the petitioner would be 58 years and not 60 years. In the counter affidavit filed by the District Inspector of Schools it has been stated that the option given by the petitioner was received through the manager of the institution. It was accepted and returned back through the management. If the option exercised by the petitioner has not been mentioned in the service book of the petitioner, then it was the fault of the management. The option once exercised could not be changed and petitioner retired at the age of 58 years at the end of academic session on 30.6.1997.

The question whether option counter signed by the District Inspector of Schools has to be treated as final and binding has been considered by the full Bench of this court in Prabha Kakkar (Smt.) v. Joint Director of Education, Kanpur and others (2000) 2 UPLBEC 1378. The Full Bench after considering the various government orders issued by the respondents held that the option exercised by the employee has to be made in the prescribed format and it had to be accepted by the Regional Deputy Director of Education and the fact of acceptance or non-acceptance of the option exercised by the employee was required to be communicated by the Regional Deputy Director of Education to the concerned employee within the specified time. Mere counter signing of the option by the District Inspector of Schools could not be taken as acceptance of the option. It held that the act of acceptance of option by the Regional Deputy Director of Education and its communication to the employee was necessary to make the option final. The counter signature by the District Inspector of Schools on such option could nether be taken as an acceptance nor it could attach any finality to the option. The facts of this case demonstrates that option exercised by the petitioner on 31.12.1990 was never accepted by the Regional Deputy Director of Education nor it was communicated by him to the petitioner, therefore, the option exercised by the petitioner on 31.12.1990 could not be given effect to and it remained a dead letter. Therefore, the option given by the petitioner on 26.2.1997 that she would continue in service till the age of 60 years has to be accepted because under Regulation 21 of Chapter-II of the Regulations framed under U.P. Intermediate Education Act 1921 the age of superannuation of a teacher is provided to be 60 years and the teacher is entitled to continue till the end of academic session. Thus the age of retirement of the petitioner would be 60 years and not 58 years as held by the District Inspector of Schools. She would have retired on 30.6.1999. The impugned order passed by the District Inspector of Schools on 1.4.1999 cannot be maintained.

In the result this writ petition succeeds and is allowed. The order dated 1.4.1999 passed by the District Inspector of Schools, Kanpur Nagar Annexure-11 to the writ petition is quashed. The age of superannuation of the petitioner is held to be sixty years at the end of academic session on 0.6.1999, therefore, the respondents are directed to calculate her arrears of salary and her post-retiral

benefits and pay the same to the petitioner treating the age of the retirement of the petitioner to be sixty years, within a period of four months from the date a certified copy of this order is produced before respondent no. 4.

Parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.11.2000

BEFORE
THE HON'BLE S. RAFAT ALAM, J.

Civil Misc. Contempt Petition No. 1686 of 1996

Santosh Kumar Srivastava ...Petitioner
Versus
Managing Director, U.P. Rajkiya Nirman Nigam Ltd., Lucknow and others ...Respondents

Counsel for the Petitioner:
Shri K.M.L. Hajela
Shri S.M.A. Kazmi

Counsel for the Respondents:
Shri Sunit Kumar
Shri U.N. Sharma

Contempt of Courts Act, 1972-Section 12-Civil contempt direction to declare the result for Recruitment of Sub-Engineers and if successful to consider for appointment in accordance with law-result declared but appointment could not be made due to non existence of vacancy – No wilful obedience on the part of Respondents can not be punished for such an act or ommission.

Para 16 (Held)

In the case in hand as noticed earlier there was only direction to consider the Petitioner for appointment in accordance with law keeping in view the vacancy position. In the absence of any vacancy there is no occasion to consider the Petitioner for appointment and, therefore, no part of the order of this court can be said to have flouted by the respondent-contemner.

Case law discussed:
(1985) Sec-122
AIR 1984 Sec – 736
(1994) 4 Sec – 332

By the Court

1. These are petitions under Section 12 of the Contempt of Courts Act for initiating contempt proceeding against the respondents for the alleged defiance of Division Bench judgment and order dated 24.5.1996 of this Court in Special Appeal No. 384 of 1993 and Writ Petition No. 16816 of 1993. Both the contempt petitions arise out of the common judgment and therefore, they were heard together and are being disposed of by this judgment

2. Heard Sri K.M.L. Hajela assisted by Sri S.M.A. Kazmi, learned counsel for the Petitioner and Sri Sunit Kumar, learned counsel appearing for the respondents.

3. The Short fact of the case giving rise to the contempt petition is that U.P. Rajkiya Nirman Nigam advertised 70 posts of Sub Engineers (Civil) in the year 1988 inviting application for appointment. The vacancy was subsequently increased from 70 to 146. The Petitioners were diploma holders in civil engineering and being eligible applied in the prescribed proforma for selection and appointment. They also appeared in the written test as well as interview conducted in the year 1989. However, when their results were not declared, the Petitioner, Santosh

Kumar Srivastava, filed Writ Petition No. 30071 of 1992 which was heard and allowed vide judgment and order dated 21.5.1993. The operative portion of the order is as under

"For the reasons given in writ petition no. 5859 of 1991 Mahesh Kumar Vs. U.P. Rajkiya Nirman Nigam Ltd. Lucknow and another the respondents are directed to declare the result of the Petitioner within a period of two weeks from the date of filing of a certificate copy of this order, In case the Petitioner qualifies in the said examination, then a letter of appointment may be issued in his favour within a period of one month from the date of declaration of the result.

The writ petition is allowed.
There will be no order as to costs.

4. Rajkiya Nirman Nigam Limited filed Special Appeal No. 384 of 199 for setting aside the above order of the learned Single Judge. The Division Bench of this Court while hearing the special appeal also summoned Writ Petition No. 16816 of 1993 filed by Sri Rakesh Kumar Sharma and they were heard together and disposed of vide judgment and order dated 24.5.1996. The Division Bench in view of the settled legal position that no mandamus can be issued directing issuance of appointment order to the Petitioner even if he is successful in the recruitment examination, and a selected candidate cannot claim appointment as a matter of right, quashed that part of the order of the learned Single Judge whereby mandamus was issued for issuing the letter of appointment in favour of the Petitioner. However, their lordships directed the appellant Rajkiya Nirman Nigam Limited to declare the result of the recruitment examination within four weeks. It was further pointed out that if the Petitioners are declared successful, they may be considered for appointment in accordance with law. The operative portion of the order of the Division Bench is as under:

"Accordingly, it is ordered that the respondents shall declare the result of the recruitment examination within four weeks from the date of production of a certified copy of the judgment and thereafter if the petitioners are found be successful in the examination consider their cases for appointment in accordance with law keeping in view the vacancy position.

The Special Appeal and the writ petition are disposed of on the above terms. No costs."

5. Admittedly, the results have been declared pursuant to the order of the Division Bench in special appeal and petitioner Rakesh Kumar Sharma has been declared successful and he stands at Serial No. 62 in the merit list but the petitioner Santosh Kumar Srivastava could not qualify the examination.

6. It is argued by the learned counsel for the petitioner that the contemnor – opposite party has not considered the claim of appointment of petitioner Rakesh Kumar Srivastava who was at Serial No. 62 of the successful candidate. It is also contended that one Mahesh Kumar who also appeared in the interview and declared successful along with him has been given appointment and, therefore, the respondents cannot deny the appointment to the petitioner. Learned counsel also relying on two judgments of the Apex Court rendered in the case of

Jatinder Kumar and others Vs. State of Punjab and others reported in (1985) 1 SCC 122 and in the case of State of Bihar and others Vs. The Secretariat Assistant Successful Examinees Union 1986 and others reported in AIR 1984 SC 736 sought to argue that once the petitioner has been declared successful, he has a right to be considered for appointment and, therefore, the respondents having refused to consider the claim of the petitioner for appointment has committed gross contempt of this court.

7. On the other hand the respondents- Nigam has filed affidavit stating that it is true that in the merit list the name of the petitioner Rakesh Kumar Sharma finds place at Serial No. 62 but there is no vacancy in the Nirman Nigam for making fresh appointment. In the supplementary counter affidavit they have further stated that the result pursuant to the aforesaid interview was not declared earlier because of pendency of the Writ Petition No. 5686 of 1990 filed by Muster Roll Diploma Holders Engineering who were seeking their regularisation but after the judgment of this Court in Special Appeal the result has been declared. It has also been averred that the financial position of the Nigam was not sound and it was found that there are surplus employees in Nigam and therefore manpower planning was done by the Nigam and a proposal was accordingly sent to the State Government which was subsequently approved Prior to the man power planning the total posts of Sub Engineers of all categories were 443 against which 304 regular Sub Engineers and 177 on muster roll were working. Thus against 443 posts of Sub Engineers 481 persons were working as Sub Engineer. However, after man planning the sanctioned posts of Sub Engineers were reduced from 443 to 330 as a result of which 168 Sub Engineers became surplus. Therefore, the State Government directed the Nigam not to make any appointment unless all the employees who have became surplus because of the man power planning are regularised against the sanctioned posts.

8. In pare-12 of the counter-affidavit the Board has also given figure about their financial position and it has been submitted that the Nigam's financial position does not permit to make any fresh appointment. It has also been averred in para-14 of the counter-affidavit that the Nigam has considered the case of the selected candidates but for the reason that the surplus employees have to be adjusted. It is not possible to make fresh appointment from the selection held in the year 1988.

9. In short the stand of the respondents for not giving appointment to the petitioners is firstly: their poor financial condition, secondly; reduction of sanctioned strength on account of man power planning and thirdly; the staff declared surplus on account of man power planning is to be accommodated first.

10. Learned counsel for the petitioner vehemently contended that the Division Bench has made specific direction that if the petitioners are found to be successful in the examination, the respondents shall consider their case for appointment in accordance with law keeping in view the vacancy position. Therefore, the respondents are duty bound to consider the claim of the petitioner for appointment.

11. Inspite of my anxious consideration I am not persuaded with the contention for the reason that the direction of this Court was two fold. Firstly to declare the result and secondly to consider their cases for appointment in accordance with law keeping in view the vacancy position. First part of direction has been complied with by declaring the result and therefore, now the controversy centres round to the second part only. The second part of the order is clear and admits only one interpretation, that to consider them for appointment provided there is vacancy. The order of the Division Bench is "to consider their cases for appointment in accordance with law keeping in view the vacancy position." Therefore, in the absence of vacancy they are not required to be considered. In other words, consideration of their claim for appointment in the event of their being declared successful, is dependent on the availability of the posts. Respondents in their counter-affidavit have disclosed the existing number of sanctioned posts of Sub-Engineers and the number of Sub-Engineers who are already working in the Nigam (Corporation), it appears that due to financial constraint the Nigam with the approval of the State Government decided to down size their strength. Consequently, they reduced the posts of Sub Engineers from 443 to 330. Therefore, the second part of the direction being dependent on the vacancy position, in the absence of any vacancy, was not possible to be carried out and therefore, in the facts and circumstances, it cannot be held that it amounts to deliberate defiance of this Court's order. Respondents have given detailed explanation in their affidavit, which in my opinion is convincing and sufficient.

12. It is settled legal position that a selected candidate has no right to the post and he cannot claim appointment as a matter of right but he is only entitled to be considered. In the case in hand in view of the fact that there was no vacancy and the Nigam has decided not to make any appointment unless the surplus employees are adjusted against the vacancies, in my opinion, it could not be held that the respondents have wilfully flouted the order of this Court. The authorities cited by the learned counsel for the petitioner are also of no help as in the case of Jatinder Kumar & others Vs. State of Punjab. (Supra), the Apex Court has held that a selected candidate has no right to be appointed which could be enforced by mandamus. Similar view was taken in the case of State of Bihar Vs. Secretariat Assistant Successful Examinees Union (Supra), wherein the Apex Court has quashed that part of the order of the High Court wherein mandamus was issued to make appointment.

13. During the course of submission Mr. Hajela, learned counsel sought to argue that there was a clear direction of the Division Bench to consider the petitioner against the existing vacancy for appointment. I am afraid such interpretation, if accepted, will amount to restore that part of the judgment of the learned Single Judge which has been quashed by the Division Bench. The learned Singhl Judge vide order dated 21.5.1992 directed the Nigam to declare the result of the petitioners within a period of two weeks from the date of filing of the certified copy of the order and in case they have qualified, the letter of appointment may be issued in their favour within a period of one month from the date of publication of the result. The

Division Bench, on appeal, by the Nigam quashed the second part of the order directing to appoint the petitioners in view of the settled legal position that such a direction could not be appropriately issued.

14. In a contempt proceeding it is to be seen as to whether there is any wilful disobedience or not and if such wilful disobedience is found to be on account of compelling circumstances the contemnor may not be held liable for contempt.

In the case of **Dushyant Somal Vs. Sushma Somal** reported in AIR 1981 SC 1026 the Hon'ble Supreme Court observed as under:

"Nor is a person to be punished for contempt of court for disobeying an order of court except when the disobedience is established beyond reasonable doubt, the standard of proof being similar, even if not the same, as in a criminal proceeding. Where the person alleged to be in contempt is able to place before the court sufficient material to conclude that it is impossible to obey the order. The court will not be justified in punishing the alleged contemnor."

15. In the case of **Niaz Mohammad and others Versus State of Haryana and others** reported in (1994) 6 Supreme Court Cases 332 the Apex Court has observed as under:

"9 Section 2(b) of the Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act') defines "civil contempt" to mean "wilful disobedience to any judgment decree direction order writ or other process of a court….." Where the contempt consists in failure to comply with or carry out an order of a court made in favour of a party, it is a civil contempt. The person or persons in whose favour such order or direction has been made can move the court for initiating proceeding for contempt against the alleged contemner, with a view to enforce the right flowing from the order or direction in question. But such a proceeding is not like an execution proceeding under Code of Civil Procedure. The party in whose favour an order has been passed, is entitled to the benefit of such order, the court while considering the issue as to whether the alleged contemner should be punished for not having complied with and carried out the direction of the court, has to take into consideration all facts and circumstances of a particular case. That is why the framers of the Act while defining civil contempt, have said that it must be wilful disobedience to any judgment, decree, direction, order, writ or other process of a court. Before a contemner is punished for non-compliance of the direction of a court, the court must not only be satisfied about the disobedience of any judgment, decree, direction or writ but should also be satisfied that such disobedience was wilful and intentional. The civil court while executing a decree against the judgment debtor do not concerned and bothered whether the disobedience to any judgment or decree was wilful. Once a decree has been passed, it is the duty of the court to execute the decree whatever may be consequence thereof. But while examining the grievance of the person who has invoked the jurisdiction of the court to initiate the proceeding for contempt for disobedience of its order, before any such contemner is held guilty and punished, the court has to record a finding that such disobedience was wilful

and intentional. If from the circumstances of a particular case, brought to the notice of the court, the court is satisfied that although there has been a disobedience but such disobedience is the result of some compelling circumstances under which it was not possible for the contemner to comply with the order, the court may not punish the alleged contemner."

16. Therefore, before holding guilty for the alleged defiance of the order, the court is required to take into consideration all facts and circumstances of a particular case and has to be satisfied that such dis-obedience is wilful, deliberate and intentional before punishing the contemnor under the Contempt of Courts Act. If however, it is found that there is dis-obedience but such dis-obedience is on account of some compelling circumstances under which it is impossible for the contemnor to comply with the order, the contemner may not be punished. In the case in hand as noticed earlier there was only direction to consider the petitioner for appointment in accordance with law keeping in view the vacancy position. In the absence of any vacancy there is no occasion to consider the petitioner for appointment and therefore, no part of the order of this Court can be said to have flouted by the respondent-contemner.

17. Having heard learned counsel for the parties at length and having regard to all the facts and circumstances of the case, in my opinion, there is no wilful obedience on the part of the respondents by not considering their claim for appointment in view of the fact that no vacancy exists. In such a circumstances, it cannot be held that the respondents have wilfully disobeyed the order of this Court and as such liable to be punished for committing contempt of this Court.

For the discussions made above, the contempt petition is dismissed. The respondents are discharged from the rule. However, there will be no order as to costs.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD DECEMBER 14, 2000

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S. RAFAT ALAM, J.

Civil Misc. writ Petition No. 53894 of 2000

Paras Nath and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners :
Shri M.D. Singh

Counsel for the Respondents :
S.C.

Constitution of India, Article 226-writ Petition-Challenging election on ground of disqualification Alternative remedy by way of election petition available – Writ petition, held, not maintainable.

Held – Para 3

It has been averred that under Section 13 D disqualification has been prescribed. Since the elected member is below age he is disqualified. That amounts to the fact that nomination paper should not have been accepted and that is covered under Section 19C. Under Section 19 C he is to file election petition. In that view of the matter we are of the opinion that election petition

is appropriate remedy and writ petition does not lie.

By the Court

1. Heard Shri M.D. Singh, learned counsel for the petitioners.

2. The instant writ petition has been filed challenging the election on two grounds. Firstly that voter's name was included in two wards and secondly, the candidate was not duly qualified since he was below age. Both the grounds are covered by our judgment wherein it has been held that election petition is appropriate remedy. So far as the first ground is concerned we have already held today in writ petition no. 53873 of 2000 that the petitioner has an equally efficacious and speedy alternative remedy by way of filing an election petition. So far as other ground is concerned Section 19 C provides as follows:

"19(c) that such person was not qualified to be nominated as a candidate for election or that the nomination paper of the petitioner was improperly rejected."

3. It has been averred that under Section 13 D disqualification has been prescribed. Since the elected member is below age he is disqualified. That amounts to the fact that nomination paper should not have been accepted and that is covered under Section 19 C. Under Section 19 C he is to file election petition. In that view of the matter we are of the opinion that election petition is appropriate remedy and writ petition does not lie.

4. The writ petition fails and is dismissed.

5. Mr. Singh prays for certificate under Article 134-A of the Constitution of India for appeal to the Supreme Court. We are of the view that the matter does not involve substantial question of law of general importance to grant leave. The prayer for grant of leave is, therefore, rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: JANUARY 17,2001

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. writ Petition No. 43483 of 2000

Lallan Prasad ...Petitioner
Versus
State of Uttar Pradesh and others ...Respondents

Counsel for the Petitioners:
Sri M.M. Rai
Sri Purshottam Upadhyay
Sri Sudhakar Pandey.

Counsel for the Respondents :
Miss Naheed Ara Moonis,
S.C.

U.P. Laghu Sinchai Boring Providhigya Seva Niyamawali – 1993, R.3 (Ka)- Departmental enquiry – Suspension pending enquiry – Order passed by an Officer higher in rank than the appointing authority – Legality: held valid.

Held – Para 16

The order of interim suspension is capable of being passed by the appointing or the disciplinary authority or an authority subordinate to the appointing authority if permissible under the rules or duly authorised in that

behalf. In the absence of delegation or due authorisation the subordinate authority, though may intimate enquiry, cannot pass an order of interim suspension. But converse is not true for, an authority higher in rank to the appointing authority can always exercise the powers and functions which its subordinate functionary can perform.

Case Law Discussed:

1968 ALJ 257
AIR 1984 SE 192
1986(I)AISLJ P 20 (1982) 3 SCC 200
1997 UPLBEC 1160
1989 (I) UPLBEC 484
AIR 1957 SE 246
1992(19) AIR 522
AIR 1970 SE 1263
AIR 1964 SE 784
AIR 1971 ALL 214
(1999) UPLBEX (SUM) 27
JT 1994 (7) SE 744

By the Court

1. The short and moot point for determination and consideration in the present petition is whether a Government servant can be placed under suspension pending departmental enquiry or in contemplation thereof by an order passed by an officer higher in rank than the appointing authority ? The controversy has arisen in the wake of the following facts:

2. The petitioner, who is a Boring Technician in the Department of Minor Irrigation and is posted at Vikas Khand, Virnao, district Ghazipur, has been placed under suspension in contemplation of departmental enquiry by order dated 21.9.2000 by the Superintending Engineer, Minor Irrigation Circle, Allahabad. There is no dispute about the fact that the services of the petitioner are governed by U.P. Laghu Sinchai Boring Providhigya Sewa Niyamawali, 1993 (hereinafter referred to as the "Niyamawali") and in pursuance of Rule 3 (ka), the Executive Engineer, (Adhishashi Abhiyanta) of concerned Mandal of the Minor Irrigation Department is the appointing authority.

3. It is also an indubitable fact that the order of suspension dated 21.9.2000, a copy of which is Annuexure 1 to the petition, has been passed by Superintending Engineer, Minor Irrigation Circle, Allahabad, who is an authority higher in rank to the Executive Engineer, i.e., the appointing authority. The gravamen of the charges against the petitioner is that he has submitted false Travelling Allowance bills for Rs. 9308.90P on the basis of forged and fictitious documents by misleading the authorities. He has further misconducted himself by capricious and indisciplined behaviour.

4. The only ground canvassed to challenge the aforesaid order of suspension in this writ petition under Article 226 the Constitution of India is that it is vitiated on account of the fact that it has not been passed by the Executive Engineer, compete to appoint the petitioner under the rules.

5. This position is accepted at all hands that the Executive Engineer concerned is the appointing authority of the petitioner, while the Superintending Engineer who has suspended the petitioner is an officer higher in rank than the Executive Engineer.

6. Heard S/Sri M.M. Rai and Sudhakar Pandey, learned counsel for the petitioner, learned Standing counsel as well as Ms. Naheed Ara Moonis

appearing on behalf of the respondent no. 4.

7. Sri Sudhakar Pandey, learned counsel for the petitioner urged that since the Executive Engineer has been specified as the appointing authority under the rules governing the service conditions, no other officer is empowered to suspend the petitioner. He further urged that when specific provision with regard to the appointing authority has been made in the rules, no other authority can exercise the powers to initiate disciplinary proceedings or to suspend an employee. In short, the submission of the learned counsel for the petitioner is that when a rule deals with a particular subject and is exhaustive on that subject, it has to be followed and no other course in violation thereof is permissible. In support of his contention, the learned counsel for the petitioner placed reliance on the full Bench decision of this court in the case of **S.P. Srivastava Vs. Banaras Electric Light and Power Company Ltd.(1968 A.L.J. – 257)** in which it was observed that it is a well known cannon of construction that when a particular mode of doing something is specified by statute, the modes of doing that thing are prohibited by necessary implication. A reference was also made to the decision of the apex court in Babaji Kondaji Garad and other Vs. Nasik Nerchants Co-operative Bank Ltd. ALR 1984 S.C. –192 in which the principles of interpretation of statutes and construction of legislative measures came to be considered. It was held that when Statutes require certain things to be done in a particular manner, it can be done in that manner alone, unless al contrary indication is to be found in the statutes. There can be no quarrel about the proposition of law laid down in the aforesaid two decisions with regard to the interpretation and construction of the provisions of law and the rules.

8. Sri Pandey further placed reliance on the decision of the Division Bench of this court in the case **R.N. Tiwari Vs. Joint General Manager (Administration Personnel) and another**-1986 (I) AISLJ Page 20 to lend strength to his submission that the suspension by an authority senior to the appointing authority but not empowered by the Rules is not permissible. The petitioner of that case was suspended in contemplation of enquiry by the Joint General Manager, U.P. State Road Transport Corporation while his appointing authority was the Regional Manager, an authority lower in rank than the Joint General Manager. On behalf of the petitioner of that case, contention was raised than an order by an authority not competent to pass is void and bad in law. The order of suspension was quashed on the ground that the joint General Manager was not the person competent to suspend the petitioner of that case. A careful study of the aforesaid decision would reveal that it was nowhere laid down that the authority superior to the appointing authority cannot pass an order of suspension or initiate departmental enquiry. In that case undisputed facts were that the appointing authority was the Regional Manager but the Board of Directors of the U.P. State Transport Corporation had passed a resolution empowering the General Manager also to pass order of suspension and to initiate disciplinary action against certain categories of persons whose appointing authority was lower in rank than the Chairman and the General Manager. There was no delegation and authorisation

in favour of the Joint General Manager. The submission on behalf of the U.P. State Road Transport Corporation that on the date on which the order was passed the General Manager was out of station and the Joint General Manager was discharging his functions and therefore, the order was passed by the Joint General Manager exercising the power of General Manager was valid and operative was negatived on the ground that a bare perusal of the order impugned showed that it has been passed by Joint General Manager in whose favour there was no delegation and accordingly the order of suspension was held to be illegal. The case of Sampuran Singh Vs. State of Punjab –1982 (3) S.C.C. – 200 was also distinguished on the ground that the language of Regulation 67 of the U.P. State Road Transport Corporation Employees (other than officers) Service Regulation 1931 provides that an order of suspension can be passed either by the appointing authority or by any one of the authorities empowered in this behalf by the Board. In view of this specific provision it was held that the decision of the apex court in Sampuran Singh (Supra) does not apply to the case. The decision of R.N. Tewari (supra) is of no help to the petitioner. It is not an authority on the point that the authority higher in rank to the appointing authority cannot suspend a delinquent subordinate in the department.

9. Sri Sudhakar Pandey further placed reliance on the decision in the case of State of U.P. and others Vs. Ram Singh and another – 1997 U.P.L.B.E.C. 1160 as well as Division Bench decision of this court in Amanat Hussain Vs. Assistant Conservator of Forests 1989 (1) U.P.L.B.E.C. – 484. The law which flows from these two decisions is that an authority subordinate to the appointing authority if not invested with the power of suspension either under the rules or by specific authorisation or delegation, is not entitled to pass an order of suspension and if an order of suspension has been passed by such an authority, it would be bad in law. These authorities have no bearing on the question that the order of suspension passed by an authority superior to the appointing authority is not sustainable. The reliance on these two decisions is, therefore, misplaced.

10. One cannot lose sight of the fact that an order of suspension in contemplation of the disciplinary enquiry or during the pendency thereof or even during the investigation enquiry or trial of a criminal charge, does not amount to an order of punishment. The employee concerned continues to be in service. He is merely forbidden from performing his duties. It is well settled proposition of law that an enquiry may initiated against a delinquent employee even by an officer who is subordinate to the appointing authority as in such a case provisions of Article 311 of the Constitution of India would not be attracted. An order of suspension passed against a Government servant pending departmental enquiry is neither one of dismissal nor removal from service within the meaning of Article 311 of the Constitution of India. This position has been clearly laid down by a Constitution Bench of the Hon'ble Supreme Court in the case of Mohd. Gause Vs. State of Andhra Pradesh A.I.R. 1957 S.C. 246. Clause (1) of Article 311 will get attracted only when an employee of the category specified in the Article or one who holds a civil post under the Union or State is 'dismissed' or 'removed' from service. The provisions of

the said clause has no application, whatever, to a situation where a Government servant has been merely placed under suspension pending departmental enquiry since such action does not constitute either dismissal or removal from service. It was in this context that the apex court in Sampuran Singh (Supra) took a view that by necessary implication the receiving authority may be higher in rank to the appointing authority.

11. The point in hand came to be directly considered and decided by this court in the case of Kamlesh Kumar Chaurasia Vs. State of U.P. and others 1992 (19) A.L.R. – 522. In that case, the Chief Secretary of the State who is higher in rank to the Joint Director of Medical and Health passed an order of suspension. It was held that chief Secretary who undoubtedly is the superior authority could pass order of suspension though such an order could not be passed by an authority inferior or subordinate to the appointing authority unless specifically authorised. Placing reliance on the decisions of the apex court in Sampuran Singh (Supra); State of U.P. V. Ram Naresh Lal A.I.R. 1970 S.C. 1262 and R.P.Kapoor Vs. Union of India and another A.I.R. 1964 S.C. 784 as well as the decision of this court in Mritunjai Singh Vs. State of U.P. A.I.R. 1971 Allahabad –214 it was held that on general principles, the State Government being employer has a right to suspend a public servant. The Government acts through its Secretaries and the Chief Secretary is highest civil servant of the State. Therefore, the impugned order of suspension it was observed, can be treated to be one passed by the State Government, which has the authority to suspend the petitioner (of that case).

12. In view of the peculiar structural hierarchy of the Government, the powers which are conferred on the subordinate authorities are exercisable by the superior officers. In this connection, a reference may be made to clause(e) of paragraph 3 in Annexure- Part IV under the heading 'Delegation and Forms' appended to Financial Hand Book, Part II to IV, which provides that any power delegated to any authority may also be exercised by any authority higher to such authority in the same department and also by the administrative department concerned, and any such higher authority or the administrative department concerned may modify or cancel any orders passed by a lower authority.

13. Sequel to the above provision, a reference was made to the observations made by this court in the case of Committee of Management Sri Gadhi Adarsh Inter College, Lavedi district Etawah and others Vs. Joint Director of Education, Kanpur Region, Kanpur and others (1999)1 U.P.L.B.E.C.(Sum)-27 which run as under:

"…….A superior officer has the implied and implicit administrative power to perform the functions which its subordinate can discharge. If a subordinate officer has omitted to perform his administrative duty or administrative function, the superior would certainly step in to pass appropriate correct order on administrative side. If the illegal and incorrect administrative order of the subordinates are allowed to exist and continue, the very purpose of creating the

hierarchy in the civil services would frustrate ……..”

14. In the instant case, there is an allegation that the appointing authority was in collusion with the present petitioner and since the former was not inclined to initiate disciplinary proceedings against the latter, the Superintending Engineer, an officer higher in rank, had no option but to pass an order of suspension in contemplation of the departmental enquiry. This fact has been controverted by the petitioners. So far as the truthfulness and correctness of this allegation is concerned, it is not required to be sifted but the fact remains that if such a situation arises, should the higher authorities rendered to a helpless state. The answer to it is an emphatic ‘no’. The hierarchical structure of the governmental machinery is founded on the pre-supposition that the higher departmental authorities may exercise all such powers, as may be vested in the subordinate officer. If any void or vacuum arises, it is permissible for the higher authorities to exercise all those powers and functions, which may be resorted to or taken recourse by their subordinates.

15. As said above, service condition of the petitioner are regulated by the Niyamawali. Apart from the provision made in rule 3 (Ka) that the Executive Engineer of concerned Mandal of the Minor Irrigation Department shall be the appointing authority of boring Technicians, there is no legal interdict of the rules that the superior authority cannot initiate disciplinary action against such Technicians. The silence of a rule on the point has no exclusionary effect except where it flows from necessary implication. The Niyamawali governing the service conditions of the petitioner does not prohibit the initiation of disciplinary enquiry by an authority other than the appointing authority.

16. The firm legal position which emerges from the various decisions of the apex court or of this court may thus be stated that insofar as initiation of enquiry by an officer subordinate of the appointing authority is concerned, it is unobjectionable. The initiation can be by an officer subordinate to the appointing authority. Only the dismissal/removal shall not be by an authority subordinate to the appointing authority (See Transport Commissioner, Madras-5 V. Thiru A Radha Krishna Moorthy –JT 1994 (7) S.C. –744). The order of interim suspension is capable of being passed by the appointing or the disciplinary authority or an authority subordinate to the appointing authority if permissible under the rules or duly authorised in that behalf. In the absence of delegation or due authorisation the subordinate authority, though may initiate enquiry, cannot pass an order of interim suspension. But converse is not true for an authority higher in rank to the appointing authority can always exercise the powers and functions which its subordinate functionary can perform.

17. The matter may be viewed with yet another angle. Though the order of punishment normally subject to scrutiny by means of a departmental appeal to be preferred before designated higher authority, the order of suspension pending enquiry or in contemplation of the enquiry is not appealable. No appeal lies against an interim order of suspension. Therefore, an employee who has been suspended by an authority higher to the appointing

authority cannot complain that he has been deprived of the right of appeal. The delinquent employee is not prejudiced in any manner, if the order of suspension is passed by a higher authority.

18. In the conspectus of above discussion, I have no hesitation in recording a firm finding that an order of suspension pending enquiry or in contemplation of such enquiry or, for that matter, during the investigation, enquiry and trial on a criminal charge of a Government servant may be passed by an authority superior and higher in rank to the appointing authority. There is no law to the contrary. Therefore, by virtue of his placement higher in hierarchy, the Superintending Engineer could pass an order of suspension of the petitioner in contemplation of the enquiry.

19. Learned counsel for the petitioner wanted me to go into the merits or demerits of the allegations on the strength of which the petitioner has been suspended. The truthfulness, correctness and the genuineness or otherwise of the allegations charges against the petitioner have to be determined by the enquiry officer after evidence. The apex court has repeatedly pointed out that even when the matter comes to the High Court or Tribunal after the imposition of punishment, it has no jurisdiction to go into truth of the allegations/charges except in a case where they are based on no evidence, i.e. where they are perverse. The jurisdiction of this court, i.e. the power of judicial review, is limited to the examination of the procedural correctness of the decision making process. This writ court cannot sift the merits of the allegations against the petitioner.

20. For the reasons stated above, the order of suspension passed by the Superintending Engineer cannot be legally faulted or assailed. The writ petition, therefore, turns out to be devoid of any merits and substance and it is accordingly dismissed without any order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JANUARY 10, 2001

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No. 20060 of 1999

Anil Kumar Azad and others ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Shri Ashok Khare
Shri V.D. Chauhan

Counsel for the Respondents:
S.C.
Mr. B.D. Madhyan

Constitution of India, Article 226 read with Service Regulation, 1965 and 1987 Ad-hoc appointment-Termination of Services – Policy decision – Termination order set aside in earlier decision by High Court – No special appeal filed by State Government following Mukesh Kumar's case, Petitioner deemed to have continued in service and relegated to their original position.

Held- paras 11 and 12

State Government had taken a decision on 22.09.2000 not file a Special Appeal against the decision in Mukesh Kumar's case (supra). Similar decision was taken by Mandi Parishad on 09.10.2000. The petitioners covered by Mukesh Kumar's

case (supra) have been permitted to join on their respective posts. It is, thus, clear that the State Government as well as the Mandi Parishad have treated the decision in Mukesh Kumar (supra) as final and have implemented the same. Therefore, there does not appear to be any occasion for this court to take a view different from that, which has been taken in the case of Mukesh Kumar (supra) as final and have implemented the same. Therefore, there does not appear to be any occasion for this court to take a view different from that, which has been taken in the case of Mukesh Kumar (supra). The petitioners are obviously entitled to the benefit of the decision in the said case.

The petitioners shall be deemed to have continued in service and as such they shall be relegated to their original position.

Case Law discussed

2000 (1) ESC 558 (All).
W.P. No.: 955 of 2000, decided on 24.02.2000.
W.P. No. 537 of 1999 (SB) decided on 05.09.2000 (DB)
W.P. No. 25376 of 1999 decided on 10.10.2000
1999(2) AWC 1638
1999(2) UPLBEC 998
Spl. Appeal No. 8 of 1998 decided on 12.01.1998
CMW No. 26272 of 1998 decided on 06.08.1998
1998(1) UPLBEC 690
W.P. No. 1093 of 1999 decided on 13.11.2000
CMW No. 41671 of 1996 decided on 05.09.1997
CMW No. 17521 of 1990 decided on 28.10.1997
1999(1) ESC 547 (All)
AIR 1997 SC 1628
2000 All LJ 1268
AIR 1997 SC 3657

By the Court

1. The petitioners, who are three in number, were appointed in Krishi Utpadan Mandi Samiti Chhibramau in district Kannauj. Petitioner No. 1- Anil Kumar Azad who happens to be a Scheduled Caste was appointed as Mandi Assistant on 14.06.1996 and he joined on the said post on 17.06.1996. Ram Kishore, petitioner No. 2 belonging to the Backward Class was appointed as Mandi Sahayak by order dated 14.05.1997. He joined on the same date. Ashan Ali, petitioner no. 3 was appointed as Mandi Abhirakshak on 08.09.1997. Pursuant to the decision taken by the State Government on 12.02.1999 and the resolution adopted by the Mandi Parishad on 09.03.1999, the services of all the three petitioners were terminated by separate orders dated 15.03.1999, copies whereof are Annexures 6-A, 6-B, 7-A and 7-B. They were paid on month's salary in lieu of notice besides the requisite amount of compensation.

2. The petitioners have alleged that their past antecedents have been neat and their work and conduct have been quite satisfactory. Therefore, there was hardly any occasion to terminate their services as their appointments were made till the regularly selected candidates were available to replace them. The validity of the Government order dated 12.02.1999 on the basis of which the resolution was adopted by the Mandi Parishad and the termination orders were passed by the Mandi Samiti has been challenged on a variety of grounds.

3. The stand taken in the counter affidavit filed on behalf of the respondents is that the petitioners were appointed in temporary capacity and on a fixed remuneration as a stop gap arrangement on a clear understanding that their services were liable to be terminated

at any time without notice and since the petitioners had no right to the posts on which they were appointed, they cannot complain against the orders by which their ad-hoc appointment have been brought to an end.

Counter and rejoinder affidavits have been exchanged. Heard Sri Ash Khare, Senior Advocate, assisted by Sri V.D. Chauhan for the petitioners and Sri B.D. Madhyan, appearing on behalf of the respondent nos. 2 to 4 as well as learned Standing counsel for respondent no. 1-State of U.P.

4. At the outset it may be mentioned that hundreds of persons were appointed in the various Mandi Samitis all over the State of U.P. during the relevant period on ad-hoc basis in temporary capacity and for fixed period liable to be extended from time to time. In some cases, the salary was to be paid in the regular pay scales whiles in others, consolidated amount of remuneration was made payable. One thing common in all the appointments, however, was that the services of the persons so appointed were terminable at any time without notice. The appointees, therefore, had no right on any particulars post.

5. It appears that there arose a difficulty in absorbing the employees so appointed and in spite of the fact that the departmental authorities were chalking out a scheme for absorbing them on different posts or to confer regular appointment in a phased manner, the State Government, on the reference made by the Director, Rajya Krishi Mandi Utpadan Parishad, passed an order on 12.02.1999 taking the policy decision that the services of all such employees be terminated. Pursuant to the orders passed by the State government, the Mandi Parishad adopted a resolution on 09.09.1999, which was circulated to the Mandi Samitis for compliance. The services of the employees who were appointed during the relevant period were terminated on different dates. The orders passed by the State Government, the resolution adopted by the Mandi Parsishad and the termination orders passed by the Mandi Samitis concerned gave rise to a spate a petitions before this court as well as its Lucknow bench. One such petition no. 40563 of 1999 was filed by **Mukesh Chandra**, which was decided by this court (Hon'ble Mr. V.M. Sahai, J.) on 27.10.1999 reported in 2000 (1) E.S.C.-558 (Allahabad). In paragraph 36 of that decision, the following directions were issued:-

"For the reasons stated above, this petition succeeds and is allowed. The order dated 11.06.1999 passed by respondent no. 3, Annexure 4 to the writ petition is quashed with following directions:-

(1) The petitioners shall be reinstated and shall be permitted to continue as clerk till regular selections are held;

(2) The respondents shall hold regular selection for the vacancies within six months from today. The petitioner shall be permitted to participate in it. If he has become over age he shall be granted age relaxation.

(3) The petitioner was appointed by the Additional Director on the recommendation of the Deputy Director. He worked as a clerk from the date of his appointment till the date of his

termination. He was paid Rs.1,400 per month only. He shall be paid the difference in the emoluments paid and the salary payable to a clerk within three month from today;

(4) The appropriate authority under the Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964, U.P. Agriculture Produce markets Board (Officers and Staff Punishment) Regulations, 1984 and the U.P. Agriculture Produce Market Committees (Centralised) Services Regulations, 1984 or the State Government as the case may be shall initiate action against both the recommending and appointing authority departmentally and by initiating criminal proceedings;

(5) It would be open to the respondents to recover the amount spent on salary in excess of 10% from the appointing authorities and if recommending authorities are involved then proportionately from both;

(6) A copy of this judgement shall be sent by the office within a week to the Chief Secretary, State of Uttar Pradesh to ensure that the directions are complied.

Another Writ petition no. 955 of 2000 files by Vinai Kumar Shukla came to be decided by this court (Hon'ble Mr. S.R. Singh, J.) on 24.02.2000. it was allowed in terms of the directions (aforesaid) issued in **Mukesh Chandr's** case (supra). As many as 102 writ petitions (leading of which was Writ No. 1346 of 1999 – **Mukesh Kumar Vs. U.P. Rajya Krishi Utpadan Mandi Parishad and others)** were decided by a common judgement dated 11.08.2000 by the Lucknow Bench of this court (Hon'ble Mr. Bhanwar Singh, J.) in which the following direction was issued:-

"……Having regard to the discussions made above, I am inclined to hold that written and verbal termination orders of the petitioners issued by the authorities at the dictation of Government as contained in letter dated 12.02.1999 are arbitrary, unreasonable and discriminatory and, therefore, all such termination orders along with the irrational impugned letter of source dated 12.02.1999 are hereby quashed. A writ of certiorari is issued accordingly. Further, a writ of mandamus is also issued commanding the opposite parties to allow the petitioners to resume their duty with immediate effect. They shall be deemed to have continued in services and as such they shall be relegated to their original position. However, they will not get their back wages. The U.P. Agricultural Produce Market Board shall within six months resolve and formulate a policy to deal with the terms of their services by giving due consideration to its earlier resolution regarding regularisation of their services. The Board will also take stern step to ensure that such an odd situation to the embarrassment of the competent authorities does not arise in future."

Another case – **Rajneesh Varshney and others Vs. State of U.P. and others** (writ petition no. 537 of 1999 (S.B.) filed before Lucknow Bench) was decided by a Division bench (Hon'ble Mr. Ashish Kumar Trivedi, J. and Hon'ble Mr. R.D. Mathur, J.) on 05.09.2000. The decision dated 11.08.2000 of the learned Single Judge in **Mukesh Kumar's** case (supra) was approved. Fifty six more writ petitions (of which leading case was writ no. 2537 of 1999- **Manoj Kumar and**

others Vs. U.P. Rajya Krishi Utpadan Mandi Parishad and others) were decided by this court (Hon'ble Yatinder Singh, J.) on 10.10.2000 in terms of **Mukesh Kumar's** case (supra)

6. In the conspectus of series of aforesaid decisions, Sri Ash Khare, learned Senior Advocate urged that the case of the present petitioners is squarely covered and the benefit extended to the petitioners in the writ petitions, aforesaid, has, of necessity, to be made available to the present petitioners also.

7. This submission has been repelled by Sri B.D. Madhyan who argued that the decision, aforesaid are clearly against law laid down in **Arvind Kumar Vs. Director Rajya Krishi Utpadan Mandi Parishad, Lucknow and others** – 1999 (2) A.W.C.-1638; **Qmar Vishal Siddiqui Vs. Director Krishi Utpadan Mandi Parishad U.P. Lucknow and others** – (1999) 2 U.P.L.B.E.C – 998; **Employees Union of Mandi Assistants through its Secretary Ravindra Kumar and others Vs. Director U.P. Krishi Utpadan Mandi Parishad and others** decided on 20.11.1997; Special arising out of the aforesaid writ petition (Special Appeal No. 8 of 1998 decided on 12.01.1998); and **Mohan Pandey Vs. The Director Addl. Director of Rajya Krishi Utpadan Mandi Parishad U.P. and others** in Civil Misc. Writ no. 26272 of 1998 decided on 06.08.1998 as well as in the decision of the Division Benches of this court in the case of **Raja Ram Maurya Vs. U.P. Rajya Krishi Utpadan Mandi Samiti and others** – 1998 (1) U.P.L.B.E.C.-690 and another Division bench decision dated 13.11.2000 in writ petition no. 1093 of 1999. **Anshuman Mishra Vs. State of U.P. and others**.

8. So far as the cases of **Arvind Kumar** (supra); **Qmar Vishal Siddiqui** (supra); **Employees Union of Mandi Assistant through its Secretary Ravindra Kumar and others** (supra) and **Mohan Pandey** (supra) are concerned, they are the decision of the Hon'ble Single Judges and were rendered prior to the decision in the case of **Mukesh Kumar** (supra) since **Mukesh Kumar** (supra) has been approved by subsequent Division Bench in the case of **Rajneesh Varshney** (supra) all the above decision rendered by Hon'ble Single Judges are of no assistance and the reliance on them is misplaced. The decision dated 12.01.1998 in Special Appeal no. 8 of 1998 Employees Union of Mandi Assistants (supra) though has not disturbed the decision of the learned Single Judge, a direction was issued that the affected employees shall make a representation to the authorities concerned. This decision also does not appear to be of much help in view of the discussion which is now to follow.

9. A short and swift reference may also be made to the decision in the cases of **Mithlesh Kumar Pandey Vs. Sate of U.P. and others** in Civil Misc. Writi no. 41671 of 1996 decided on 05.03.1997; **Arvind Kumar Agarwal Vs. State of U.P. and others** in Civil Misc. Writ no. 17521 of 1990 decided on 28.10.1997; **Girish Kumar Mishra Vs. District Inspector of Schools Shahjahanpur and others** – 1999 (1) E.S.C.-47 (Alld). **Ashwani Kumar and others Vs. State of Bihar and others** – A.I.R. 1997 S.C. – 1928; **Dr. Sharan Kumar Singh Chauhan Vs. State of U.P. and others** – 2000 All. L.J.-1268 and **Himanshu Kumar Vidyarthi and others Vs. State of Bihar and others** A.I.R. 1997 S.C.-

3657. All these decisions are not directly on the point. **Mithlesh Kumar Pandey** (supra) deals with the matter of transfer. Other decisions laid down certain principles of law in an entirely different set of facts. There can be no quarrel about the principles of law laid down in the said cases, but certainly they are not res integra.

10. The two crucial case of the Division Benches are those of **Anshuman Misra** (supra) and **Raja Ram Maurya** (supra) rendered by Presiding Judge Hon'ble S.H.A. Raja, J. in which a view contrary to the view taken in the decision relied upon by Sri Ash Khare has been taken on the ground that the appointment de hors the regulation were had in law. **Anshuman Misra** (supra) was decided by placing emphatic reliance on the observations made in paragraphs 30 and 31 of **Raja Ram Maurya** (supra), which are quoted below:-

"30. In the present cases before us; the petitioners have no lien on the posts of Assistant Engineer. They were asked to work as Assistant engineers as a stop gap arrangement which do hors the Rules. The return from the back door from which they entered, cannot be subjected to judicial serutiny. Since the order of their promotion as stop gap arrangement to the posts of Assistant Engineer was made in violation of the Service Regulations, the illegality committed in passing the order of promotion has only been corrected by means of impugned orders. In such a situation the petitioners were not required to be given an opportunity of being heard for correcting such a mistake or illegality.

31. The action of the Director of Mandi Parishad who has passed the impugned orders cannot be faulted because he was bound to follow the direction of the State Government as contained in Section 26-M of the Act. The State Government has the power to issue such directions under the Uttar Prade3sh State Control over Public Corruption Act, 1975 also."

11. In **Anshuman Mishra's** case (supra) it was further observed that the Division Bench decision in **Rajneesh Varshney** case (supra) was per incurium, as it did not take notice of the earlier decision in **Raja Ram Maurya's** case (supra). I have given thoughtful consideration to the matter and find it difficult to pursued myself to agree with Sri Madhya. **Ansuhman Mishra's** case (supra) is primarily based on the observations made in paragraphs 30 and 31 (above quoted) in **Raja Ram Maurya's** case (supra). The facts in **Raja Ram Maurya's** case (supra) are altogether different and the observations made in that case do not squarely apply to the facts of the present case as well as the cases which have been decided in favour of the employees whose services were terminated. In **Raja Ram Maury's** case (supra) the Mandi Parishad had taken a decision to promote the Junior Engineers as Assistant Engineer without obtaining previous approval regarding sanction of posts. Since the Junior Engineers themselves were working and ad-hoc basis, their appointment as Assistant Engineers on promotion would have certainly been against the public policy because their appointment on promotional post would have been substantive and such a backdoor entry would have been injurious to the cause of public and against the Regulations, 1965 as well as 1984. The contention of Sri Madhya, learned counsel for the Mandi Parishad is

correct that the appointment on the substantive post without taking recourse to the prescribed procedure as laid in the two Regulations, referred to above, is illegal and it was on the basis of the same rationale that the Court upheld in the case of **Raja Ram Maurya** (supra) that the government could lay down a policy and issue directions to the Board if illegal appointment are proposed to be made by the Mandi Parishad or Mandi Samitees. In the instant case, as well as decision, which have been made in favour of the employees of the Mandi Samiti, neither the Mandi Parishad nor the Mandi Samitees has made any regular appointment. Raja Ram Maurya's case was considered and distinguished in Mukesh Kumar's case (supra), decided on 11.08.2000 in the following terms:-

"……. Hence, in these cases, neither the Mandi Parishad nor the Mandi Samitees ahs made nay regular appointment and as conceded on behalf of Mandi Parishad and also mentioned above, never before or after the cut off period, regular appointment have been made. The government could have certainly issued some directions by evolving a policy and suggested ways and means to deal with the appointment of ad-hoc employees. Section 26-F clearly postulates that the Board will make all appointments of officers and servants in accordance with the terms and conditions as may be provided for in regulations made by the Board."

I am in full agreement with the observations made above and find that the various observations made in **Raja Ram Maurya's** case (supra) are to be confined to the facts of that case only and whatever has been averred, canvassed and determined in that case is not applicable on all fours to the facts of the present case. **Mukesh Kumar's** case has been specifically approved by a Division Bench in **Rajneesh Varshney's** case (supra) which was decided on 05.09.200. Sri B.D. Madhyan appearing on behalf of the Mandi Parishad and other frankly conceded that the State Government had taken a decision on 22.09.2000 not to file a Special Appeal against the Decision in **Mukesh Kumar's** case (supra). Similar Decision was taken by Mandi Parishad on 09.10.2000. the petitioners covered by **Mukesh Kumar's** case (supra) have been permitted to join on their respective posts. It is, thus, clear that the State Government as well as the Mandi Parishad have treated the decision in **Mukesh Kumar** (supra) as final and have implemented the same. Therefore, there does not appear to be any occasion for this court to take a view different from that, which has been taken in the case of **Mukesh Kumar** (supra). The petitioners are obviously entitled to the benefit of the decision in the said case.

12. The writ petition is allowed and the impugned orders dated 15.03.1999 terminating the services of the petitioners are hereby quashed on the basis of the reasoning adopted in **Mukesh Kumar's** case (supra), which squarely applies to the case of the case of the present petitioners. The petitioners shall be deemed to have continued in service and as such they shall be relegated to their original position. The petitioners, however, shall not be entitled to back wages. There shall be no order as to costs.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 12.12.2000

BEFORE
THE HON'BLE D.S. SINHA, J.
THE HON'BLE DEV KANT TRIVEDI, J.

Civil Misc. Writ Petition No. 34163 of 1998

Dhirendra Kumar Gautam ...Petitioner
Versus
The U.P. Public Services Tribunal, Lucknow and others ...Respondents.

Counsel for the Petitioner:
Shri Mahesh Gautam
Shri Vijay Gautam

Counsel for the Respondents:
Shri V.N. Agarwal
Standing Counsel

U.P. Temporary Government Servants (Termination of Services) Rules, 1975 – Principle of Natural Justice – Principle of 'first come last go' – Applicability.

Held- Paras 5, 8 and 9)

Thus, there is no escape from the conclusion that the petitioners was appointed temporarily on ad-hoc basis, and his services were liable to be terminated at any time without notice. After examining the material before it thoroughly, the Tribunal has recorded a finding of fact that the impugned order of termination was not passed by way of punishment. It was rather an order passed in terms of the conditions of the appointment and in accordance with the provision of U.P. Temporary Government Servants (Termination of Services) Rules, 1975, which indisputably, were applicable cannot be faulted on the ground that it was passed without giving any opportunity to the petitioners. The Tribunal did not commit any error much less error apparent on the face of record, in upholding the order of termination. Otherwise also, reliance upon the principle ' first come last go' is misplaced in as much as this principle is not applicable in the case of termination of services of temporary employee in terms of the conditions of the appointment and in accordance with the provisions of Rules regulating the termination of services of temporary employee.

By the Court

1. Heard Sri Mahesh Gautam, the learned counsel appearing for the petitioner, and Sri V.N. Agarwal, the learned Standing Counsel of the State of U.P., representing the respondent.

2. Dhirendra Kumar Gautam, an erstwhile Jail Warden, invokes the jurisdiction of this Court under Article 226 of the Constitution of India for impugning the two orders and judgement date 15th July, 1998 and 23rd July, 1998 passed by the U.P. Public Services Tribunal, Lucknow, copies where of are Annexures '6' and '8' to the petition.

3. By the order and judgement dated 15th July, 1988, the Tribunal has rejected the claim petition of the petitioner and the order and judgement dated 23rd July, 1998 purports to reject the petition of the petitioner seeking review of the order and judgement dated 15th July, 1998. The prayer for quashing the order dated 20th February, 1987 and 1st July, 1991, giving rise to the claim petition, has also been made. The order dated 20th February, 1987, a copy whereof is Annexure '1' to the petition, is the offer terminating the services of the petitioner and the order dated 1st July, 1991 is the order passed by the appellate authority rejecting appeal of the petitioner.

4. Before the Tribunal the petitioner urged that he was confirmed employee and his services could not be dispensed with without giving him opportunity. Same submission has been repeated before this Court also.

5. The Tribunal has categorically found that the petitioner was not a confirmed employees. Indeed, he was an ad-hoc employee. This finding of the Tribunal is based on the documentary evidence in the shape of the appointment order dated 29th August, 1984. A copy of the appointment order is available on record before this Court as Annexure '11' to the petition. The order clearly and unequivocally, without reservation of any kind, declared that the services of the petitioner were wholly temporary, liable to be terminated at any time without any notice. Neither before the Tribunal nor before this Court has any such cogent material been produced which may show that the petitioner acquired the status of a permanent employee. Thus, there is no escape from the conclusion that the petitioner was appointment temporally on ad-hoc basis, and his services were liable to be terminated at any time without notice.

6. Next attack on the order of termination before the Tribunal was and before this Court is on the ground that the order is punitive in nature. Learned counsel appearing for the petitioner argues that the impugned order begin the one of punishment could not be passed without giving opportunity to the petitioner.

7. It is settled that no order of punishment can be passed against an employee without giving an opportunity. But, in the instant case the question that arises for consideration is whether the impugned order was infact passed as a measure of punishment or was it an order discharging the petitioner from service simplicitor without stigmatising him.

8. After examining the material before it thoroughly, the Tribunal has recorded a finding of fact that the impugned order of termination was not passed by way of punishment. It was rather an order passed in terms of the conditions of the appointment and in accordance with the provisions of U.P. Temporary Government Servants (Termination of Service) Rules, 1975, which, indisputably, were applicable to the petitioner. Thus, the impugned order of termination cannot be faulted on the ground that it was passed without giving any opportunity to the petitioner. The Tribunal did not commit any error much less error apparent on the face of record, in upholding the order of termination.

9. Lastly, the impugned order of termination was and is sought to be assailed on the ground that the employees junior to the petitioner were retained and this was in violation of the settled principle 'first come last go'. To meet this assertion, the contesting respondents have taken stand to the effect that while the work and conduct of the employees retained was satisfactory the work and conduct of the petitioner was not found suitable. This stand has been upheld by the Tribunal. Nothing has been pointed out before this court to show that the work and conduct of the other employees who were retained in service and were allegedly juniors to the petitioner was not suitable. Therefore, as a matter of fact, it cannot be held that in retaining the

services of other employees and dispensing with the services of the petitioner any illegality or irregularity was committed. Otherwise also, reliance upon the principle 'first come last go' is misplaced in as much as this principle is not applicable in the case of termination of services of temporary employee in terms of the conditions of the appointment and in accordance with the provision of Rules regulating the termination of services of temporary employee.

10. All told, in the opinion of the Court, the petition is devoid of substance and liable to be dismissed summarily.

Accordingly, the petition is dismissed summarily.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.01.2001

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

Civil Misc. Writ Petition No. 145 of 2001

Committee of Management ...Petitioner
Versus
Prescribed Authority/ Upzila Magistrate and others ...Respondents.

Counsel for the Petitioner:
Shri Vinod Sinha
Shri S.P. Singh

Counsel for the Respondents:
S.C.
Sri Krishna Prasad

Societies Registration Act, 1860, S. 25- Prescribed authority whether acts as Election Tribunal, while exercising powers under the Act.

Held-Para 3

Therefore, the Prescribed Authority in exercise of his judicial function as Tribunal has held by the impugned order dated 18.12.2000 that elections of the petitioners and respondent no. 4 were illegal, contrary to bye-laws of the society and it directed for holding fresh election. I do not find any illegality in the impugned order passed by the Prescribed Authority.

Case Law:
2000 (3) UPC BEC 2499-Disapproved
1999(1) UPC BEC 697 (DB) followed.

By the Court

1. The petitioner's committee of management was elected on 03.02.2000. The District Basis Education officer on 28.02.2000 recognised the election and attested the signature of the Manager. On 08.03.2000 renewal of the society was granted in favour of the petitioner. The election of the respondent no. 4 was held on 05.02.2000 and the respondent no. 4 made a complaint before the Deputy Registrar, Firs, Societies and Chits, the respondent no. 2. The respondent no. 2 made a reference to the Prescribed Authority under Section 25(1) of the Societies Registration Act 1860(in brief the Act). The prescribed Authority on 18.12.2000 has held that elections of the petitioner and respondent no. 4 were illegal and were contrary to the bye-laws of the society, therefore, he directed for holding fresh election. It is this order which has been challenged in this petition.

2. Sri Vinod Sinha the learned counsel for the petitioner has vehemently urged that the prescribed Authority while exercising power under the Act, does not function as Election Tribunal and he

cannot decide the dispute about the validity of the election. He has placed reliance on the decision of learned Single Judge in Abdul Kalam and another v. the prescribed Authority/SDM, Phoolpur and others 2000 (3) UPLBEC 2499. On the other hand Sri Krishna Prasad the learned standing counsel has urged that the Prescribed Authority can examine the validity of the elections. He has placed reliance on a division Bench decision of this court in Jai Prakash Agarwal V. Prescribed Authority (Sub Divisional Officer), Sadar, District Deoria and others 1999 (1) UPLBEC 697.

3. On the arguments advanced by the learned counsel for the parties, the question is whether the Prescribed Authority function as a Tribunal and could go into the question of validity of the elections. The Division Bench in Jai Prakash Agarwal (supra) has considered this question and has held that the Prescribed Authority decides important dispute of election and continuance in officer of an office bearer, which is essentially a dispute of civil nature. From the provisions of section 25 (1) and (2), it is clear that the Prescribed Authority decides the dispute in exercise of inherent power of the State vested in him by the State Government. In further held that the Prescribed Authority under Section 25 of the Societies Registration Act, 1860, as applicable in Uttar Pradesh, is a Tribunal and the orders passed by the Prescribed Authority can be challenged in writ petition under Article 26 of the Constitution and Special appeal under Rule 5 of Chapter VIII of the Rules of the Court would not lie against the order of the Single Judge passed in a writ petition. It appears that this decision of the Division Bench was not placed before the learned Single Judge in Abdul Kalam's case were in he has held that the Prescribed Authority does not act as an Tribunal. The decision in Abdul Kalam's case in of no help to the petitioner. Therefore, the prescribed Authority in exercise of his judicial function as Tribunal has held by the impugned order dated 18.12.2000 that election of the petitioner and respondent no. 4 were illegal, contrary to bye-laws of the society and it directed for holding fresh election. I do not find any illegality in the impugned order passed by the Prescribed Authority.

4. The writ petition has no merit and is accordingly dismissed.

Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD: 25.01.2001

BEFORE
THE HON'BLE U.S. TRIPATHI, J.

Crime Misc. Bail Application No. 19750 of 2000

Case Crime No. 820 of 2000 Under section 364/302/34 I.P.C. Police Station Lone, District Ghaziabad.

Bijendra Singh alias Pintoo ...Applicant (In jail)
Versus
State of U.P. ...Opposite party

Counsel for the Applicant:
Shri Jai Shanker Audichya

Counsel for the Respondent:
Sri R.S. Shukla
A.G.A.

Code of Criminal Procedure Code, 1973, S. 167 (2)- Bail-Grant of – First remand

of accused granted by A.C.M.M. on 08.09.2000 – Statutory period of 90 days for submission of charge sheet expired on 09.12.2000 – Charge sheet submitted on 13.12.2000 as mentioned in C.J.M's order dated 14.12.2000 -Contention that period of 90 days should be contend from date of 2nd remand by the C.J.M., Ghaziabad after expiry of 14 days, rejected – Held, that relevant period under S. 167(2) shall be counted from date of first remand i.e. 08.09.2000 only.

Held-para 9

In this way, the light of accused to be enlarged an bail under the proviso to Section 167 (2) Cr. P.C. accrued on 09.12.2000 has no effect as held by the Apex Court in the case of the accused in entitled to bail under the proviso to Section 167 (2) Cr. P.C.

Case law Discussed:

1994 J.C.C. (Cst) 1433
(1944) 4 SCC 602
1996 – JIC 499 (SC)

By the Court

1. The applicant Bijendra @ Pintoo had moved this bail application mainly on the ground that he was arrested in this case and was produced before Additional Chief Metropolitan Magistrate, Delhi on 08.09.2000 from, where he was granted judicial remand. But the charge sheet in the case was not filed till 12.12.2000 i.e. even after lapse of 95 days and thereafter he away entitled to bail under the mandatory provision of Section 167(2) Cr. P.C.

2. Initially the bail application of the applicant was rejected by the learned Sessions Judge, Ghaziabad on merit on 03.11.2000. Thereafter, the applicant moved this bail application before this Court on 07.12.2000. During tendency of this bail application before this Court he applied for bail under the provision of Section 167(2) before Chief Judicial magistrate, Ghaziabad on 12.12.2000. The learned Chief Judicial magistrate rejected the bail application on 14.12.2000 on the ground that the applicant was remanded to judicial custody on 21.09.2000 and therefore, the statutory limit of 90 days for completion of investigation have not expired till 12.12.2000 and charge sheet was submitted in the Court on 12.12.2000. Therefore, the applicant was not entitled to bail under Section 167(2) Cr. P.C. the applicant, therefore filed supplementary affidavit and also claimed his bail under the provision.

3. Heard the learned counsel for the applicant and the learned A.G.A.

4. It is not disputed that initially report of the occurrence was lodged at P.S. Sahadara, district North East (Delhi) by Sub Inspector Guru Sewak Singh Sahib and the applicant was also arrested by police of P.S. Sahadara on 7/8.9.2000. Certified copy of order of A.C.M.M., Delhi shows that he was remanded to judicial custody till 22.09.2000 on 08.09.2000 in F.I.R. no. Nil of 2000 under section 364, 302/34 I.P.C. P.S. Sahadara. It is also not disputed that charge sheet in this case was submitted on 13.12.2000 as it is apparent from the order of the Chief Judicial Magistrate dated 14.12.2000.

5. Proviso to Section 167 (2) Cr. P.C. provides that the Magistrate may authorise the detention of the accused persons, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate ground exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this

paragraph for a total period exceeding ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less that ten years and on the expiry of the said period of 90 days, the accused persons shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter.

6. The Apex court held in the case of Sanjay Vs. State through C.B.I., Bombay (II), 1994 SCC (Cri) 1433 that "indefeasible right" of that accused to be released on bail in accordance with Section 20(4) (Bb) of he TADA Act read with Section 167 (2) of the Code of Criminal Procedure in default of completion of the investigation and filing of the challan within the time allowed, as held in Hitendra Vishnu Thakur, (1994) 4 SCC, 602 is a right which ensures to, and is enforceable by the accused only from the time of default till the filing of the challan being filed. If the accused applied for bail under this provision on expiry of the period of 180 days or the extended period, as the case may be, then he has to be released on bail forthwith. The accused, so released on bail may be arrested an committed to custody according tot he provision of the Code of Criminal procedure. The right of the accused to be released on bail after filing of the challan, notwithstanding the default in filing it within the time allowed, is governed from the time of filing of the challan only by the provision relating to the grant of bail application at the state. It is also mentioned in paragraph 48 of the said judgement than the indefeasible right accruing to the accused in such a situation in enforceable only prior to the filing of the challan and it does not survive or remain enforceable on the challan being filed, if already not availed of. Once the challan has been filed, the question of grant of bail has to be considered and decided only with reference to the merits of the case under the provisions relating to grant of bail to an accused after the filing of the charge sheet.

7. It has also been held by the Apex court in the case of Mohammad Iqbal Madar Shekh and other vs. State of Maharashtra, 1996 JIC 499 (SC) that unless applications had been made on behalf of the appellants, there was no question of their being released on ground of default in completion of investigation within the statutory period. It is now settled that this right cannot be exercised after the charge-sheet has been submitted and cognizance has been taken.

8. It is clear from the remand order passed by Additional Chief Metropolitan magistrate, Delhi on 08.09.2000 that first, that first remand of the accused was granted on 08.09.2000. the statutory period of 90 days for completion of investigation and submission of charge sheet thus expired on 09.12.2000 Admittedly, the accused applicant applied for bail before Chief Judicial Magistrate under Section 167 (2) Cr. P.C. on 12.12.2000 and charge sheet in this case was submitted on 13.12.2000 as it is clear from the order of the Chief Judicial Magistrate dated 14.12.2000. The learned A.G.A. contended that period of 90 days shall be counted from the date of remand given by Chief Judicial Magistrate, Ghaziabad i.e. 21.09.2000. this contention has no force as the applicant was

remanded to judicial custody for the first time on 08.09.2000 and second remand on the expiry of 14 days was granted by the Chief Judicial Magistrate, Ghaziabad. The relevant period for the purposes of proviso of Section 167 (2) Cr. P.C. shall be counted from the date of first remand to judicial custody and not drawn subsequent or second remand.

9. In this way, the right of accused to be enlarged on bail under the proviso to Section 167 (2) Cr. P.C. accrued on 09.12.2000 and he availed that right 12.12.2000, by which date, no charge sheet was filed. The passing of the order on the bail application on 14.12.2000 has no effect as held by the Apex court in the case of Mohammad Iqbal Madar Sheikh and other (supra). Therefore, the accused in entitled to bail under the proviso the Section 167 (2) Cr. P.C.

10. Let the accused applicant Bijendra @ Pintoo involved in case crime no. 820 of 2000 under Section 364/302/34 I.P.C., P.C. Lone, District Ghaziabad be enlarged on bail on his furnishing a personal bond and two sureties each in the like amount to the satisfaction of Chief Judicial Magistrate, Ghaziabad.

Application Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 04.01.2001

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

Civil Misc. Application No. 1497 of 1999

Samaydin ...Petitioner
Versus
State of U.P. and others ...Respondents.

Counsel for the Petitioner:
Shri Sunil Kumar

Counsel for the Respondents:
A.G.A

Code of Criminal Procedure, 1973- S. 125(2) – Maintenance Grant of to wife – from date of application – without recording any reasons – Order illegal.

Held – Para 4

From an examination of the language of sub-section (2) of section 125 it clearly follows that in normal circumstances the maintenance must be granted from the date of the order. IN only extra-ordinary circumstances it may also be ordered to be paid from the date of application for maintenance. It is thus clear that there must be a discussion of such circumstances which warrant the court to allow it from the date of application. No other inference is permissible from the language of sub-section (2). One such extra ordinary circumstances may dilatory tactics adhered to by the husband in the disposal of the proceeding. The other one may untold cruelty practised against his wife. The learned Magistrate date of the application. No where in judgement before delivering the operative portion he had shown any such inclination. As a matter of fact the court has taken the husband by surprise by making such a direction for the first time in the operative portion of the judgement. I am, under the circumstances, inclined to accept this contention and modify the order and make it payable from the date of order. The maintenance allowance shall be payable from the date of the order.

By the Court

1. Heard learned counsel for the applicant and learned A.G.A. Sri Anoop Ghosh and have perused bot the orders also.

2. The order of the learned Judicial Magistrate granting maintenance of Rs. 500/- to the respondent from the date of the application has been modified by the learned IX Additional Sessions Judge, Bulandshahr, only to extent of reducing the amount from Rs. 500/- to Rs. 400/-.

3. On examination of both the judgements, I do not find any serious infirmity in them nor any such infirmity was pointed out on behalf of the applicant. It is only urged that maintenance amount should be fixed from the date of the order as the law normally requires. If the court intends to grant maintenance from the date of application court must record its reasons for doing so. The contention has some force. Sub-section (2) of Section 125, Cr.P.C. spells as under :

"(2) Such allowance shall be payable from the date of the order, or, if so ordered from the date of the application for maintenance."

4. From an examination of the language of sub-section (2) of Section 125 it clearly follows that in normal circumstances the maintenance must be granted from the date of the order. In only extra-ordinary circumstances it may also be ordered to be paid from the date of the application for maintenance. It is thus clear that there must be a discussion of such circumstances which warrant the court to allow it from the date of application. No other inference is permissible from the language of sub-section(2). One such extraordinary circumstances may be dilatory tactics adhered to by the husband in the disposal of the proceeding. The other one may be untold cruelty practised against his wife. No extensive ground can be formulated justify. The learned Magistrate has not given any reason for allowing maintenance from the date of the application. No where in judgement before delivering the operative portion he had shown any such inclination. As a matter of fact the court has taken the husband by surprise by making such direction for the first time in the operative portion of the judgement. I am under the circumstances, inclined to accept this contention and modify the order and make it payable from the date of order. The maintenance allowance shall be payable from the date of the order.

Accordingly this application is partly allowed.

Partly Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 02.01.2001

BEFORE
THE HON'BLE SHITLA PD. SRIVASTAVA

Civil Misc. Writ Petition No. 40619 of 2000

Kunj Behari ...Petitioner
Versus
Board of Revenue, U.P. Lucknow and others ...Respondents.

Counsel for the Petitioner:
Shri Brij Bhushan Paul

Counsel for the Respondents:
Shri N. B. Tewari
Shri P.K. Resaria
Shri J.N. Mishra

Constitution of India, Articles 226 read with Act, S.34-Writ Petition against orders passed S. 34, Land Revenue Act – Maintainability.

Held-Para 11

I am of the view that in a number of decisions, this court has held that the proceedings under section 34 of the Act is fiscal in nature and does not decided the title or right of the parties, therefore, no writ lies. I also at firm the view taken in the decision reported in 1999 RD 633, therefore, I am of the view that the present writ petition is not maintainable, as such, it is dismissed.

Case Law discussed

1999RD633
1981RD18
1993[RD]206
1999RD416
AIR1957A11.205
W.P. NO. 1746 of 1984, dated 23-05-1990
1996(87) RD
W.P. NO. 1983 OF 1993 dated 05-04-1983
1972ALJ769
1974RD241
AIR1975All.125
AIR1962SC1044
JT1998(7)243
1990 RD 193
C.M.W No. 3 Of 1970, DECIDED ON 23-07-1971
w.p. No. 1459 of 1968, decided on 16-04-69
1969 R.D.34.4
1962 RD 172
AIR 1970SC1093
AIR1986SC500
1963 RD 67
(1981) ISCC 405
JJ1998(4)SC362
1970RD465
1980RD148
1969RD312
1991RD364
1993 RD 414

By the Court

1. This writ petition has been filed by the petitioner for quashing the order dated 23-08-2000 passed by respondent no. 1, which has been filed as Annexure-12 to the present writ petition and further prayer has been made to issue a direction that alleged claim of respondent nos. 5 and 6 in respect of property in question based on mortgage deed dated 02-02-1974 is not maintainable being barred by Section 49 of the U.P. Consolidation of Holdings Act. The other prayer has been made for issue of ad interim Mandamus staying the operation of the impugned order of the respondent no. 1 dated 23-08-2000 including dispossession of the petitioner from the property in question.

2. Sri N.B. Tewari, learned counsel for the respondent has raised a preliminary objection that the presence writ petition is not maintainable as it has arisen out of the proceedings under Section 34 of the Land Revenue Act. His submission is that this Court has taken a view in a case reported in **1999 RD 633 (Smt. Rani Devi Vs. Board of Revenue)** that the writ petition against order passed in the proceedings arising out of mutation case in not maintainable. He has further submitted that mutation proceedings is summary in nature and it does not decide the right of the parties, therefore, that judgement and order passed in the mutation will not bound the parties nor the regular court is bound by the said order and can take it own decision, therefore, the writ petition under Article 226 of the Constitution of India in not maintainable. For that purpose he has placed reliance on an number of decisions.

3. The first decision cited by him for this purpose is reported in **1981 RD 18 (Lekhraj and another vs. Board of Revenue)** delivered in writ petition No. 4785 of 1979 dated 04-08-1980 where this court has upheld the preliminary objection raised on behalf of the Opposite Party and dismissed the writ petition on the ground of the existence of an equally

efficacious alternative remedy by way of filing a regular suit to establish title. The second decision relied upon by Sri Tewari is a decision reported in **1993 RD 206 (State of U.P. through the Collector, Agra vs. Board of Revenue at Lucknow and others) delivered** in Writ Petition NO. 30386 of 1991 where this Court has held that under Section 34 of the Act the right of parties are not decided rather mutation proceedings are fiscal in nature and remedy before competent court is by filing a regular suit or initiating some other proceedings. Third decision relied upon by Shri Tewari is reported in **1999 RD 416 (Narain Singh and another Vs. Additional Commissioner, Meerut and another)** given in the Writ Petition No. 10128 of 1999, where this court has held that Section 34 proceedings is summary in nature and right and title of the parties are not decided and orders passed are not binding upon the courts in regular suits or proceedings, therefore the writ petition is not maintainable. Fourth decision relied upon by Shri Tewari is reported in **AIR 1957, Alld. 205 (Jaipal Vs. Board of Revenue),** where the Division Bench of this Court has held that Section 3 of the Land Revenue Act expressly reserve the right of the party to establish his right and title in a regular suit, therefore the writ petition against the proceedings under Section 34 of the Land Revenue Act is not maintainable. Sri Tewari has also placed reliance on a case reported in 1993 RD 206 wherein this Court has held that reference proceedings in mutation cases are only to facilitate payment of Revenue rights of the parties are not decided. It is fiscal in nature and the writ petition is not maintainable.

4. Sri N.B. Tewari has placed reliance on a Division Bench decision of this Court delivered in **Writ Petition No. 1746 of 1984 (Ram Bharsoe Lal Vs. State of U.P. & Others)** dated 23-05-1990 where the Division Bench of this Court held that the proceedings under Section 34 of the Land Revenue Act do not decided the title of the parties and the proceedings are just fiscal in nature and high Court need not interfere under Article 226 of the Constitution of India.

5. Sri P.K.Besaria, learned Standing Counsel has also supported Sri Tewari and has submitted that order under Sections34, 39 and 40 of the Land Revenue Act are passed merely on the basis of possession and as such it does not affect the rights of any party, therefore, the writ petition is not maintainable. He has placed reliance on a case reported in **1996(87) R.D. Chandra Pal Singh Vs. Board of Revenue** delivered in Civil Misc. Petition No. 6842 of 1996.

6. Sri B.B. Paul learned counsel appearing for the petitioner in reply has submitted that if there had been litigation between the parties in Civil Court and consolidation court and final orders have been passed in those proceedings then the revenue court has no jurisdiction to over look those orders in the proceedings under Section 34 or in any other summary proceedings and they must decide the proceedings on the basis of earlier judgements of the competent court and if they do not do so, the order passed by the mutation court are without jurisdiction and the writ petition is maintainable. His submission is that even if in ordinary circumstances, the writ petition is not maintainable but in the special circumstances, the writ petition under Article-26 of the Constitution of India is maintainable against the orders passed in

the proceedings under Section 34 of the Land Revenue Act. For that purpose he has placed reliance on a judgement delivered by this court on 05-04-1983 in **Civil Misc. Writ Petition No. 1983 of 1993 (Vijay Prakash Vs. Board of Revenue).** The relevant portion of the said judgement is quoted below :-

"Having heard learned counsel for the petitioner and gone through the impugned order, it appears that it is a fit case in which notices be issued and the matter be heard finally 1956 ALJ 807(Supra) does not say that in no circumstances a writ petition in the matter of correction of mutation of the names is maintainable.

The observations are only to the limited extent and in appropriate case, where proper remedy is available, a regular suit can be filed and in such circumstances, this Court should refrain itself from excising its extra ordinary jurisdiction under Article 226 of the Constitution. But, when there is a class of cases, where expunging the name of a person without a notice to him may cause irreparable injury this Court may always exercise the power under Article 226 of the Constitution."

7. Sri Paul further submitted that the order without jurisdiction can be challenged under writ jurisdiction. He has further submitted that under U.P. Consolidation of Holdings Act when the right has been decided earlier then no one can start fresh proceedings in respect of the same property and fresh proceedings are barred under Section 49 of the U.P. Consolidation of Holdings Act. In this connection he has placed reliance on a decision reported in **1972 ALJ 769 (Rakesh Kumar Minor Vs. Board of Revenue).**

8. He has also placed reliance on a decision reported in 1**974 RD 241 (Ram Sanehi Lal Vs. Board of Revenue)**. In this case reliance was placed on Rakesh Kumar case (Supra) and AIR 1975 **Alld. 125 (Rudra Pratap and another vs. Board of Revenue)** and submitted that the High Court should interfere where they restricted to question of possession and also decide the question of title. He has further placed reliance **AIR 1962 SC 1044 (Calcutta Gas Company (Proprietary) Ltd. Vs. State of West Bengal and others).** His submissions are that as the petitioner is aggrieved by the order passed in Section 34 proceedings and his legal right has been prejudiced, he can file writ petition under Article 226 of the Constitution of India .

9. He has further placed reliance on a decision reported in **JT.1998 (7) 243 (Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others)** wherein it has been held that power to issue prerogative writs under Article 226 of Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by High Court not only for issuing writs in the nature of Quo warranto and Certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose". Sri Paul has also submitted that in view of the provisions laid down in the Revenue Court Manual in the proceedings under Section 34, only question of possession should be decided in summary manner and title should not be decided, therefore, if the title has been decided, the writ petition is maintainable.

In this connection, he has also cited a case reported in **1990 RD 193 Smt. Dulari Devi vs. Janardan Singh and others)** which deals with the provisions of Section 49 of the U.P. Consolidation of Holdings Act. He has also placed reliance on an unreported case delivered in **Civil Misc. Writ Petition No. 3 of 1970 (Yadram vs. Board of Revenue)** on 23-07-1971 where it was held that for the purpose if an objection is filed even under Section 12 of U.P. Consolidation of Holdings Act regarding title, it has to be determined. His submissions are that the title had already been determined in an earlier consolation proceedings, therefore, any proceeding under Section 34 of the Land Revenue Act, no adverse finding should have been given contrary to the findings given in consolidation proceedings. He has also placed reliance on another unreported case decided on 16-04-1969 in **Writ Petition No. 1459 of 1968 (Mangal Singh vs. Board of Revenue)** on the point that Section 12 and 49 of the U.P. Consolidation of Holdings Act. He has further placed reliance on a decision reported in **1969 RD 344 (Raghu Nath vs. Ram Khelawan)** to the effect that if the court has no jurisdiction to entertain the matter then decision given by him is not same as decision by the court competent to decide the question of Law and further that the proceedings taken finally in the court without jurisdiction can be challenged under Article 256 of the Constitution of India. Sri Paul further placed reliance on a decision reported in **1962 RD 172 (Kushar vs. Ahmad Khan)** that if the entries have been made in the Revenue record as a result of consolidation proceedings, then the jurisdiction of civil as well as revenue courts to question their correctness is barred. He has submitted that after the consolidation judgement, the proceedings under Section 34 of the Land Revenue Act should not have been entertained. The word entertain, according to him, has been interpreted by the Supreme Court in **1970 Supreme Court 1093 (Lala Ram vs. Hari Ram)** wherein it has been held that entertain means file or received by the court. His submission is that the proceedings should not have been entertained. He has further placed reliance on **AIR 1986 SC 500 Malkhan Singh vs. SOHAN Singh and others)** on the point of bar of Section 49 of the U.P. Consolidation of Holdings Act. His submission is that it is true that the High Court has no jurisdiction under Article 226 of the Constitution of India but while deciding the appeal, the Government has not given opportunity to make the representation to the parties, then it will amount non compliance of the rules of natural justice and the High Court may ask for rehearing by the Government. For that purpose he has placed reliance on 1981 (I) SCC 405 **(P.Kasilingam vs. P.S.G. College of Technology)** and **JT. 1998(4) Supreme Court 362 (State of Haryana and others vs. Ram Atri and others)** which deal with the practice and procedure under Article 136 of the Constitution of India .

10. Sri N.B. Tewari, learned counsel for the respondent in reply to the arguments of Sri B.B. Paul, learned counsel for the petitioner submitted that the writ petition is not maintainable. This Court will not see what was decision of the consolidation authorities and what was the decision of the revenue court under Section 3 of the Land Revenue Act. His submission is that this point can be seen only when the writ petition is entertained and decided on merits. On the

bar of Section 49 of the U.P. Consolidation of Holdings Act he has submitted that if after lapse of five years of the order passed by the consolidation authorities, a cause of action arose to any party he an choose forum through which he is to get relief. If the relief is not under Section 34 of the Act, then Section 49 will not come into play and much proceedings even under the U.P. Consolidation of Holdings Act are subject to the final decision by the regular suit. For that purpose he has placed reliance on **1970 RD 465 (Bala Din vs. Smt. Baura).** He has further submitted that the proceedings under Section 34 does not confer any right or title to the parties, therefore the writ is not maintainable. For that purpose he has cited decisions reported in **1980 RD 148 (Majid and others vs. Munafit and others)** and **1969 RD 312 (Dabbali alias Soney Lal Vs. Ram Sewak etc.)** Regarding bar under Section 49 of the Act, he has placed reliance on the decisions **1993 RD 414 (Om Prakash and others vs. Jai Prakash)** and **1991 RD 364 (Rajeshwar and another vs. The Board of Revenue).** His submission is that the court may not see the merits of the case when the writ petition in not maintainable.

11. After hearing the learned counsel for the parties at length and seeing various decisions. I am of the view that in a number of decisions, this court has held that the proceedings under Section 34 of the Act is fiscal in nature and does not decide the title or right of the parties, therefore, no writ lies. I also affirm the view taken in the decision reported in 1999 RD 633, therefore, I am of the view that the present writ petition in not maintainable, as such, it is dismissed.

Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 04.01.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE BHAGWAN DIN, J.

First Appeal from Order No. 704 of 1993.

New India Assurance Company Ltd., Kanpur Opposite party/Appellant
Versus
Km. Vibha Devi and others...Claimants/ Respondents

Counsel for the Appellant :
Shri A, B. Saran
Sri Vineet Saran

Counsel for the Respondents:
Shri H.P. Mishra

Indian Limitation Act – Section 6 read with Motor Vehicle Act 1939 Section 166 (3) – as amended upto date – the claimants being son and daughters of the accused were minor on 07-05-77- claim petition filed on 12-04-90 when one of the claimant is still minor – claim petition shall be treated to be filed within time.

Held – Para II

At the time of death of the deceased on 07-05-1977 the claimants were minors. The claim petition was filed on 12-04-1990 and on the said date the elder daughter was 20 years and 9 months, his son was 19 years and 9 months and second son was still minor aged about 16 years. Section 6 of the Limitation Act provides that where a person is entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned a, minor or insane, or and idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would

otherwise have been allowed from the time specified therefore in the third column of the Schedule.

Case law discussed

AIR 1991 SC-2156

By the Court

1. This appeals is directed against the award of the Motor Accident Claims Tribunal, Kanpur Dehat dated 21.03.1993 in claim petition No. 114 of 1991 whereby a sum of Rs. 1,75,000/- has been awarded to the claimant-respondents.

2. The claim petition was filed by the claimant respondents on 12.04.1990 with the allegations that their father Brij Bhushan, who was going on a cycle with his eldest son Arun Kumar towards his village Pailawar, while reached near culvert near Rajpur Roadways Bus Stop, the truck No. UTW 9228 dashed against him with the result he received severe injuries within half an hour of the accident leaving behind him one unmarried daughter and two minor sons i.e. the claimant-respondents. Rajendra Singh was the driver and he was driving the truck rashly and negligently. The wife of the deceased (mother of the claimant-respondents) had expired. The claimant-respondents were minors at the time of the accident. The deceased was aged about 48 years at the time of his death and was earning Rs. 1000/- per month from his hotel business. They claimed a sum of Rs. 5,28,000/- as compensation.

3. The driver of the truck filed written-statement and he stated that he was not driving the truck in question on the relevant date. The owner of the truck also filed written-statement and denied that the accident had taken place from the vehicle in question. The appellant also filed written-statement and took the same plea as were taken by the owner of the truck. It further took the plea that the claim petition was barred by limitation. The tribunal recorded a finding that the accident had taken place as alleged by the claimant-respondents due to which Brij Bhushan expired and on appreciation of evidence, held that the claimant-respondents were entitled to a sum of Rs. 1,75,000/- as compensation. This order has been challenged in the present appeal.

4. We have heard Sri A.B. Saran, learned Senior Advocate for the appellant and Sri H.P. Misra, learned counsel for the contesting respondents.

5. Learned counsel for the appellant vehemently contended that the claim petition was barred by limitation and therefore, the Tribunal had no jurisdiction to entertain the petition. Admittedly, the claimant-respondents had filed an application to condone the delay in filing the claim petition. The Tribunal condoned the delay.

6. Learned counsel for the appellant contended that the Tribunal had no power to condone the delay in filing the claim petition. He has referred to the decision in Vinod Gurudas Raikar Vs. National Insurance Co. Ltd. And another AIR 1991 SC-2156 wherein the Supreme Court has held that if the claim petition is filed after repeal of the old Act, the Tribunal has no power to condone the delay of more than six months.

7. It is necessary to refer the legislative changes under the provisions of the Motor Vehicles Act. At the time of the death of the deceased in the year 1977, Motor Vehicles Act, 1939 was

applicable. The claim petition should have been filed under section 110-A of the said Act Sub-section (3) of Section 110-A of the Act provide that :-

"no application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident:

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

The Tribunal had jurisdiction to condone the delay and there was no limitation as to up to what period the delay could be condoned.

8. The Motor Vehicles Act, 1939 was repeated and the Motor Vehicles Act, 1988 came into force w.e.f. 01.07.1989. The new Act provided that a period of limitation for filing the clam petition under sub-section (3) of Section 166. The said sub-section provided that :

"no application for such compensation shall be entertained unless it is made within six months of the occurrence of the accident.

Provided that the Claims Tribunal may entertain the application after the expiry of the said period of six months if it is satisfied that the applicant was prevented by sufficient cause from making the application in time."

The power of the Tribunal to condone the delay under the aforesaid provision was limited for a period of six months.

9. Sub-section (3) of Section 166 of the Motor Vehicles Act, 1988 has been omitted by Section 53 of the Motor Vehicles (Amendment) Act 1994. The effect of the Amending Act is that there is no limitation for filing petition before the Tribunal in respect of any claim. The matter was considered by the Supreme Court in Dhannalal Vs. D.P. Vijayvargiya and other AIR 1996 SC 2155 and it was observed "the parliament realised the grave injustice and injury which was being caused to the heirs and legal representatives of the victims who died in accidents by rejecting their claim petitions only on ground of limitation. It is a matter of common knowledge that majority of the claimants for such compensation are ignorant about the period during which such claims should be preferred. After the death due to the accident, of the bread earner of the family, in many cases such claimants are virtually on the streets. Even in cases where the victims escape death some of such victims are hospitalised for months if not for years." It was held that the said deletion shall be deemed as retrospective and made the followings observations :-

"in this background now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub-section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deletion of sub section (3) of Section 166, is not extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before

14.11.1994 when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14.11.1994 in respect of such accident ? Whether a claim petition filed after 14.11.1994 can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section(3) of Section 166 was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14.11.1994? According to us, the answer should be in negative."

10. In the present case the Tribunal had given award on 31.03.1993. The appellant filed an appeal against this order and it will be taken as continuation of the same proceeding. The claimant-respondents are entitled to the benefit of the said provision.

11. Secondly, at the time of the death of the deceased on 07.05.1977 the claimants were minors. The claim petition was filed in 12.04.1990 and on the said date the elder daughter was 20 years and 9 months, his son was 19 years and 9 months and second son was still minor aged about 16 years. Section 6 of the Limitation Act provides that where a person is entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned a, minor or instance, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefore in the third column of the Schedule. As the claimants were minors at the time of the death of the deceased, they could have filed the claim petition on attaining the age of majority. As stated above, the claimants were minors and after attaining the age of majority, they had filed claim petition, which shall be treated to have been filed within time.

12. Thirdly, the appellant as Insurance Company could raised such objections as permissible under Section 149 of the Motor Vehicles Act, 1988. Section 149 does not permit the Insurance Company to raise any objection in respect of the limitation. The appellant has not shown that it had taken permission of the Tribunal under section 170 of the Act to contest the claim petition in respect of its merit including the question of limitation. The appellant, in these circumstances, is not entitled to contest the claim petition on the ground that it is barred by limitation.

13. The next submission of the learned counsel for the appellant is that the Tribunal has not recorded any specific finding that the accident was caused due to rash and negligent driving by the driver of the vehicle in question. The claim petition was filed with the allegations that Brij Bhushan. The claim petition was filed with his son Arun Kumar and when he reached near the culvert he was hit by truck No. UTW 928 which was being driven rashly and negligently by Rajendra Singh driver. He on receiving the injuries died within half hour of the accident. The appellant and the respondents denied that the accident was caused by the vehicle in question. The allegations of the appellant and other contesting respondents were found to be wrong. Arun Kumar, the son of the deceased appeared as P.W.I. He

narrated the full incident and his statement has been believed by the Tribunal. His statement clearly indicates that the accident was caused due to rash and negligent driving of the driver of the truck.

In view of the above, we do not find any merit in the appeal. It is, accordingly, dismissed with costs to the claimant-respondents.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 04.01.2001

BEFORE
THE HON'BLE S. K. SEN, C.J.
THE HON'BLE S. R. ALAM, J.

First Appeal from Order No. 55846 of 2000.

Naumi Ram ...Petitioner
Versus
Dy. Collector (UP Ziladhikari) Tahsil Sagri, District Azamgarh and others ...Respondents

Counsel for the Appellant:
Shri S.P. Gupta

Counsel for the Respondents:
Shri C.S. Singh

Natural Justice – Principles of – Applicability.

Held – Para 3.

We are of the view that it is obligatory on the respondent authorities to follow the procedure prescribed by the Law and there is no power conferred on the authority to stop the supply on the basis of mere allegations or complaint and to take such action without affording an opportunity to the writ petitioner. In the circumstances, the impugned order dated 13th November'2000 is quashed. The supply shall be restored to the writ petitioner forthwith. We however observe that it shall be open to the respondent authorities to take appropriate action in accordance with Law.

By the Court

1. We have heard Sri S.P. Gupta, learned Advocate for the writ petitioner and Sri C.S. Singh learned Standing Counsel appearing for respondents no. 1 and 2.

2. On the basis of some complaint received by Up-Ziladhikari (Sub-Divisional Officer) tehsil Sagari, District Azamgarh, supply of the writ petitioner who claims to be a fair price shop dealer has been stopped by the Sub-Divisional Officer, respondent no. 1. The order has been issued by the said respondent to that effect on 13.11.2000. It does not appear that any inquiry is pending or any opportunity of hearings was given on the allegation made in the said complaint.

3. We are of the view that it is obligatory on the respondent authorities to follow the procedure prescribed by the law and there is no power conferred on the authority to stop the supply on the basis of more allegation or compliant and to take such action without affording an opportunity to the writ petitioner. In the circumstances, the impugned order dated 13th November'2000 is quashed. The supply shall be restored to the writ petitioner forthwith. We however observe that it shall be open to the respondent authorities to take appropriate action in accordance with law.

The writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 21.12.2000

BEFORE
THE HON'BLE S. R. SINGH, J.
THE HON'BLE D. R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 54599 of 2000.

Rajendra Prasad ...Petitioner
Versus
Union of India, through General Manager and others ...Respondents

Counsel for the Appellant:
Shri M. D. Mishra
Shri Dileep Mishra

Counsel for the Respondents:
Shri A. K. Rai

Administrative Tribunal Act 1985 Section 28 (2) – as amended by Act No. 19 of 1986 – Jurisdiction of Industrial Tribunal Labour Court or any authority constituted under the Industrial Dispute Act 1947 has power to adjudicate the matter regarding recruitment and such service matter as may be otherwise falling within the jurisdiction of C.A.T. – amended provision gives choice to the litigant workman either to approach before the CAT or before the labour court.
Held – Para 2
The amended provision gives a choice to the litigant workman either to approach the Central Administrative Tribunal or the Labour Court and in case the litigant has chosen the forum of the Central Administrative Tribunal, it cannot said, that the application is not maintainable.

By the Court

1. Heard Sri M.D. Mishra, learned counsel for the petitioner and Sri A.K. Rai, learned counsel representing respondents and perused the order passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad thereby holding that the applicant under Section 19 of the Administrative Tribunals Act, 1985 (in short the 'Act') filed by the petitioner is not maintainable.

2. Admittedly, the petitioner comes within the purview of "Workman" within the meaning of the term as defined in Section 2(z) of the Industrial Disputes Act, 1947. The question is whether an application under section 19 of the Act is maintainable before the Central Administrative Tribunal and it has jurisdiction to entertain the application concerning services matters of the workman. Section 2 of the Administrative Tribunal Act, 1985 enumerates the matter is respect of which the provisions of the Administrative Tribunal Act, 1985 will have no application. Clause (b) of Section 2, as it stood before its omission by Act No. 19 of 1986 with effect from 01.11.85, reads thus "any person governed by the provisions of the Industrial Disputes Act, 1947 (14 of 1947) in regard to such matters in respect of which he is so governed". After omission of Clause (b) from section 2 of the Act with effect from 01.11.85 the provision of the Act became applicable in relation to any matter is respect of which a workman is governed by the provisions of the Industrial disputes, 1947. The Section 28 of the Act was also amended by the self same Act 19 of 1986 where by jurisdiction of all Courts "except the Supreme Court; or any Industrial Tribunal, Labour Court or other Authority constituted under the Industrial Disputes Act, 1947 (14 of 1947) or any other corresponding law for the time being in force," has been ousted. As a result of the amendment in Section 28, it

has now become possible "for any Industrial Tribunal Labour Court or other Authority constituted under the Industrial Disputes Act, 1947" to exercise any jurisdiction power, authority in regard to recruitment or matters concerning such recruitment and such service matters as may be otherwise falling within the jurisdiction of the Central Administrative Tribunals Act, 1985 as they stand amended by Act 19 of 1986 leads to the conclusion that though the workman can approach the Industrial Tribunal, Labour Court or the authority constituted under the provision of the Industrial Tribunal Act,1947, it cannot be said that a petition under Section 19 of the Act is not maintainable before the Central Administrative Tribunal. The amended provision gives a choice to the litigant – workman either to approach the Central Administrative Tribunal or the Labour Court and in case the litigant has chosen the forum of the Central Administrative Tribunal, it cannot said, that the application is not maintainable. The view taken by the Central Administrative Tribunal that the application under Section 19 of the Administrative Tribunal Act, 1985 filed by the petitioner was not maintainable before it, cannot be sustained. The writ petition, in the circumstances, succeeds and is allowed. The impugned order of Tribunal is set aside. The matter is remitted to the Central Administrative Tribunal, Allahabad bench, Allahabad for taking decision on merit.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 10.01.2001

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No. 53031 of 2000.

Sri Pardeep Kumar Rastogi ...Petitioner
Versus
The XVI Additional District Judge, Meerut and others ...Respondents

Counsel for the Appellant:
Shri Rajesh Tandon
Shri Anurag Khanna

Counsel for the Respondents:
Shri Ashish Kumar Singh
Shri Ravi Kiran Jain
Sri Pushkar

Constitution of India, Article 226 read with U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 S.21(i)(a)-powers under where to be exercised.

Held – Para 9 and 10

It is not a case in which the learned Prescribed Authority or the appellate court has arrived at the conclusion based on wrong application of principles of law or has failed to take into consideration the relevant material which was germane for decision on the controversy in hand. The findings recorded by them cannot be said to be arbitrary or perverse.

I feel that suffice it to say that this Court cannot re appreciate or reappraise the findings of facts recorded by the two courts below that the a landlord bona fide requires for his personal occupation the tenanted shop and that the balance of hardship tilts in his favour.
Case Law discussed

1984(2) All R.C. 344
1976 UPRCC 376
1976 UPRCC 342
1977 UPRCC 230
1966(2) ARC 409
1997(1) ARC 627

By the Court

1. The dispute in this writ petition pertains to the release of Shop No. 85 (old premises numbers 286,288 and 289) situate in Subhash Bazar, Meerut City. The said shop was originally owned by one Jagdish Chandra Gera and was under the tenancy of late Dr. Jitendra Vir, who was running the business of sale of homeopathic medicines. After the death of the original tenant, his son Pradeep Kumar Rastogi, the present petitioner inherited the tenancy rights and is carrying on the business of sale of homeopathic medicines from the disputed shop. He is paying monthly rent at the rate of Rs.57.50P. Vivek Gupta respondent no. 3 had purchased the property, in question, from the previous owner Jagdish Chandra Gera in the year 1988.

2. He filed an application for release of the tenanted accommodation under Section 21(1)(a) of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (Act No. XIII of 1972) (Hereinafter referred to as 'the Act'). It was registered as P.A. case no.23 of 1994. The case of the landlord respondent no. 3 was that he is in occupation of a tenanted shop situate in a closed lane of Khair Nagar Bazar, Meerut since the year 1989 at an exorbitant monthly rent of Rs.1300 and that the provisions of the Act also do not apply to the said shop. According to the landlord, he was under the threat for vacating the tenanted shop in Khair Nagar Bazar and therefore has a bonafide and genuine need to occupy the tenanted shop in occupation of the petitioner Pradeep Kumar Rastogi. It was also averred that the tenanted shop in dispute was eminently suited for carrying out the business of ready-made garments. The petitioner resisted the various allegations of the landlord – respondent no. 3 and contested the petition on a variety of grounds. The Prescribed Authority allowed the release petition of the landlord-respondent no. 3 by order dated 18.08.2000 and the present petitioner was directed to hand over the vacant possession of the tenanted shop to the landlord-respondent no. 3 within the specified period subject to payment of compensation equivalent to two years rent. The petitioner preferred a rent appeal no. 243 of 2000 under section 22 of the Act. The appeal was also dismissed on 25.10.2000 by XVIth Additional District Judge, Meerut-respondent no. 1. It is in these circumstances that the petitioner has come forward before this Court by filing the present petition under Article 226 of the Constitution of India to challenge the order of release passed by the Prescribed Authority and as confirmed in appeal.

3. At the time of admission of the present petition, Sri Ravi Kiran Jain, learned Senior Advocate, assisted by Sri Pushkar put in appearance on behalf of the landlord-respondent no. 3. On behalf of the petitioner, Sri Rajesh Tandon, learned Senior Advocate assisted by Sri Anurag Khanna had appeared. Learned counsel for both the parties agreed that the petition be finally disposed of on merits on the basis of material available on record. I have, therefore, heard this petition, on merits, at the admission stage in view of the agreement between the

learned counsel for the parties and proceed to decide the same on merits.

4. It is an indubitable fact that the petitioner is the tenant of the disputed shop and the relationship of landlord and tenant subsists between the petitioner and the respondent no. 3. The petitioner has acknowledged the respondent no. 3 as the owner-landlord by paying monthly rent. The application for release of the said shop under Section 21(1)(a) of the Act was moved by the landlord as he needed the disputed shop to occupy himself to carry on his business as he had been carrying on the business in rented shop in Khair Nagar market which according to him was highly inconvenient for the business of readymade garments as the lay customer hesitated to approach the shop on account of its location. According to him, he was paying exorbitant rent of Rs.1300 per month and did not have the required protection to continue in the rented shop as the provisions of the Act are not applicable to it. On the other hand, the petitioner took the plea that he is having a joint business with his father and brothers and that there are other Joint Hindu Family properties in which the petitioner is joint owner. In any case, according to the petitioner, the first floor accommodation is available to the landlord in Subhash Nagar itself which can usefully utilize for running the business which he is carrying on from the rented shop in Khair Nagar market. Sri Rajesh Tandon, learned counsel for the petitioner further pointed out that the petitioner has earned good will in the sale of homeopathic medicines on account of his long standing possession over the disputed shop for a number of decades and in case the petitioner is evicted pursuant to the release order, his business is likely to be completely ruined. It was urged that the Prescribed Authority as well as the appellate court have not appraised the various pleas taken by the petitioner in their true perspective and consequently they were misdirected in arriving at the conclusions which they have recorded. Sri Tandon also took me through the evidence of the parties and the findings recorded by the two courts below. Sri Ravi Kiran Jain, maintained that in view of the concurrent findings of fact recorded by the two authorities below this court has very limited jurisdiction and the writ jurisdiction under Article 226 of the Constitution of India cannot be invoked to upset the said findings.

5. I have given thoughtful consideration to the respective submissions made by the learned counsel for the parties. The order passed by the Prescribed Authority is quite elaborate and well reasoned. All the pleas which have been canvassed by Sri Rajesh Tandon before this court have been considered by him. The judgement of the appellate court is even more thorough. It gives a complete answer to all the points which have been canvassed by Sri Tandon before this court. None of the findings recorded by the two courts below can be said to be perverse or suffering from material irregularity. As a matter of fact, a reading of the two judgements would indicate that the Prescribe Authority as well as the appellate court have rightly rejected the various contentions and the pleas raised on behalf of the petitioner.

6. The question of bonafide need as well as that of the hardship has been held to be a finding of fact which cannot be interfered with by invoking the extraordinary jurisdiction under Article

226 of the Constitution of India . The findings of the Prescribed Authority as well as the appellate authority that the tenanted shop was bonafide required by the landlord-respondent no. 3 for his own use and occupation is unquestionably a finding of fact and it is not competent for this court to interfere with the said finding by reappraising the evidence. In Kamla Sarin Vs. Shyam Lal and others – 1984(2) All. R.C.-344, this court following the various decisions of the Hon'ble Supreme Court observed as follows :-

"Their finding that the need of the petitioner was not bonafied being that of fact cannot be set aside under Article 226 of the Constitution. In Munni Lal and another Vs. Prescribed Authority and another – A.I.R. 1978 S.C.-29 the Supreme Court held while deciding an appeal preferred from the judgement of this court that the finding on the ground of bonafied need is one of fact. In Nattu Lal Vs. Radhey – AIR 1974 SC-1696, a similar view has been taken. The court under Article 226 of the Constitution has no power to reappraise evidence and to record its own finding. In Babhutmal Raichand Vs. Laxmibai – AIR 1975 SC-1296 the Supreme Court held that the High Court has no jurisdiction under Article 227 to reconsider the evidence. The law laid down in this case applied to the present petition under Article 226 of the Constitution as well (see Smt. Labhkumar Bhagwani Shaha Vs. Janardan Mahadeo Kalan – AIR 1983 SC-535)"

7. In Ram Rakesh Pal and others Vs. Additional District Judge and others – 1976 U.P.R.C.C.-376, it was ruled that the question of bona fide requirement of the premises as well as that of comparative need are questions of fact and therefore High Court has no power to correct the question of fact even if erroneously decided. A reference may also be made to the decision of this court in the case of Jagan Prasad Vs. District Judge and others – 1976 U.P.R.C.C.-342 and Laxmi Narain Vs. IInd Additional District Judge and others –1977 U.P.R.C.C.-230. In the case of Smt. Nirmala Tandon Vs. Xth Additional District Judge, Kanpur Nagar – 1966 (2) ARC-409 this court held that the writ jurisdiction of this court under Articles 226 and 227 of the Constitution of India is of supervisory nature only and it does not ____ a court of appeal when called upon to judge the finding of the competent authorities, namely, the bona fide need of the landlord and comparative hardship of the parties. The court would not embark upon reappraisal of the evidence or substitute its own findings of fact in place of the findings reached by the fact finding authorities. It is clearly outside the Court and ambit of the judicial review when this court exercise its powers under Article 226 of the Constitution of India. However, a finding of fact may be interfered with when it is based on account of wrong application of principle of law relevant thereto or relevant material has not been taken into consideration or a finding is otherwise arbitrary or perverse.

8. The matter was further considered by the apex court in the case Kamleshwar Prasad Vs. Pradumanju Agarwal – 1997(1) ARC-627 in which it was held that under the Act the order of the appellate authority is final and the said order is a decree of the civil court and a decree of a competent court having become final cannot be interfered with by the High Court is exercise of its power of superintendence under Articles 226 and

227 of the Constitution of India by taking into account may subsequent event which might have happened. That apart, it was further observed that the fact that the landlord needed the premises in question for starting a business which fact has been found by the appellate authority, in the eye of law, must be that on the day of application for eviction, which is the crucial day, the tenant incurred the liability of being evicted from the premises. The finality of the decision cannot be disbursed on account of any subsequent events on a petition under Article 226 of the Constitution of India.

9. It is not a case in which the learned Prescribed Authority or the appellate court has arrived at the conclusion based on wrong application of principles of law or has failed to take into consideration the relevant material which was germane for decision on the controversy in hand. The findings recorded by them cannot be said to be arbitrary or perverse.

10. Without burdening this judgement with a plethora of other decisions on the point, I feel that suffice it to say that this court cannot reapprociate or reappraise the findings of facts recorded by the two courts below that the landlord bona fide requires for his personal occupation the tenanted shop and the balance of hardship tilts in his favour. It is an innate desire of every owner-landlord to occupy his own shop. In the instant case the need of the landlord-respondent no. 3 cannot be said to be unreal, fraudulent or colourable. The release petition is not actuated by any avarice. When once the need of the landlord is established as bona fide and genuine, the tenant has to make a way. There is ample evidence on record to indicate that the petitioner did have may alternatives to shift but he did not make any attempts in spite of the fact that the question of release of the tenanted shop in favour of the landlord continued to attract the attention of the authorities below for a long period of six years.

11. All told, the petitioner has no case to resist the bona fide need of the landlord to occupy his own shop which is under the tenancy of the petitioner. The release application has been rightly allowed. The writ petition, therefore, fails as being devoid of merits and substance and is accordingly dismissed without any order as to costs.

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.1.2001

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No. 27291 of 1991

Shakuntala Devi ...Petitioner
Versus
Executive Engineer and another ...Respondents

Counsel for the Petitioner:
Sri V.K.Jaiswal
Sri H.N. Singh
Sri P.C. Srivastava
Sri A.L. Naqvi

Counsel for the Respondents:
Sri Arvind Kumar
S.C.

U.P. Recruitment of Dependent of Government Servant (Dying in Harness) Rules 1974- One Shakuntala Devi along with her daughter put a claim relating to gratuity pension etc. being legally

wedded wife of the deceased-another wife Smt. Bhagmati Devi contested the claim alleging herself to be the wife of the deceased- on strength of nomination made by the deceased- held nomination for limited purpose, and when the marriage of Smt. Bhagmati Devi took place, the earlier wife was not divorced – Petitioner held entitled to collect the entire dues apart from to claim appointment on compassionate ground if the Financial condition so necessitated.

By the Court

1. Two rival claimants of the retiral and other service benefits consequent upon the death of their alleged husband late Nand Kishore have filed these petitions under Article 226 of the Constitution of India with the prayer that a direction be issued to the Executive Engineer, Electricity Transmission Sub Division, George Town, Allahabad-respondent no. 1 to release the entire amount in their favour and for offering an appointment under the U,.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules 1974 (hereinafter referred to as ' the Rules').

2. Put briefly, the facts governing the two petitions are that Nand Kishore was employed as a class IV employee in the Electricity Board and at the relevant time, was working in the office of the Executive Engineer, Electricity Sub Division, Electricity Transmission First, 57, George Town, Allahabad. He met with an accidental death due to electric shock on 12th May, 1990. Consequent upon his death, certain payments under the heads of General Provident Fund, Gratuity, Pension and other benefits as admissible under law, became due. Smt. Shakuntala Devi, who has filed Civil Misc. Writ No. 27291 of 1991 admittedly was the legally wedded wife of the deceased employee. Out of the wedlock, Km. Sangeeta, a female child took birth. Smt. Shakuntala Devi applied for the dues as admissible under the law. The departmental authorities required her to produce a certificate of succession, a copy of post mortem certificate and a certificate about the date of death of the deceased. Smt. Shakuntala Devi furnished all the above documents. A succession certificate which was issued in her favour in succession case no. 271 of 1991 on 4.12.1991 by Civil Judge (Junior Division) was also obtained by her. An enquiry was made by the revenue authorities of the Tahsil and it was reported that Smt. Shakuntala and her daughter Km. Sangeeta were the only legal heirs left by the deceased employee-Nand Kishore. Before the payment could be released in favour of Smt. Shakuntala Devi, Smt. Bhawan Mati Devi, petitioner of Civil Misc. Writ no. 3058 of 1993 appeared at the scene and claiming herself to be the widow of the deceased employee required the department to release the benefits in her favour. The department obviously was in a quandary and when neither of the women was getting the payments released in her favour, they filed the present writ petitions for direction by this court to the departmental authorities to release the payment in their respective favour.

3. Counter and rejoinder affidavits have been exchanged.

4. Both these writ petitions came up for hearing on 11.2.2000 on which date, both the writ petitions were disposed of and a direction was issued to the respondents to release the payments in favour of Smt. Shakuntala Devi if she

produces a succession certificate. It was further directed that the question of appointment of Smt. Shakuntala Devi as dependant of late Nand Kishore may also be considered by them according to law. On the move of Smt. Bhawan Mati Devi, on whose petition none appeared at the time of hearing of the writ petitions, the order dated 11.2.2000 was recalled by order dated 7.4.2000 and it is in these circumstances that both these writ petitions have come up again for hearing by this Court.

5. Heard Sri H.N. Singh, learned counsel for the petitioner- Smt. Shakuntala Devi and Sri P.C. Srivastava assisted by Sri A.L. Naqvi on behalf of Smt. Bhawan Mati Devi and Sri Arvind Kumar appearing on behalf of the respondent no. 1- employer.

6. As said above, it is an indubitable fact that Smt. Shakuntala Devi was the legally wedded wife of late Nand Kishore . Smt. Bhawan Mati Devi claims herself to have married late Nand Kishore in the month of May, 1978 and in support of her marriage, she has filed a certificate of Pradhan of the village. She is also armed with an unquestionable nomination made by the deceased in her favour for payment under the ex-gratis compensation scheme. According to Smt. Bhawan Mati Devi, though Smt. Shakuntala Devi had married the deceased employee, she was divorced in the year 1985 by adopting Chuttan Chutta method prevalent in the Pal Biradari. According to her, it was a Talaq by Panchayat on account of the fact that the relations between Smt. Shakuntala Devi and her husband were highly strained. The case of Smt. Bhawan Mati Devi is that she being the subsisting widow of the deceased employee and having a nomination in her favour, is entitled to receive the amount payable under the various heads as a result of death of late Nand Kishore as well as to other benefits admissible under the law.

7. Except the bald assertion made by Smt. Bhawan Mati Devi, there is nothing on record in indicate that Smt. Shakuntala Devi was divorced by her husband . On the other hand, the stand taken by Smt. Shakuntala Devi is that in proceedings under Section 125 of the Code of Criminal Procedure, her husband had candidly admitted her to be his only wife and Km. Sangeeta as his daughter and had mentioned that he has not married any other woman. Sri H.N. Singh, learned counsel for Smt. Shakuntala Devi pointed out that in the absence of decree of divorce, late Nand Kishore being a Hindu made, could not have married Smt. Bhawan Mati Devi, another woman as under the law, marriage by a Hindu male with another woman during the subsistence of the other spouse is void. In support of his submission, Sri Singh placed reliance on the decision of the apex court in Bakulabai and another Vs. Gangaram and another- 1988 (25) A.C.C.-19 in which it was held that the marriage of a Hindu woman with a Hindu male with a living spouse performed after the coming into force of the Hindu Marriage Act, 1955 is null and void and the woman is not entitled to maintenance under Section 125 of the Code of Criminal Procedure. On the strength of this decision of the apex court, it was urged that Smt. Bhawan Mati Devi could not marry late Nand Kishore as Smt. Shakuntala Devi, the earlier legally wedded wife was surviving. Even if it be taken that divorce had taken place in the year 1985 in between late Nand Kishore

and Smt. Shakuntala Devi, Smt. Bhawan Mati Devi could have been married in the month of May 1978 with late Nand Kishore as at that time admittedly Smt. Shakuntala Devi had not been divorced. After the commencement of Hindu Marriage Act, 1955, a Hindu male cannot have two wives at the time. Therefore, there can be no escape from the finding that the assertions of Smt. Bhawan Mati Devi that she had married late Nand Kishore in the month of May, 1978 and that Smt. Shakuntala Devi was divorced in the year 1985 are incorrect. In any case, marriage of Smt. Bhawan Mati Devi in the year 1978 could not have taken place and if it has, in fact, taken place, it was ab initio void in law.

8. Now the question is whether Smt. Bhawan Mati Devi, on the strength of nomination made by the deceased in her favour for ex gratia compensation scheme is entitled to collect the entire amount which is payable to Smt. Shakuntala Devi.

9. Sri P.C. Srivastava referred to the General Provident Fund (Uttar Pradesh) Rules, 1985 to support his contention that a nomination made under Rule 5 is effective in favour of Smt. Bhawan Mati Devi and the definition of the term 'family' as mentioned in clause © of Rule 2 in the case of male subscriber (deceased) and the widow or widows and children of a deceased son of the subscriber. It was also stressed that the proviso that his wife has been judicially separated from him or has ceased under the customary law of the community to which she belongs to be entitled to maintenance, she shall henceforth be deemed to be no younger a member of the subscriber's family in matters to which these rules relate unless the subscriber's family in matters to which these rules relate unless the subscriber subsequently intimates in writing to the Account Officer that she shall continue to be so regarded. I have given thoughtful consideration to the matter and find that reference to the definition contained in Rule 2 is otiose. Rule 2 © does not permit that a Hindu male can have two wives at a time. A Mohammendan male can have more than one wife under the personal law. It is for this reason that the expression 'wives in sub-clause (I) to clause © will not be applicable in ;the instant case as late Nand Kishore had not proved before the department that Smt. Shakuntala Devi had been judicially separated and have ceased to be the member of his family. It is true that nomination with regard to ex gratia compensation scheme is in favour of Smt. Bhawan Mati Devi. Learned counsel for Smt. Bhawan Mati Devi placed reliance on a decision of Division Bench of this court in Aqueela Kamal Vs. Oriental Fire and General Insurance Co. Ltd. Lucknow and another- AIR 1995 Allahabad –299 to support his submission that the amount covered by the nomination has to be released in favour of the nominee. I have thoroughly scrutinized the aforesaid decision and find that it is not applicable to the facts of the present case for one simple reason that in that case there was no dispute between the rival claimants. In that case, it was held that the insurance company is bound to pay the amount of compensation to the nominee without requiring him to furnish a succession certificate. That was a case of personal accident policy which was covered by Section 38 and 39 of the Insurance Act. Reliance was also placed on the decision of Delhi High Court in Mrs. Uma Sehgal and another V. Dwarka Das Sehgal and

others- AIR 1982 Delhi –36 wherein it was held that a nominee is entitled to receive insurance money in his own right absolutely and that he is neither a trustee nor agent of legal heirs of assured. The aforesaid decision does not lay down the correct law as it has been overruled by the apex court in Smt. Sarbati Devi and another Vs. Smt. Usha Devi- AIR 1984 SC 346 in which it was observed that a mere nomination made under Section 39 does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorised to receive the amount on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them. In a recent decision of the apex court in G.L. Bhatia Vs. Union of India and another-2000 (1) E.S.C.-135 (SC) it was ruled that if a nomination is made contrary to the statutory provision, it would be inoperative. In that case, the husband of the deceased-employee claimed family pension while nomination was not in his favour. The forums below have taken the view agreeing with the authorities that since the nomination was not in favour of the husband and the husband was staying separate from the wife, the husband would not be entitled to family pension in question. This view cannot be sustained in view of the provisions contained in Rule 54 of the rules. It is too well settled that where rights of the parties are governed by statutory provision, the individual nomination contrary to the statute will not operate.

10. In view of the well settled legal position with regard to the nomination, Smt. Bhawan Mati Devi- petitioner is not entitled to collect amount for herself to the exclusion of Smt. Shakuntala Devi is a legally wedded wife of deceased Nand Kishore. She was never divorced. In proceedings under Section 125 Code of Criminal Procedure her husband had admitted her to be his wife and Km. Sangeeta, minor as his daughter. On the death of Nand Kishore, revenue authorities have reported that Smt. Shakuntala Devik and her daughter Km. Sangeeta were the only legal heirs of the deceased employee. A succession certificate in case no. 271 of 1991 had already been issued in favour of Smt. Shakuntala Devi though subsequently on the move of Smt. Bhawan Mati Devi its operation had been stayed. Smt. Bhawan Mati Devi could not marry late Nand Kishore in the month of May, 1978 as at that Smt. Shakuntala Devi, wife of late Nand Kishore was alive and no divorce between Nand Kishore and Smt. Shakuntala Devi had taken place. Smt. Bhawan Mati Devi cannot, therefore, be treated as the legally wedded wife of late Nand Kishore. The nomination in favour of Smt. Bhawan Mati Devi is for the limited purpose as indicated in the decision of the apex court in Smt. Sarbati Devi and another's case (supra).

11. In the conspectus of above discussions, Civil Misc. Writ no. 3058 of 1993 filed by Smt. Bhawan Mati Devi turns out to be devoid of any merit and substance and is accordingly dismissed. Civil Misc. Writ no. 27291 of 1991 filed by Smt. Shakuntala Devi is allowed and it is directed that the respondent-department shall release the pensionary benefits, amount of General Provident Fund,

gratuity, leave encashment, etc., in favour of Smt. Shakuntala Devi within a period of one month from the date of production of a certified copy of this judgement and order before respondent no. 1. It is further directed that the question of appointment on compassionate ground of Smt. Shakuntala Devi under the U.P. Recruitment of Dependents of Government Servant (Dying in Harness) Rules 1974 shall also be considered. It shall, however, be open to the respondent no. 1 to inquiries about the means and the financial condition of Smt. Shakuntala Devi and as to whether the appointment of Smt. Shakuntala Devi in necessitated so as to tide over the financial crisis on account of sudden death of the bread winner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD THE: 31.1.2001.

BEFORE
THE HON'BLE O.P. GARG J.

Civil Misc. Writ Petition No. 27555 of 2000

Hirdai Narain Misra ...Petitioner.
Versus
Raj Narain Shukla and another ...Respondents.

Counsel for the Petitioner:
Sri Rakesh Bahadur

Counsel for the Respondents:
Sri A.N. Sinha
Sri Chhotey Lal Kureel

U.P. Urban Buildings (Regulation of Letting, Rent5 and Eviction) Act, 1972, s. 12 (3)- Deemed vacancy.

Held- Para 11

In the conspectus of the above facts, there can be no escape from the conclusion that on account of the acquisition in a vacant state of Daboli house by the petitioner, a deemed vacancy under Section 12 (3) of the Act had occurred and consequently, the tenanted accommodation was amenable for being allotted or for being released in favour of the land lord. When once the order of vacancy had been passed after taking into consideration the stand taken by the petitioner on 29.5.2000, the subsequent application moved by the petitioner on 8.6.2000 which was the date fixed for consideration of the application for release in favour of the land lord was otiose. Ignoring the said application, the Rent Control, and Eviction Officer was empowered and legally justified to pass orders on the release application on date fixed. The order of vacancy dated 29.5.2000 and the subsequent order of release dated 8.6.2000 do not suffer from any infirmity. They had been passed according to law.

Case Law discussed.
1986 (1) ARC 116
1980 A11. CJ. 194
1987 (1) ARC 276
1989 (2) ARC 223
1995 (1) ARC 220
CA. No 15575 of 1996 decided on 23.4.1997

By the Court

1. In this petition the dispute relates to Premises No. 119/216 E (New No. 119/468) Om Nagar, Darshanpurwa, Kanpur Nagar (hereinafter referred to as the 'tenanted house') of which respondent no. 1 Ram Narain Shukla is the owner-land lord. The petitioner- Hirdai Narain Misra, it is an indubitable fact, has been the tenant of a portion of ground floor of the said house for the last more than four decades. It is also an admitted fact that the petitioner-tenant was allotted on lease house no. 14-L/2 Daboli, Kanpur Nagar

(hereinafter called as 'Daboli House') by the Kanpur Development Authority. The landlord moved an application on 23.4.1999 before the Rent Control and Eviction Officer/Additional City Magistrate-VI Kanpur Nagar for releasing the tenanted accommodation as a 'deemed vacancy' has arisen on account of acquisition of Daboli House within the municipal limits of Kanpur Nagar, in a vacant state by the tenant-petitioner. After obtaining the report of the Rent Control Inspector dated 14.,6.1999, a vacancy in respect of the tenanted accommodation was declared by order dated 29.5.2000, a copy of which is Annexure-5 to the petition. The application of land lord for release was fixed for hearing on 8.6.2000. On that date the petitioner moved an application for recalling the order of vacancy dated 29.5.2000, on which, it is alleged, notice was directed to be issued to the land lord for 4.7.2000. An order of release was passed in favourj of the land lord respondent no. 1 on 8.6.2000 itself and Form-C was issued for eviction of the petitioner. It is alleged that the petitioner moved an application dated 12.6.2000 to recall the order of vacancy and release but the application was not entertained.

2. This writ petition was filed in Summer Vacations and was taken up on 22.6.2000. Sri A.N. Shukla appeared on behalf of the land lord. :Parties were directed to exchange counter and rejoinder affidavits. It was further directed that the petitioner would not be dis-possessed till 31st August, 2000. This order has been extended from time to time.

3. Counter and Rejoinder affidavits have been exchanged.

4. Heard Sri Rakesh Bahadur learned counsel for the tenant petitioner as well as S/Sri A.N. Sinha and Chhotey Lal Kureel appearing on behalf of land lord at considerable length.

5. The moot point for consideration and determination in the present writ petition is whether on account of acquisition of Daboli House by the petitioner, a deemed vacancy under Section 12 (3) of U.P. Urban Buildings (Regularization of letting, Rent and Eviction) Act, 1972 (Act No. XIII of 1972) (hereinafter referred to as 'the Act') has arisen in view of the assertions made by the parties.

The condition for the applicability of sub-section (3) of Section 12 of the Act dealing with the deemed vacancy are-

(i) There is a residential building let out to the tenant;

(ii) The tenant or any member of his family-

(a) builds

(b) otherwise acquires in a vacant state, or

(c) gets vacated

a building which is –

(i) residential and

(ii) is situated in the same city, municipality, notified area or town area in which the building under tenancy is situated.

6. It is undisputed fact that the Kanpur Development Authority allotted Daboli House on lease in favour of the petitioner and his same came to be recorded in the Municipal Assessment Register for the years 1987-92 as owner of the said house with effect from 1st

October, 1990. The case of the petitioner is that though the said house was allotted in his favour in the year 1982, possession was not delivered to him thereon. It is further averred that a suit no. 1635 of 1994 was filed in respect of the said house by one R.N. Dwivedi who claimed himself to be in possession of the said house and later on handed over the possession to one Shiv Singh Rathore. The petitioner further claimed that on account of compelling circumstances due to paucity of funds, the petitioner sold the house in question in the year 1998j to one Anurag Sharma. The emphatic assertion of the petitioner is that the possession over the Daboli House was never delivered to or obtained by him and consequently the eventuality of deemed vacancy as contemplated under section 12 (3) of the Act did not arise and since there was no vacancy deemed or actual the tenanted house could not be released in favour of the land lord. On behalf of the land lord, it is maintained that the petitioner did acquire 'Daboli House and had obtained its possession and, therefore, Rent Control and Eviction Officer has rightly declared the vacancy and released the accommodation.

7. Sri Rakesh Bahadur, learned counsel for the petitioner counsel for the urged that the recall application which was moved by the petitioner on 8.6.2000 was directed to be put up on 4.7.2000 as would be evident from the copy of the order which is Annexure-7j to the petition. It was urged that when once the notice to other party had been issued for 4.7,.2000 on the application of recalled dated 8.6.2000, there appeared to be no earthly reason for passing the order of release on the same day. Be that as it may the question is whether on account j of the admitted position that the petitioner has acquired by purchase the Daboli house from the Kanpur Development Authority, a deemed vacancy has arisen or not. The purchase of Daboli House and its subsequent sale by the petitioner in favour of Anurag Sharma in the year 1998 is not in dispute. The only dispute is with regard to the fact whether the petitioner ever obtained the possession of the said house. The assertion on behalf of the petitioner is that the Daboli House which he acquired from the Kanpur Development Authority was also allotted to one R.N. Dwivedi who had filed the civil suit to protect his possession after acquisition of the Daboli House and, therefore, it cannot be said that he had acquired Daboli House in a vacant state.

8. From the material on record, it appears that the plea of the petitioner that one R.N. Dwivedi had intervened and asserted his possession over Daboli house and had, as a matter of fact, filed suit no. 1635 of 1994 an after thought. The fact remains that the petitioner did acquire Daboli house and got its possession in a vacant state. The suit, it appears, was the outcome of the manipulation made by the petitioner with a view to support his defense that Daboli house, though acquired, was not in a vacant state. This aspect of the matter came to be considered in Rajendra Singh and others Vs. District Judge, Kanpur and others- 1986 (1) ARC-116. In that case, the tenant who had purchased a new house in his name, tried to get over the effect of Section 12 (3) by obtaining a collusive decree in a suit filed by his brother in civil court against him, in which it was declared that tenant was Benami owner of the house purchased. In the context of these facts, it was held that the decree was

rightly held to be against the public policy behind Section 12 9(3) and, as such void. The Rent Control and Eviction Officer or the revisional authority were held to have been rightly noticed. In ;the instant case also, the petitioner appears to have raised the bogey of not getting possession over Daboli house obviously with a view to negate the effect of Section 12 9(3) of the Act. If the petitioner had not, in fact, come in possession over Daboli house, he could not have sold the same subsequently in the year 1998 in favour of one Anurag Sharma. There is nothing on record to indicate that R.N. Dwivedi who is alleged to have filed suit no. 1635j of 1994 was, in fact, in possession of Daboli house and after his eviction the house was sold to Anurage Sharma. A house which was already in possession of R.N. Dwivedi as claimed by the petitioner, could not have been purchased by Anurag Sharma from the petitioner.

9. It would be of no consequence that on the date on which the vacancy was declared the petitioner had ceased to own and occupy Daboli house. A deemed vacancy under the provisions of Section 12(3) of the Act arises the moment tenant obtains another premises. Subsequent changes are hardly relevant. In Sri Rajendra Prasad v. 9th Addl. District Judge, Kanpur and others- 1980 All.C.J.-194, it was held that the relevant date is the date when the vacancy occurred and not subsequent fact or subsequent user of the property. The matter also came to be discussed in another decision in Surendra Prakash Goel V. Ist Addl. District Judge, Muzaffarnagar and others –1987 (1) ARC-276, in which it was observed that as soon as tenant acquires in a vacant state or gets vacated a residential house, a vacancy validly arises under Section 12 (3) of the Act and if after acquiring in vacant state his own residential house he lets it out or parts with its possession without any objection the effect of the vacancy so arising is not wiped out or even suspended. For the application of Section 12 (3), all that is required to be established is, firstly, that the tenant builds or otherwise acquires a residential building in the same city, and secondly, gets vacant possession of the same or gets it vacated. On the proof of these two facts, a vacancy comes into being under Section 12 (3) read with Section 12 (4) of the act authorising the Rent Control and Eviction Officer to allot the building under the tenancy of the tenant. The apex court has also taken similar view in Smt. Mohini Badhwar Vs. Raghunandan Saran Ashok Saran-1989 (2) ARC-223,In that case, acquisition of residence in a vacant possession by tenant was not denied but it was pleaded that soon after acquiring possession, the tenant sold it and, therefore, it was not available on the date the petition was filed for occupation by the tenant in a vacant state. It was held that the fact that the tenant lost possession of acquired residence when petition for eviction was filed would not protect the tenant against Section 14 (1) (h) of Delhi Rent Control Act, 1958. Taking inspiration from the aforesaid decisions. I have no hesitation in coming to the conclusion that the fact that the petitioner had sold Daboli house which he acquired in a vacant state in the year 1998 to Anurag Sharma and thus lost its possession would hardly be germane or relevant for declaring vacancy under Section 12 (3) of the Act is now well settled. In Harish Tandon Vs. Addl. District Magistrate Allahabad and others – 1995 (1) ARC 220 it was observed by the apex court that when a suit creates a

fiction saying that something shall be deemed to have been done which in fact, in truth, has not been done, court has to examine and ascertain as to for what purpose and between what persons such statutory fiction is to be resorted to. Thereafter, full effect has to be given to such statutory fiction is to be resorted to. Thereafter, full effect has to be given to such a statutory fiction and it has to be carried to its logical conclusion.

10. The sufficiency or otherwise of the accommodation acquired by the tenant in a vacant state is also not required to be gone into or sifted while declaring deemed vacancy under Section 12 (3) of the Act. This aspect of the matter was considered by the apex court in a decision dated 23rd April, 1997 in Civil Appeal No. 15575 of 1996- Prakash Chandra Rastogi Vs. Rent Control and Eviction Officer, Kanpur Nagar and others. In that case, an argument was raised on behalf of the tenant that the room constructed by him was quite small and insufficient for residential use and, therefore, the construction of the said room should not be treated as construction of a residential structure so that the deemed vacancy under the Act can be declared. The apex court did not accept the said contention because house itself was residential one and the construction made in the open terrace, even though small, could not be held to be not at all suitable for residential purpose.

11. In the conspectus of the above facts, there can be no escape from the conclusion that on account of the acquisition in a vacant state of Daboli house by the petitioner, a deemed vacancy under Section 12 (3) of the Act had occurred and consequently, the tenanted accommodation was amenable for being allotted or for being released in favour of the land lord. When once the order of vacancy had been passed after taking into consideration the stand taken by the petitioner on 29.5.2000, the subsequent application moved by the petitioner on 8.6.2000 which was the date fixed for consideration of the application for release in favour of the land lord was otiose. Ignoring the said application, the Rent Control and Eviction Officer was empowered and legally justified to pass orders on ;the release application on the date fixed. The order of vacancy dated 29.5.2000 and the subsequent order of release dated 8.6.2000 do not suffer from any infirmity. They had been passed according to law.

12. It is, therefore, not a case in which invocation of Article 226 of the Constitution of India is warranted. The writ petition is dismissed. Interim order dated 22.6.2000, which has been extended from time to time, shall stand discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 31.01.2001

BEFORE
THE HON'BLE U.S. TRIPATHI, J.

Civil Misc. Writ Petition No. 3225 of 2001

Mool Chand ...Petitioner
Versus
Sri Trilok Chand and others .Respondents

Counsel for the Petitioner:
Shri Dhruva Narayana
Shri B.K. Narayana

Counsel for the Respondents:
Shri Ashok Kumar

Provisional Small Cause Courts Act, Section 25 read with C.P.C., O.XLI R.27 - Revisional Court's power to allow additional evidence- only for doing justice between parties.

Held- Para 10

The settled legal position, therefore, is that provisions of Order XLI Rule 27 C.P.C. cannot be pressed into service in a revision under Section 25 of Provincial Small Cause Courts Act, but if it appears that additional evidence is essential for doing justice between the parties, the Revisional Court may entertain additional evidence in the exercise of inherent powers of the Court.

By the Court

1. Heard the learned counsel for the petitioner, Sri Ash Kumar, learned counsel for respondent no. 1 and perused the record.

2. This writ petition has been filed for issued of a writ, order or direction in the nature of certiorari quashing the order date 12.01.2001 passed by XVth Additional district Judge, Kanpur Nagar in SCC revision No. 137 of 1999.

3. The respondents filed SCC suit no. 95 of 1991 against the petitioner for his ejectment and recovery of arrears of rent and damages on the ground of subletting and changing the user of the premises. The petitioner contested the suit denying the relationship of landlord and tenant between the parties. The Trial Court decreed the suit for ejectment as well as arrears of rent and damages. Aggrieved with the above judgement and decree the petitioner filed SCC Revision No.137 of 1999 before District Judge, Kanpur Nagar. The revision was transferred to the Court of XVth Additional District Judge, Kanpur Nagar for disposal.

4. During pendency of the revision the petitioner moved an application paper no. 30-C before the Revisional Court under Order XLI Rule 27 C.P.C. for permission to adduce additional evidence and to file papers per list 31-C. The respondents filed objection against the above application on the ground that provisions of Order XLI Rule 27 C.P.C. are not applicable to revision and there was also no sufficient ground for allowing the additional evidence.

5. Learned Additional District Judge on hearing the learned counsel for the parties held that provisions or Order XLI Rule 27 C.P.C. are not applicable to revision proceeding, but, however, additional evidence may be adduced in a revision under Section 25 of provincial Small causes, Court Act under the inherent powers of the court. He further held the additional evidence sought to be adduced related to questions of fact and would amount recording a fresh finding, which was beyond the purview revisional jurisdiction. With these observations he rejected the application, vide impugned order dated 12.01.2001.

6. The above order has been challenged in this writ petition.

7. I have heard the learned counsel for the parties, as narrated above. The learned counsel for the petitioner contended that assuming that provisions of XLI Rule 27 C.P.C. are not applicable to the revisional proceeding, additional evidence may be admitted in the exercise of inherent power of the Court. He placed reliance of Division Bench case of this

Court in Virendra Singh Kushwaha vs. VIIth Additional District Judge, Agra and others, 1996 (2) ARC, 108. It was held in the said case that in the exercise of inherent power of the Court in its revisional jurisdiction under Section 25 of Provincial Small Cause Court Act. It was further held in the said case that it is also settled law that the additional evidence urged to be allowed to be admitted must be relevant to decide the real controversy and the Court must feel that the admission of the same is required in the interest of justice i.e. it must meet the requirements of provisions of Order XLI rule 27 C.P.C.

8. It was held in the case of Smt. Gayatri Devi and others vs. Additional District Judge/Special Judge (E.C. Act), Etawah and another, 1992 (1) ARC, 148 that under inherent powers of the Court for doing justice between the parties, the revisional Court exercising its jurisdiction under Section 25 of the Provincial Small Cause Courts Act, has also the power to take additional evidence for doing complete justice between the parties.

9. The learned counsel for respondent no. 1 contended that the provisions of Order XLI Rule 27 C.P.C. cannot be pressed into service for admitting additional evidence in revision under Section 25 of Provincial Small Causes Courts Act. He placed reliance on a Division Bench case of Babu Ram vs. the Additional District Judge, Dehradun and another, 1983 (1) ARC, 15, in which it was held that Order XLI Rule 27 of the Code of Civil Procedure confers right on a court of appeal to admit additional evidence. But, since that order has expressly been excluded from application to Provincial Small Cause court Act, neither Order XLI Rule 27 in terms nor in principle can be applied for taking additional evidence. So far as a revision under Section 25 of the Provincial Small Causes Court Act is concerned, the Court has a much narrower power than that of the first appellate Court. Under Section 25, the Court can interfere only when the decree or order made in any case decided by a court of Small Causes was not according to law. Order XLI Rule 27 cannot, therefore, be pressed into service for admitting additional evidence in revision under Section 25 of the provincial Small Cause Courts Act.

10. The settled legal position, therefore, is that provisions of Order XLI Rule 27 C.P.C. cannot be pressed into service in a revision under Section 25 of Provincial Small Cause Court Act, but if it appears that additional evidence is essential for doing justice between the parties, the Revisional Court may entertain additional evidence in the exercise of inherent powers of the Court.

11. In the instant case the petitioner wanted to examine. At Shiv Prasad and to obtain expert report on the signature of Chhedi Lal, father of petitioner on the alleged agreement deed relied on by the plaintiff. The case of the petitioner was that respondent no. 1 was not landlord of the premises in question, but Shiv Prasad was landlord of the premises in question. The petitioner was, therefore, aware of the case taken by him at the initial stage and he had to prove the case set up by him. There is nothing in the application for adducing additional evidence to show that no with standing the exercise of due diligence such evidence was not within his knowledge or could not, after the exercise of due diligence be produced by him at the time when the decree appealed

against was passed or that he applied for adducing above evidence and the court had refused to admit the same. It is also not the case of the petitioner that the evidence sought to be adduced before Revisional court was not within the knowledge of the petitioner. Moreover, if additional evidence sought to be adduced was taken, the Revisional Court had to record a finding of fact, which was beyond the scope of revisional jurisdiction as the Revisional Court had no jurisdiction to interfere with the finding of fact and has held in the case of Babu Ram vs. Additional District Judge, Dehradun (supra) Under Section 25 of Provincial Small Causes Courts Act, the Court cannot admit additional evidence for reappraisal of the evidence or for setting aside a finding of fact.

12. There is also nothing on record to show that the additional evidence sought to be adduced was essential in the interest of justice. Contrary to it, the admission of additional evidence would have amounted in filling the lacunae in the case of the petitioner. As such, the admission of additional evidence as rightly refused. The petition has, therefore, no force and is, accordingly, dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: JANUARY 12, 2001

BEFORE
THE HON'BLE O.P. GARG, J.

Civil Misc. Writ Petition No. 1015 of 1996

M/s Bata India Ltd. ...Petitioner
Versus
3rd Additional District Judge, Muzaffarnagar and others ..Respondents

Counsel for the Petitioner:
Shri K.R. Singh
Shri K.N. Tripathi

Counsel for the Respondents:
Shri Arjun Singhal
Shri Atul Dayal

U.P. Urban Buildings (Regulation of letting, rent and Eviction Act, 1972, S.21 (1) (a) – Application of release by land lord owner – Doctvine of Election – Approbate and reprebate – Applicability.

Held- Para 11 and 13

I have given a thoughtful consideration to the matter and find that the land lady may not be prevented from filing a fresh application for release by invoking the previsions of section 21(1) (a) of the Act, But the fact remains that the law does not permit the land lady to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that no party can accept and reject the same instrument and that "a persons cannot say at the time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

In the conspectus of the above discussion, the order of release passed on 10.03.1994 in P.A. Case no. 30 of 1992 and as confirmed by order dated 08.12.1995 in Rent Appeal no. 23 of 1994, cannot be interfered with invoking the writ jurisdiction under Article 226 of Constitution of India. The writ petition is accordingly dismissed.

Case Law Discussed:
1984 (2) ARC 344
AIR 1978 S.C. 29
AIR 1974S.C. 1669
AIR 1975S.C. 1296
AIR 1983 S.C. 535

1976 UPRCC 376
1976 UPRCC 342
1977 UPRCC 230
1996(2) ARC 409
1997(2) ARC 627
(1995) 5 SCC –709
AIR 1977 All Wt.
(1996) 3 SCC 289
1990 ACJ 84
1988 (2) ARC 12
1978 ARC 226 (SC)
1995 (s) ARC 12
1989 (2) ARC 261
1993 (1) ARC 93
1993 (1) ARC 1 (SC)
1993 (2) ARC 548

By the Court

1. The dispute relates to premises/shop no. 37 Martinganj, Shamli Road, Muzaffarnagar, of which admittedly the respondent no. 3 Smt. Urmila Devi is the owner of the shop in dispute while the petitioner Bata India Limited is the tenant. The application for release under Section 21(1) (a) of U.P. Act no. 13 of 1972 was lied by the land lady respondent no. 3 against the petitioner in the year 1992. It was registered as P.A. Case no. 30 of 1992. The said application was allowed by the Prescribed Authority by an order dated 10.05.1994 holding that the need of the land lady respondent no. 3 was bonafide and genuine and that the balance of hardship tilts in her favour. Aggrieved, the tenant petitioner preferred a Rent Appeal no. 23 of 1994 under section 22 of the Act which was dismissed on 08/12/1995. It is in these circumstances that the petitioner tenant has come before this court by means of this writ petition under Article 226 of Constitution of India with the prayer that the order of release passed in favour of respondent no. 3 and as confirmed in appeal under section 22 of the Act be quashed.

2. Counter and rejoinder affidavits have been exchanged.

3. Heard Sri K.R. Singh, learned counsel for the petitioner and Sri Atul Dayal appearing on behalf of respondent no. 3.

4. To begin with, it may be pointed out that the conclusion that the need of the land lady to occupy the disputed shop in bonafide and genuine and the question of hardship are finding of fact which cannot be canvassed or challenged in writ jurisdiction, Sri Atul Dayal, therefore, pointed out that the order of release which has become final, cannot be disturbed by this Court in writ jurisdiction and in support of his contention he placed reliance of the decisions in the case of Kamla Sarin vs. Shyam Lal and others – 1984 (2) All. R.C. 344; in the case of Munni Lal and another versus Prescribed Authority and another A.I.R. 1978, S.C. 29; in the case of Natthu Lal vs. Radhey A.I.R. 1974 S.C., 1696; in the case of Babhutmal Raichand versus Laxmibai, A.I.R. 1978 S.C. 1296; in the case of Smt. Labkhkumar Bhagwani Shaha vs. Janardan Mahadeo Kalan A.I.R. 1983 S.C. 535, in the case of Ram Rakesh Pal and others versus 1st Additional District Judge and others 1976 U.P.R.C. 376; in the case of Jagan Prasad vs. District Judge and others 1976 U.P.R.C.C. 342; in the case of Laxmi Narain vs. IInd Additional District Judge and others 1977 U.P.R.C.C. 230,; in the case of Smt. Nirmala Tandon vs. Xth Additional District Judge, Kanpur nagar – 1996 (2) A.R.C. page 409 and in the case of Kamleshwar Prasad versus

Pradumanju Agarwal 1994 (1) A.R.C. 627.

5. Sri K.R. Singh, learned counsel for the petitioner made attempts to point out that certain subsequent events had occurred on account of the construction of certain new shops by the land lady. Sri Atul Dayal pointed out that in view of the decision of Kamleshwar Prasad (supra) it was held that the order of release as confirmed in appeal acquires the status of a final decree which cannot be disturbed by consideration of the subsequent events in the writ jurisdiction, as the rights of the parties under a final decree are determined with reference to the facts and circumstances as obtaining by the time by which the appeal confirming the decree came into existence.

6. The sheet anchor of the case of the petitioner as canvassed by Sri K.R. Singh is that prior to the filing of the P.A. Case no. 30 of 1992 the respondent no. 1 filed a release application under section 21(1)(a) of the Act which was registered as P.A. Case no. 74 of 1983 and during the pendency of the said release application, the parties came to terms and on the basis of the compromise arrived at between them, a decree for eviction pursuant to the release order on the subsequent application filed in the year 1992 could not be passed. A copy of the compromise filed and verified before the prescribed Authority in P.A. Case no. 74 of 1983 is no record. It contemplates that the petitioner shall pay enhanced amount of rent in the following manner:

For the period	Amount
From 01/01/1984to31/12/1989	Rs. 950.00 per month
From01/01/1990to31/12/1994	Rs.12000.00 per month
From 01/01/1995 to 31/12/1999	Rs. 1500.00 per month
From 01/01/2000 to 31/12/2004	@ Rs. 950.00 per month

7. The amount of rent payable by the petitioner was to be enhanced every five years in a graduated manner as indicated above. The compromise contemplated that the land lady respondent no. 3 shall not evict the petitioner till 31/12/2004, if he pays the rent which was to be enhanced in a phased manner either every five years.

8. Sri Atul Dayal pointed out that the compromise in question could not be acted upon, as it was not registered. According to him, the registration of the compromise was compulsory in view of the decision of the Apex Court in the case of Bhoop Singh Versus Ram Singh Major and others (1995) 5 Supreme Court Cases 709. Sri K.R. Singh pointed out that the said decision does not apply to the facts of the present case as the law laid down in the said case with regard to the compulsory registration of a compromise decree was in the wake of the fact that certain new rights, title or interest in presenting in immovable property of value of Rs.100 or above were created. I have also wadded through the said decision and find that it does not apply to the facts of the present case on all fours. In Sardar Iqbal Singh versus Ram Nath Chowdhary and another A.I.R. 1982 Rajasthan (Jaipur Bench) page 116, it was held that a compromise decree was not required to be registered as no fresh tenancy was created. In Hari Shankar versus Durga Devi and another, AIR 1977 Allahabad 455, the circumstances in which a compromise decree is required to be compulsory registered have been laid down. In this connection are a reference may also be made to the decision of the Apex Court in the case of S. Noordeen

versus V.S.Thiru Venkita Reddiar and others (1996) 3 Supreme Court Cases 289, in which it has been laid down that a compromise decree dealing with the immovable property is required to be registered.

9. In the instant case undoubtedly the petitioner was the tenant of the respondent no. 3. The release petition was filed in the year 1983 treating the petitioner to be the tenant. By virtue of the compromise which was made part of the release petition, no new right of tenancy were created in favour of the petitioner and even the genuineness and bonafide nature of the need of the land lady was determined. A decree on the basis of the compromise cannot be said to be vitiated on account of its non registration, which under the law, was not required.

10. Sri Atul Dayal took pains to make out a point that inspite of the compromise between the parties in earlier release petition no. 74 of 1983, the land lady was not debarred form making a fresh application for release, if on account of certain circumstances she required the accommodation to satisfy her personal need. The crux of the submission made on behalf of the land lady was that statutory right to get the tenanted shop released, could not defeated or nullified, merely because a compromise was earlier arrived at between the parties in release proceedings. Sri Atul Dayal fortified his submission by placing reliance on Motilal versus VII Additional District Judge, 1990 A.C.J. 84 Haji Mohd. Amin vs. VII Additional District Judge 1988 (20 A.R.C. 416 (D.B.); Smt. Nai Bibi versus Late Ram Narain and others 1978 A.R.C. 226 (SC); Mohd. Ahmad Vs. III Additional Judge, 1995 (2) A.R.C. 12 Bakride vs. III Additional District Judge 1989 (2) A.R.C. 261 and Ashok Kumar Sheth versus IV Additional District Judge, 1993 (1) A.R.C.

11. I have given a thoughtful consideration to the matter and find that the land lady may not be prevented from filing a fresh application for release by invoking the provisions of section 21(1) (a) of the Act, but the fact remains that the law does not permit the land lady to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that " a person cannot say at one time that a transaction is valid and thereby obtain in some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

12. The above observation flew from the decision of the Apex Court in the case of R.N. Gosain versus Yashpal Dhir 1993 (1) A.R.C. page 1 (S.C.). In Rama Shankar Tewari versus Ram Raghubir Jaiswal and others 1993(2) A.R.C. page 1 (S). In Rama Shankr Tewari versus Ram Raghubir Jaiswal and others 1993 (2) A.R.C. page 548, this Court has taken the vide that it is the duty of the court to prevent the beneficiaries from taking undue and impermissible advantages by turning does to suit the exigencies of the case. It is an indubitable fact that the land lady has been accepting the enhanced amount of rent as contemplated in the compromise which forms part of the order passed in release application no. 74 of 1983 After a period of every five years, who is getting the advantage of enhanced

rent. This advantage was available to her under the compromise arrived at between the parties. The land lady therefore cannot play loose and fast or in the common parlance she cannot be permitted to blow hot and cold. She has to abide by the conditions contained in the compromise and the order of release passed in the subsequent P.A. Case no. 30 of 1992, which has become final, should not be implemented prior to 31/12/2004. On equitable consideration she is bound to permit the petitioner tenant to continue as a tenant in the shop in dispute till 31/12/2004. She is accepting the rent at enhanced rates on the condition that the tenant shall continue in possession atleast up to 31/12/2004.

13. In the conspectus of the above discussion, the order of release passed on 10/05/1994 in P.A. Case no. 30 of 1992 and as confirmed by order dated 08/12/1995 in Rent Appeal no. 23 of 1994, cannot be interfered with by invoking the writ jurisdiction under Article 226 of constitution of India. The writ petition is accordingly dismissed.

14. However, the implementation of the order of release dated 10/05/1994 is deferred till 31/12/2004 in view of the compromise arrived at between the parties in P.A. Case no. 74 of 1983 pursuant to which the respondent no. 3 land lady is accepting enhanced rent. In case the petitioner does not vacate the premises on or before 31/12/2004, the release order shall become enforceable according to law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 04.01.2001

BEFORE
THE HON'BLE SUDHIR NARAIN, J.
THE HON'BLE BHAGWAN DIN, J.

Civil Misc. Writ Petition No. 4 of 1998

M/s Saket Bricks Traders, Ramwapur, Kushmi Bazar, Gorakhpur ...Petitioner
Versus
Additional Commissioner (Legal) Trade Tax & Others ...Respondents.

Counsel for the Petitioner:
Shri Rajes Kumar

Counsel for the Respondents:
S.C.

U.P. Trade Tax Act 1943- Section 7-D Compounding Scheme-Government by exercising power u/s 7-D provided the cut off date for making the application – 5 days beyond time-cannot be condoned by the court by applying the provisions of Limitation Act.
Case law Discussed.
AIR 1970 SC 209
1975 UPTC 297

By the Court

1. The petitioner seeks a writ of certiorari quashing the order dated 20th April, 1996 whereby the application of the petitioner for compounding has been rejected on the ground that the application was filed beyond time.

2. The petitioner is partnership firm and is carrying on the business of manufacturing and sales of bricks. The petitioner for the year 1994-95 moved an application on 5th may, 1995 for compounding under compounding

scheme introduced by the State Government in exercise of power under Section 7-D of the U.P. Trade Tax Act, 1943 (hereinafter referred to as the Act) for lump sum payment of tax during the relevant period. This application has been rejected by respondent no. 1 by the impugned order dated 20th April, 1996 on the ground that the application was filed beyond the period prescribed for submitting the application for compounding.

3. It is not disputed that the petitioner had filed an application for compounding under the scheme introduced by the State Government in exercise of power under Section 7-D of the Act, which was beyond time by 5 days. The contention of Shri Rajesh Kumar, learned counsel for the petitioner, is that the petitioner had also filed an application to condone the delay and respondent no. 1 without considering the facts as stated in the application rejected the application filed by the petitioner.

4. The sole question to be decided in this petition is whether Section 5 of the Limitation Act is applicable to an application filed for compounding under Section 7-D of the Act. Section 5 of the Limitation Act, 1963 in applicable to the courts. This legal position is settled in Nityanand M. Joshi and another Vs the Life Insurance Corporation of India and others, A.I.R. 1970 S.C. 209. The Apex Court held that Section 4 and 5 of the Limitation Act deal with applications to the courts and the Labour Court is not a Court and, therefore, an application under Section 33 C (2) cannot be held to be barred under Article 137 is so far as the claim was for period beyond three years. In the Commissioner of Sales Tax, U.P., Lucknow Vs M/s Parson Tools and Plants, Kanpur 1975 U.P.T.C. 297, the Supreme Court held that the provisions of Section 14 (23) of the Limitation Act is not applicable to the proceedings before the authorities under the Sales Tax Act irrespective of whether they exercise, original, appellate or revisional jurisdiction under the Sales Tax Act.

5. The learned counsel for the petitioner then urged that the provisions of Sections 4 to 24 of the Limitation Act will be applicable in view of the provisions of Section 29 (2) of the Limitation Act which provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law. This provision will be applicable only when the authority functions as a court. In Mukri Gopalan Vs. Cheppilat Puthanpurayil Abooacker on the facts it was found that the appellate authority constituted under Section 18 of the Kerala Rent Act, 1965 functions as a Court and, therefore, the provisions of Section 5 of the Limitation Act was made applicable in respect of appeals filed by the appellant keeping in view the provisions of Section 29 (2) of the Limitation Act.

That apart if statute makes Section 5 or any other provisions of the Limitation Act applicable in respect of any application, appeal or revision but in respect of other applications those section of the Limitation Act have not been excluded, it will be taken that they have been excluded by the legislature. In the Commissioner of Sales Tax, U.P., Lucknow Vs M/s Parson Tools and Plants, Kanpur, 1975 U.P.T.C. 297, the court considering the provisions of Section 10 of the U.P. Sales Tax Act held that the function of the legislature to exclude the unrestricted application of the principles of Section 5 and 14 of the Limitation Act is manifestly clear. The Court observed as follows:

"Be that as it may, from the scheme and language of Section 10, the intention of the Legislature to exclude the unrestricted application of the principles of Sections 5 and 14 of the Limitation Act is manifestly clear. These provisions of the Limitation Act which the legislature did not, after due application of mind, incorporate in the Sales Tax Act, Cannot be imported into it by analogy…"

6. Lastly the compounding scheme was sponsored by the State Government under Section 7-D of the Act. The Scheme has given a cut off date. If any persons wants to take advantage of the said Scheme he was to submit an application within that period. The intention of the legislature was obvious as to fixing the time limit. If the period of limitation is extended by applying the principles laid down under Section 5 of the Limitation Act, the Court could extend the period of the Scheme which was not envisaged by the State Government.

In view of the above, the impugned order does not require any interference.

The writ petition is accordingly dismissed. However the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 13.2.2001

BEFORE
THE HON'BLE MARKANDEY KATJU, J.
THE HON'BLE ONKARESHWAR BHATT, J.

Habeas Corpus Writ Petition No.54175 of 2000

Rahmat Ali ...Petitioner (In Jail)
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner :
Shri P.N. Tripathi

Counsel for the Respondents :
A.G.A.

Constitution of India Article 22(5) An order of detention can be sustained even on the basis of a solitary act depending on the nature and gravity of the act if it prejudicially affects the even tempo of the life of the community. (held in para 5)

In this case, public order has certainly been disturbed as communal tension was created as a result of which P.A.C. had to be posted in the said village.

By the Court

1. Heard Sri P.N. Tripathi, learned counsel for the petitioner and the learned Government Counsel

2. The petitioner is challenging the impugned detention order dated 16.8.2000, Annexure no. 1 to the writ petition, passed under the National Security Act.

We have carefully perused the impugned detention order as well as the grounds of detention of the petitioner and the police report. It appears that the petitioner is a resident of a village in district Basti, having majority of Muslims and only a few houses of Harijans. The allegation is that on 24.7.2000 at about 8 P.M. Kumari Kiran, who is a Harijan of that village, had taken a goat and went inside a room to tie the said goat. At that time the petitioner entered the room and bolted it from inside and after threatening Kumari Kiran raped her. It is alleged that Kumari Kiran was about 14 years of age. Some people tried to intervene when Kumari Kiran started screaming and these persons caught hold of the petitioner but then his relations came and freed him forcibly and threatened that if those Harijans do anything they will be murdered.

3. As a result of the said incident communal tension was created and public order broke down and consequently one and a half action of P.A.C. has to be posted in the village.

4. The learned counsel of the petitioner submits that this is a case of law and order and not public order. We do not agree with this submission. It is the duty of every person of the majority community in a locality to see to it that members of the minority community are not in any way harassed. In the present case the majority community in the said village is of Muslims and only a few families consisting of Harijans reside there. It was, therefore, the duty of the persons like the petitioner belonging to Muslim community to see to it that Harijans did not feel insecure and are not harassed in any way. Similarly the majority community happened to be Hindus. It would be the duty of Hindus to see that members of the minority community are not harassed.

5. In this case, public order has certainly been disturbed as communal tension was created as a result of which P.A.C. had to be posted in the said village. Secularism is a basic feature of the Constitution and if it is reached the act certainly affects public order.

6. The learned counsel for the petitioner has submitted that certain documents were not supplied to the petitioner. These documents which are said to have not been supplied only demonstrate that Kumari Kiran was not of 14 years but 17 years of age. In our opinion, this makes no difference. Surely, it cannot be said that a girl of 14 years cannot be raped but a girl of 17 years can be raped. This is a specious argument and cannot be a serious argument for reconsideration.

7. The learned counsel of the petitioner relied upon a decision of Supreme Court in Mehrunissa versus State of Maharashtra reported in A.I.R. 1981 Supreme Court page 1861 in which it has been held that non-supply of material documents will vitiate the detention order. Since in our opinion the said documents were not material, hence in this case it will make no difference at all. Hence the above Supreme Court decision is distinguishable.

8. The learned Government counsel has relied upon a division Bench decision of this court rendered in Habeas Corpus Writ Petition no. 15791 of 2000. Guddu alias Shamsher versus State of U.P. and others decided on 19.12.2000. We are in respectful agreement with the view taken in that decision.

9. In Arun Ghosh Vs. State of West Bengal AIR 1970 Supreme Court 1228 it was held that if a girl is molested in a lonely place it will create panic and terror and would be a case of public order.

10. In Bimla Rani Vs. Union of India 1989 (3) J.T. 737, Attorney General of India Vs. A.L. Prajeevan Das. 1994 S.C.C.(Cr.) 1325. Ali Jan Miyan Vs. D.M. AIR 1983 S.C. 1130 etc. it was held that an order of detention can be sustained even on the basis of a solitary act depending on the nature and gravity of the act if it prejudicially affects the even tempo of the life of the community. The same view has been taken by this Court in Vijay Pal Vs. Union of India. 1996 A.C.C. 741.

11. In view of the above there is no merit in this petition and it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 7.2.2001

BEFORE
THE HON'BLE BINOD KUMAR ROY, J.
THE HON'BLE D.R. CHAUDHARY, J.

Civil Misc. Writ Petition No. 1634 of 1999

Smt. Ilaichi Devi ...Petitioner
Versus
District Magistrate, Gorakhpur and others ...Respondents

Counsel for the Petitioner:
Sri S.P.K. Tripathi
Sri H.S.N. Tripathi
Sri P.S. Tripathi
Sri B.K. Pandey

Counsel for the Respondents:
S.C.
Sri Sabhajeet Yadav.

Constitution of India – Article 226 – in a summary proceedings under Article 226 of the Constitution of India, the question of title should not be decided.

Held in Para – 5

The Petitioner has not disclosed as to how, when and which land she had purchased, on which her alleged house is standing. She has not even disclosed the plot number of the land. On her case set forth her claim is of possessory title. The 145 Cr. P.C. proceeding, initiated on 22.6.1977, in relation to a room in which the Petitioner was first party was dropped in 1979 as the second party was not present. Municipal receipt of 1993 shows demand of latrine tax by the Nagar Mahapalika, Gorakhpur. At best electricity was supplied in 1993, Ration Card was issued in 1996. All these do not support the Petitioner's claim of possession since 50 years.

By the Court

1. The Petitioner has come up with a prayer to issue a writ, order or direction in the nature of mandamus commanding the Respondents not to demolish her House no. C/16/96 situate in Mohalla Bettiah Hata, District Gorakhpur. The moot question is as to whether this writ petition should be admitted to adjudicate the petitioner's title? This writ petition was filed on 12.1.1999 and on a prayer made by the petitioner on 13.1.1999 it was

adjourned for 1 week and thereafter has been listed before us now.

2. She asserts, inter-alia, that she is the legal owner of the house which consists 3 rooms, varandah, latrine, bathroom etc. situated on the Bettiah Estate land in which she alongwith her family members has been residing since 50 years; a proceeding initiated under Section 145 Cr.P.C. in respect of Kothari (Room) was dropped by the City Magistrate, Gorakhpur vide his order dated 26.4.1979 (as contained in Annexure-1); after assessment she has been paying house tax etc. to the Nagar Mahapalika, Gorakhpur (receipt dated 24.1.1993 is Annexure-2);her son also obtained electrical connection by depositing requisite amount of money in the Electricity Board on 16.4.1993 (deposit receipt Annexure-3); she was also issued Ration Card by the Area Rationing Officer, Gorakhpur on 14.2.1996; Respondent No. 3 & 4 often came to her residence and threaten her to vacate the premises in order to build police Station over the site and they are likely to take law in their own hands; she approached Respondent Nos.1 & 2 but no steps have been taken and hence this writ petition.

3. In the backdrop aforementioned Sri S.K. Pandey holding brief of Sri H.S.N. Tripathi, learned counsel appearing on behalf of the petitioner, contended that the relief's prayed for by the petitioner are fit to be granted and thus this case be admitted and / or allowed.

4. Sri Sabhajeet Yadav, learned Standing Counsel appearing on behalf of the Respondents contended that the claim and allegations are too vague to be accepted; no date has been disclosed of the alleged visit of Respondent Nos. 3 & 4, who have also not been impleaded by their name; the allegation is also somewhat contradictory inasmuch as the prayer is to restrain the Respondents from demolishing of her alleged house whereas the charge is of her forcible eviction; this Court under Article 226 of the Constitution will not be justified in deciding the alleged title of the petitioner; and that consequently this writ petition be summarily dismissed.

5. It is well known that in a summary proceeding under Article 226 of the Constitution of India, the question of title should not be decided. It is also well known that the petitioners of the Bettiah Estate were under the Court of Wards of Bihar and U.P. jointly carrying on their management and that the rival claim made through different suits for the Bettiah Raj property reached the Apex Court in State of Bihar Vs. Radha Krishna Singh A.I.R. 1983 S.C. 684 which were dismissed. The petitioner has not disclosed as to how, when and which land she had purchased, on which her alleged house is standing. She has not even disclosed the plot number of the land. On her case set forth her claim is of possessory title. The 145 Cr. P.C. proceeding, initiated on 22.6.1977, in relation to a room in which the petitioner was first party was dropped in 1979 as the second party was not present. Municipal Receipt of 1993 shows demand of latrine tax by the Nagar Mahapalika, Gorakhpur. At best electricity was supplied in 1993, Ration Card was issued in 1993. All these do not support the petitioner's claim of possession since 50 years.

6. In paragraph 7 she asserts that Respondent Nos. 3 & 4 often come to her residence. No specific date has been mentioned by the petitioner of their visit besides they have also not been impleaded in their personal capacity.

7. For the aforementioned reasons the petitioner is not entitled to any relief whatsoever.

8. This writ petition is consequently dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD: 07.02.2001

BEFORE
THE HON'BLE S.K. SEN, C.J.
THE HON'BLE S.R. ALAM, .J.

Civil Misc. Application No. 3686 of 2001

Catholic Diocese of Gorakhpur Education Society ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Shri Aroop Banerjee

Counsel for the Respondents:
Shri Chandra Shekar Singh

Motor Vehicles Act, 1988 Section 66(1)- the provision for permit under section 66(1) of the Motor Vehicles Act, 1988 is not applicable in the case of recognised educational institution (Held in para 3).

The petitioner is the owner of the vehicle and the petitioner is a recognised educational institution and it has produced the relevant documents showing the affiliation under the I.C.S.E. Board. Under such circumstances, we are of the view that the respondent no. 2 was not justified in insisting on permit under section 66(1) of the act from the writ petitioners.

By the Court

1. We have heard Sri Aroop Banerjee, learned counsel for the petitioners and Sri Chandra Shekhar Singh, learned Additional Chief Standing Counsel for the respondents.

2. In the instant writ petition the petitioners claim that it is a recognised educational institution and as such the provision for permit under Section 66(1) of the Motor Vehicles Act, 1988 (for short the 'Act') is not applicable in the case of the petitioners. Section 66(3)(h) of the Act specifically mentions the category of the transport vehicle for which permit shall not be required. Section 66(1) and 66(3)(h) of the Act provides as under:

66. Necessity for permit (1) No owner of a motor vehicle shall use or permit the use of the vehicle as a transport vehicle in any public place whether or not such vehicle is actually carrying any passengers or goods save in accordance with the conditions of a permit granted or countersigned by a Regional or State Transport Authority or any prescribed authority authorising him the use of the vehicle in that place in the manner in which the vehicle is being used.

Provided that a stage carriage permit shall, subject to any conditions that may be specified in the permit authorise the use of the vehicle as a contract carriage.

Provided further that a stage carriage permit may, subject to any conditions that may be specified in the permit, authorise

the use of the vehicle as a goods carriage either when carrying passengers or not :

Provided also that a goods carriage permit shall, subject to any conditions that may be specified in the permit, authorise the holder of use of vehicle for the carriage of goods for or in connection with a trade or business carried on by him.

(3) The provisions of sub section (1) shall not apply –

(h) to any transport vehicle owned by and used solely for the purpose of any educational institution which is recognised by the Central or State government or whose managing committee is a society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India."

3. Admittedly, the petitioner is the owner of the vehicle and the petitioner is a recognised educational institution and it has produced the relevant documents showing under the I.C.S.E. Board. Under such circumstances, we are of the view that the respondent no. 2 was not justified in insisting on permit under section 66(1) of the Act from the writ petitioners.

4. The writ petition succeeds and is, accordingly, allowed. The impugned order dated 09.01.2001 passed by respondent no. 2 accordingly stands quashed.
